

FREEDOM FOR SECURITY: NECESSARY EVIL OR FAUSTIAN PACT?

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I INTRODUCTION

In the aftermath of September 11, governments around the world sought legal remedies to address the perceived threat of terrorism. The Australian Government was no different. It introduced more than 20 pieces of legislation in the subsequent three years, criminalising certain activities and granting new powers to intelligence and law enforcement agencies. These laws have serious implications for civil liberties, including freedom of speech. This is one reason that the original laws, introduced in 2002, were to be subject to a major review three years from assent.

However, on 8 September 2005, before the existing laws had been reviewed, the Government proposed a new 12-point plan that would mark the most profound changes to freedoms and civil liberties since World War II. These measures far exceeded those of the original bills and presented even more serious impacts on freedom of expression. At the time of writing, the Bill is evolving as the Commonwealth and the states negotiate the finer points of differences.

It is universally agreed that freedom of speech is not absolute.¹ On this basis, some have reasoned that these laws are a necessary evil, a (hopefully) temporary suspension of certain fundamental freedoms until the scourge of terrorism passes. Others, such as Benjamin Franklin, believe that ‘they who would give up an essential liberty for temporary security, deserve neither liberty or security’, and that any such arrangement is a Faustian pact that will undermine the principles of liberal democracy. A further question is whether the measures introduced are effective in preventing terrorism.

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1 *Australian Capital Television Pty Ltd v The Commonwealth* [No 2] (1992) 108 ALR 577, 705, 737, 748; *Nationwide News Pty Limited v Wills*, 670–1, 682; *Albert Langer v Commonwealth* (1996) 134 ALR 400, 417 (Toohey and Gaudron JJ) cited in Kristen Walker and Kristie Dunn, ‘Mr Langer is not Entitled to be an Agitator’ (1996) 20 *Melbourne University Law Review* 909, 914.

II EXISTING ANTI-TERRORISM LAWS IN AUSTRALIA

Australia's main existing terrorism offences were introduced by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), which has been described as 'pos[ing] as great a threat to Australian democracy as Prime Minister Robert Menzies' attempt to ban communism in 1950'.² This was followed closely by the introduction of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2002* (Cth) that saw the granting of police-like power to the Australian Security Intelligence Organisation ('ASIO'). Several of the offences and powers have serious implications for freedom of speech, among other rights such freedom from arbitrary detention and the right to privacy.

A Questioning and Detention Powers – Secrecy Provisions

Under the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*'), ASIO has the power to obtain questioning or detention warrants on the basis that it will substantially assist the collection of intelligence that is important in relation to a terrorism offence.³ The warrant authorises ASIO to question a person for up to 48 hours⁴ and/or to detain a person for questioning for up to 168 hours.⁵

Section 34VAA of the *ASIO Act* introduces measures to prevent disclosure of the existence or contents of any questioning or detention warrant. If such a disclosure is made by anyone, be it the person subject to the warrant or any other person, the penalty is five years imprisonment.⁶

Even after the expiry of the warrant, it is an offence to disclose 'operational information', either by the person detained or any other individual for the subsequent two years.⁷ 'Operational information' is further defined as including 'an operational capability, method or plan of the organisation'.⁸

While it is understandable that an intelligence organisation needs to keep its operational procedures secret, this measure still has surprising consequences. It means, for example, that a husband cannot tell his wife where he has been if he disappears for seven days. If either psychological or physical torture were to be employed during the questioning, the only people that could be told would be the detainee's lawyer and the Inspector-General of Intelligence and Security ('IGIS'). Furthermore, the media could not report on such an occurrence.

What also concerns us is that neither ASIO nor the Attorney-General are bound by the same constraints. This leads to a power imbalance regarding

2 George Williams, 'One Year On: Australia's Legal Response to September 11' (2002) 27 *Alternative Law Journal* 212, 212.

3 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34D(1)(b).

4 Section 34HB(6) of the *Australian Security Intelligence Organisation Act 1979* (Cth) allows for a maximum of 24 hours for questioning, and s 34HB(11) provides that the maximum period of questioning where an interpreter is involved is 48 hours.

5 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HC.

6 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VAA(1).

7 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VAA(2).

8 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VAA(5).

freedom of speech: the Attorney-General could talk about a particular detainee, while the same detainee would be unable to respond to those disclosures, at penalty of imprisonment.

Assuming for the moment that one accepts the questioning and detention regime as necessary, in our view a much more balanced mechanism is a presumption *in favour of* freedom to speak about what happened, rather than the presumption against it. In such a system, ASIO would have to justify to the issuing authority – the same authority that issued the warrant – why a person should be prevented from speaking about their detention.

B Association Offence

The *Anti-Terrorism Act (No 2) 2004* (Cth) introduced a new offence of associating with a director, promoter or member of a proscribed terrorist organisation.⁹ ‘Associating’ is defined as ‘meeting or communicating’.¹⁰

There is a requirement that the association be intended to support the organisation in its continued existence, but there is no requirement that the association express support for terrorist acts or behaviour. For example, a person could easily fall foul of the legislation for expressing support to a proscribed organisation because it runs hospitals, schools or shelters for the poor.

In understanding the difficulties with the association offence, it is also worth noting our concerns with the proscription regime. There is no requirement that a proscribed organisation has planned or committed a terrorist act, only that the Attorney-General believes ‘on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act’.¹¹ This has led many to comment that the act of proscription is subjective and arbitrary.¹²

What is also particularly unusual about the limits on freedom of speech imposed by the association offence is that it affects private speech. There are only a few other situations in which private speech can amount to criminal conduct, as in the case of sexual harassment, insider trading and conspiracy offences.

This leads to a paradoxical situation because public speech of a similar nature is still legal. For example, it is currently legal to say ‘Lashkar-e-Tayyiba¹³ does lots of good work to help the poor in Kashmir and they should keep doing it’, whereas the making of similar statements privately to a member of Lashkar-e-Tayyiba could make them guilty of association.

It is also worth questioning whether or not the association offence itself is in breach of the constitutional doctrine of implied freedom of political communication.

9 *Criminal Code Act 1995* (Cth) s 102.8.

10 *Criminal Code Act 1995* (Cth) s 102.1(1).

11 *Criminal Code Act 1995* (Cth) s 102.1(2).

12 See, eg, Nigel Brew, *The Politics of Proscription in Australia*, Parliamentary Research Note 63 (2004).

13 Lashkar-e-Tayyiba is a separatist group based in Kashmir that is alleged to have been involved in terrorist activity in the subcontinent. It is also a proscribed organisations under s 102.1(1) of the *Criminal Code Act 1995* (Cth).

While s 102.8(6) of the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') expressly states that the offence does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication, it is not clear whether or not this overcomes the constitutional uncertainties. For example, it has been argued that the exemption is not clear and would place an unreasonable burden on journalists reporting on matters of public interest.¹⁴

Further, it seems to be constitutionally fraught because it may fail the test as espoused by the High Court in *Lange v Australian Broadcasting Corporation*¹⁵ that any laws burdening the freedom of communication about government or political matters must be 'reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.¹⁶

It is not clear to what end the association offence is aimed, and how the association offence assists in preventing terrorism. The provision of material and financial support to proscribed organisations are already criminalised by a number of other offences in the *Criminal Code*.

III PROPOSED ANTI-TERROR LEGISLATION 2005

At the time of writing, the Australian Government is in the process of introducing further amendments to toughen the existing anti-terror laws. Measures that potentially affect freedom of speech include control orders, preventative detention orders, the new definition for sedition, and the further broadening of criteria for the proscription regime.¹⁷

The Government has repeatedly said that it wants these laws introduced by Christmas 2005, and it seems intent on having as little public participation and debate as possible.¹⁸

The Anti-Terrorism Bill (No 2) 2005 ('the Bill') was introduced into the House of Representatives on 3 November 2005. The Senate referred the Bill to the Legal and Constitutional Legislations Committee for inquiry and report by 28 November 2005. While it has not yet passed both houses of Parliament, we make some general observations based on the Bill.

14 Submission No 71, Senate Legal and Constitutional Committee, Parliament of Australia, *Inquiry into the Provisions of the Anti-Terrorism Bill (No 2) 2004*, 2004.

15 (1997) 189 CLR 520.

16 Ibid 567.

17 Prime Minister John Howard, 'Counter-Terrorism Laws Strengthened' (Press Release, 8 September 2005).

18 'Terrorism Laws to be in Place by Christmas: PM', *The Sydney Morning Herald* (Sydney), 23 October 2005 <<http://www.smh.com.au/news/national/terrorism-laws-to-be-in-place-by-christmas-pm/2005/10/23/1130005998442.html>> at 6 November 2005.

A Control Orders

The Bill allows for control orders to be imposed on persons if the court is satisfied on the balance of probabilities that it would substantially assist in preventing a terrorist act, or that the person has trained with a proscribed organisation.¹⁹ Some of the obligations, prohibitions or restrictions may include travel restrictions, the wearing of a tracking device, prohibitions or restrictions on communication or association with specified individuals, restrictions on carrying out certain types of activities and access and use of telecommunications or other technology.²⁰ The court must be satisfied, however, that each restriction must be reasonably necessary, appropriate and adapted for the purpose of protecting the public from a terrorist act.²¹

The limitations on free speech imposed by a control order are severe, given that the test is the 'balance of probabilities'. Not only do they limit to whom one can talk, but they may prohibit entire channels of communication, such as mobile phones or the internet. There is also nothing here to stop a 'specified activity' from including speaking to the media.

B Preventative Detention

The Bill allows for preventative detention of a person if the police are satisfied on reasonable grounds that the person may be involved in a terrorist act. There is a requirement that the making of the order would substantially assist in preventing a terrorist act occurring.²² In cooperation with the states, the Federal Government is proposing that such orders will last up to 14 days.²³

While detained, there are further restrictions on contact with other persons. The detainee is entitled to contact a family member, employer, or partner in business and so forth, but solely for the purpose of letting them know that the detainee is safe but is not able to be contacted for the time being.²⁴ The detainee may contact their lawyer, but the choice of lawyer may be limited by express prohibited contact orders,²⁵ and their communication is required to be monitored for content, even if it is not in English.²⁶

While in force, disclosure of the warrant's existence by any party is an offence.²⁷ It has been suggested that a parent of a detainee would face five years gaol should they choose to tell the other parent what happened with their detained son or daughter.²⁸

19 Anti-Terrorism Bill (No 2) 2005 (Cth) sch 4, item 24, cl 104.4.

20 Anti-Terrorism Bill (No 2) 2005 (Cth) sch 4, item 24, cl 104.5(3).

21 Anti-Terrorism Bill (No 2) 2005 (Cth) sch 4, item 24, cl 104.4(1)(d).

22 Anti-Terrorism Bill (No 2) 2005 (Cth) sch 4, item 24, cl 105.4.

23 Prime Minister John Howard, above n 17.

24 Anti-Terrorism Bill (No 2) 2005 (Cth) sch 4, item 24, cl 105.35.

25 Anti-Terrorism Bill (No 2) 2005 (Cth) sch 4, item 24, cl s 105.37.

26 Anti-Terrorism Bill (No 2) 2005 (Cth) sch 4, item 24, cl 105.38.

27 Anti-Terrorism Bill (No 2) 2005 (Cth) sch 4, item 24, cl 105.41.

28 Joseph Kerr, 'Mum's the Word in Terrorist Purge', *The Sydney Morning Herald* (Sydney), 22 October 2005, 1.

C Sedition Offences

One of the Howard Government's proposals was to 'modernise' the offence of sedition. The Bill states that a person commits an offence of sedition if they are urging the overthrow of the *Constitution* or government, urging interference in parliamentary elections, urging violence within the community; urging a person to assist the enemy; and urging a person to assist those engaged in armed hostilities against the Australian Defence Force.²⁹

The proposed sedition offences differ from the existing ones in the following ways: intention is no longer required; there need not be any connection to a terrorist act or organisation; and an extended geographical jurisdiction would apply to these offences. This means that they apply whether or not the conduct occurs in Australia and whether or not a result of the conduct constituting the alleged offence occurs in Australia.³⁰

There are serious concerns that the proposed offences will have a significant impact on freedom of speech in Australia. While the Government has been at pains to reassure the community that it is not seeking to limit free speech,³¹ and Attorney-General Philip Ruddock has said that 'there is no prospect of people being found guilty of offences in relation to participating in robust debate on political issues',³² it is certain that the proposed legislation will have a much broader application and effect. Counsel opinion obtained by ABC's Media Watch states that:

it is reasonable to conclude that the Bill is intended to operate so that it will now extend to covering indirect urging as well as condoning, justifying or glorifying acts of terrorism or conduct associated with it, or even abstract opinions about that conduct. These examples of indirect urging might include offensive or emotional opinion about the significance of the events at 9-11, whether the terrorists involved had any justification for their acts, opinion about the validity of what terrorist leaders might be seeking to achieve, the desirability at an international level of victory against the American forces in Iraq (as expressed by John Pilger and dealt with later in this advice), or the inevitability of further terrorist acts, for example, in Bali, and as to whether Australian citizens should expect more of the same should they continue to be involved in the Iraqi war.³³

The difficulty in drawing the line between 'robust debate' and 'seditious commentary' is what makes these laws so potentially damaging. The history of such laws is that individuals and organisations err on the side of caution, and impose on themselves a form of self-censorship. This is not conducive to healthy and open discourse, an essential element of a democratic society.

29 Anti Terrorism Bill (No 2) 2005 (Cth) sch 7, item 12, cl 80.2.

30 See *Criminal Code Act 1995* (Cth) s 15.8.

31 Samantha Maiden, 'Rivals Unite to Lobby on Sedition', *The Australian* (Sydney), 27 October 2005, 16.

32 Michelle Grattan, 'Deflating Terror's Bubble', *The Age* (Melbourne), 16 October 2005, <<http://www.theage.com.au/news/michelle-grattan/deflating-terrors-bubble/2005/10/15/1128796745073.html?oneclick=true>> at 7 November 2005.

33 Advice from Bret Walker SC and Peter Roney to *Media Watch*, ABC Television, 24 October 2004, 13 <<http://abc.net.au/mediawatch/img/2005/ep34/advice.pdf>> at 7 November 2005.

D Advocating Terrorism

The Bill also proposes to amend the criteria for the proscription of terrorist organisations by adding that an organisation may be proscribed if it ‘advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)’.³⁴ An organisation is defined as advocating a terrorist act if it ‘directly or indirectly counsels or urges the doing of a terrorist act’; ‘directly or indirectly provides instruction on the doing of a terrorist act’; or ‘directly praises the doing of a terrorist act’.³⁵ The impact of the proscription of an organisation is severe: members whether informal or formal could be imprisoned for 10 years,³⁶ directors for 25 years.³⁷

Again, as with the concerns about incitement, the problem is the ambiguity of this definition. What does it mean to indirectly counsel the doing of a terrorist act? For example, consider the statement ‘the people of Iraq have a duty to resist the occupation of their homeland by Western forces, including, if there is no alternative, through violent means’. This would seem, *prima facie*, to be a statement that indirectly counsels the doing of a terrorist act. While some would disagree with this statement, and might indeed find it odious, the use of the criminal law as a tool in this case is both ideologically and pragmatically unsound, or at least grossly disproportionate.

It is ideologically unsound because in a liberal democracy such as Australia, there is an underlying principle that ideas that are ignorant or misguided can be ‘weeded out’ through public debate, so long as the ideas stop short of directly advocating violence or severely deriding an individual or group. Surely it is a sign of a society’s maturity that it tolerates somewhat unpalatable ideas.

It is also pragmatically unsound because the banning of a point of view often serves to validate it, entrench it, and not so much suppress its existence as merely to push it out of view of both the public and intelligence organisations.

IV APPLICATION OF ANTI-TERROR LAWS

Fully understanding the impact of laws is difficult, in part because of both the real and perceived implications of the limits on freedom of speech. Many of those who have been detained or otherwise affected by the laws are not eager to discuss their experiences.

In a submission to the 2005 Parliamentary Joint Committee on ASIO, ASIS and DSD (the Defence Signals Directorate), ASIO reported that there had been eight cases of detention and/or questioning under the *ASIO Act*.³⁸ From our contacts with lawyers and community groups, we believe an additional 10 people

34 Anti Terrorism Bill (No 2) 2005 (Cth) sch 1, item 10, amending s 102.1(2) of the *Criminal Code*.

35 Anti Terrorism Bill (No 2) 2005 (Cth) sch 1, item 10, cl 102.1(1A).

36 *Criminal Code Act 1995* (Cth) s 102.3(1).

37 *Criminal Code Act 1995* (Cth) s 102.2(1).

38 Submission to Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *Review of Division 3 Part III of the ASIO Act 1979 – Questioning and Detention Powers*, 22 April 2005, 5 (ASIO).

have been subject to detention and/or questioning warrants. No one has yet been charged with an association offence.

In our discussions with members of the community, several have referred to a more insidious use of this legislation, and that is as a means of coercion. The association offence is so broad, for example, that it could easily be used by ASIO to coerce someone into speaking to them or otherwise face an offence. The fear this coercion engenders could quite possibly cause a backlash against intelligence organisations and lead to a reticence to cooperate with authorities.

V CONCLUSION

While Australian society holds freedom of speech in high regard, it also recognises the need to place restraints on speech where appropriate. It is understood that freedom of speech is not unlimited, but limits on free speech must be justified in terms of: (a) absence of other means to deal with a particular problem or threat; and (b) how effective such limitations are in remedying a problem. Laws do exist which restrict the freedom of speech, such as defamation, incitement to racial hatred, confidentiality obligations, copyright and contempt. But in each of these cases, there is a specific harm that is being protected and the laws are arguably adapted to protect those rights.

However, with much of the anti-terrorism legislation, there is no real case made out that a specific harm would be prevented by limiting free speech. Free speech is limited with little apparent gain. It is acknowledged that it is legitimate to protect society from the harm of terrorism. Unfortunately, there is no clear nexus between the prevention of harm from terrorism and stopping persons from being able to speak when they have been detained or questioned (whether under an ASIO warrant or under the preventative detention or control orders). There is also no clear evidence that preventing association with certain persons, or limiting a person's freedom to speak their mind, even if the thoughts are unpopular or repugnant, will stop terrorism.

At the same time, there does appear to be a cost that will have to be paid later for implementing these anti-terror laws. The disenfranchisement caused by the coercive use of the laws could backfire; and there is little doubt that new measures such as the sedition offence will weaken debate on the more difficult issues our society faces. These particular laws do, indeed, seem to be taking on a distinctly Faustian character.