

Australian "counter-terrorism" laws threaten fundamental democratic rights

Mike Head
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In a far-reaching move against freedom of speech and political association, the Howard government last month introduced a package of so-called counter-terrorism bills handing vast new powers to the intelligence and police apparatus. On the pretext of protecting the Australian people from terrorist violence in the wake of the September 11 events in the United States, the government is seeking to abolish basic protections against arbitrary detention, political persecution and police frame-up.

The legislation imposes life imprisonment for a range of "terrorism" offences, which are defined in the widest possible terms, and provides a general power for the government to outlaw political parties for the first time since the 1951 attempt to ban the Communist Party of Australia.

The package has the bipartisan backing of the Labor Party, a fact underscored last week when the leaders of the Australian states and territories, all currently run by Labor governments, agreed to formally refer their powers over terrorism to the federal government. Their decision hands the federal government sole law-making and police enforcement power over politically-related crime for the first time since Federation in 1901.

The most far-reaching measures are contained in the final bill, which the government unveiled on March 21. It will enable the domestic spy agency ASIO (Australian Security Intelligence Organisation) to detain people without charge, hold them incommunicado, deny access to legal advice, strip-search detainees and interrogate them in detention for at least 48 hours.

Detainees need not be even suspected of a terrorist offence, or any other criminal offence. The Attorney-General can simply certify that their interrogation "will substantially assist the collection of intelligence that is important in relation to a terrorism offence," even if no act of terrorism has occurred. This power could easily be used to detain journalists and political activists, as well as the children, relatives or acquaintances of supposed terrorism suspects. Any detainee who refuses to answer ASIO's questions will be liable to five years imprisonment and the defence of self-incrimination will be removed.

The ASIO Legislation Amendment (Terrorism) Bill fundamentally alters the existing legal framework in a number of crucial respects. ASIO already has an array of surveillance and search and entry powers, but no powers of arrest or interrogation. The state and federal police can detain people, but only on suspicion of committing a criminal offence and those suspects must be either charged or released within a short period—generally four hours. Prisoners have the right to legal counsel and to remain silent.

These rights and restrictions will disappear under the ASIO legislation. In the first place, detainees, including children, can be held in secret, barred from contacting anyone, including their families and lawyers.

Secondly, they can be held for 48 hours from the time they are brought before a magistrate or tribunal member, and new warrants can be issued, effectively allowing ASIO to extend the detention indefinitely. As the

explanatory memorandum attached to the bill makes clear, nothing in the legislation will stop a person being subject to more than one detention warrant.

Thirdly, if ASIO demands any information from detainees, they must provide it or face five years jail. Even if detainees do not have the information, they must produce evidence proving so, reversing the traditional burden of proof on the prosecution in criminal trials. Giving false or misleading answers to ASIO questions can also result in five years jail.

Finally, police officers can use "reasonable and necessary" force to conduct strip-searches. This power also reveals the government's intention to detain children. Detainees under 10 years of age are the only exception to the search power, while those aged up to 18 can be searched in the presence of a parent, guardian or "someone else who can represent the person's interests," even if that person is not acceptable to the detainee. ASIO can seize and retain any items found or produced on its demand.

To provide a fig leaf of protection against torture, intimidation and frame-up, interrogation must be video-taped and conducted in the presence of a "prescribed authority," that is a magistrate or member of the Administrative Appeals Tribunal. Video-taping of police questioning, currently required in most Australian jurisdictions, has not prevented the planting of evidence and extraction of false confessions. And governments can readily appoint magistrates who are amenable to ASIO's requirements.

Another remarkable clause provides that detainees "must be treated with humanity and with some respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment". Apart from revealing that degrading treatment is in fact quite possible, this clause is legally meaningless. There is no penalty for its breach; instead, detainees can complain about mistreatment by ASIO to the Inspector-General of Intelligence and Security, who is a high-ranking official within the security apparatus.

In a media statement, Attorney-General Daryl Williams said the Bill contained "strict safeguards" of individual freedom—the main one being the need for ASIO to obtain his consent before seeking a detention warrant. This proviso only underscores the power that will be concentrated in the hands of the government of the day, and the highly political character of the new measures.

Under the Security Legislation Amendment (Terrorism) Bill, the Attorney-General can proscribe any organisation that in his view "has endangered, or is likely to endanger, the security or integrity" of Australia or another country. An organisation can be banned even if it or any of its members have not been charged with, or convicted of, any terrorist offence.

This provision is so wide that it could apply to any political party deemed to be subversive or a threat to national security, as well as to any group supporting opponents of another government. In the past, it would

certainly have applied to supporters of the African National Congress, Fretilin, the Liberation Tigers of Tamil Eelam and the Palestine Liberation Organisation. At present, it could easily be used against a range of causes, from Kashmiri and Tibetan secession to opposition to Israeli or US military aggression in the Middle East.

Anyone who is a member of, or in any way assists, an outlawed organisation can be jailed for 25 years. Membership includes “informal” membership. The government does not have to prove that defendants knew that the group was banned; again the burden of proof is reversed—defendants must show that they did not know and could not have known about the ban. As lawyers have pointed out, anyone who gives a donation to a political or charitable group that has links to a proscribed organisation could be jailed, even if the group has an innocent-sounding name, obscuring its connection to the outlawed organisation. In a Senate committee hearing on the legislation, senior officers of the Attorney-General’s department refused to rule out the possibility of a lawyer being charged for helping a banned organisation to appeal against its proscription.

This is the first major bid to outlaw political organisations since 1951, when the High Court declared unconstitutional Menzies’ legislation to ban the Communist Party. In a significant popular victory for free speech, the government’s subsequent referendum to amend the Constitution was defeated. The current legislation could also be challenged in the High Court, but the states’ referral of their law enforcement powers to the federal government may help provide Canberra with sufficient constitutional jurisdiction to make the legislation legally valid.

Under the existing provisions of the federal Crimes Act, the government already has the power to declare unlawful any association that advocates or encourages the overthrow of the Constitution or the government by revolution, sabotage, force or violence. These provisions, however, first introduced in 1917 to combat support for the Russian Revolution, have proven politically difficult to use. Now the government hopes to exploit the fear of terrorist violence to enable it to outlaw groups seen as a political threat.

The government’s and ASIO’s powers will be enhanced by the legislation’s sweeping definitions of terrorism and treason, also punishable by life imprisonment. Terrorism will cover any acts or threats, whether criminal or not, that advance “a political, religious or ideological cause”. It need not involve harm to a person—it can include serious damage to property or risk to public health or safety, or interference with an information, telecommunications, financial, essential services or transport system.

Preparing, providing training for or in any way assisting a terrorist act can also lead to life imprisonment, as can possession of any object or document used to prepare or assist a terrorist act. The legislation exempts “lawful advocacy, protest or dissent” and “industrial action” yet does not define “lawful” or “industrial action”.

These provisions could cover a wide range of political activity, such as planning or participating in a protest outside government buildings or facilities where damage is alleged to have occurred. Workers who picket a workplace and demonstrators who block roads or entrances to financial institutions, such as the stock exchange, could be charged as terrorists, as could computer hackers.

During questioning in a Senate committee hearing on April 8, the Attorney-General’s representatives admitted that someone who cut through a fence at the recent protest at the Woomera refugee detention centre or who invaded the parliament building during a 1996 trade union rally could have been charged with terrorism. The officials acknowledged that a picketing striker who caused “serious” property damage or a person who possessed a mobile phone used to discuss a violent act could be prosecuted under the new provisions.

While citing the September 11 attacks in the United States as its

justification, the government has adopted a definition of terrorism that goes well beyond the Bush administration’s own USA Patriot Act, which covers activity that is dangerous to human life and violates existing criminal laws. The Howard government’s version is based on the British Blair government’s Terrorism Act 2000, but goes even further in specifying disruption to various types of communications systems.

Equally ominous is the extension of the definition of treason, regarded as one of the most serious political crimes of all. It will now include assistance to an enemy, regardless of whether war has been declared, or to any organisation “engaged in armed hostilities” against the Australian military. If made retrospective, this amendment could be used against David Hicks, currently held by the US government at Guantanamo Bay, Cuba for allegedly fighting with Afghanistan’s Taliban government against US and allied forces. More generally, it could be invoked against anyone who aids resistance to an Australian military intervention, such as the current involvement in Afghanistan and the Persian Gulf.

A person who knows of any planned act of treason and does not notify the police, or fails to attempt to prevent the treason, could also face life imprisonment. In the Senate hearing, the Attorney-General’s officials admitted that they knew of no other country with a specific provision punishing failure to report or prevent treason.

These sweeping measures indicate that the legislation is meant for political use. The government admits that no discernible terrorist threat exists in Australia. Moreover, no terrorist acts have been recorded since the single 1978 bomb blast outside a British Commonwealth leaders meeting at Sydney’s Hilton Hotel—an incident that bore all the hallmarks of a state provocation. In any case, as a parliamentary library report issued last month pointed out, the security and police agencies already have all the powers they need to investigate, prevent and punish genuine acts of terrorism, which are fully covered by existing criminal law.

The legislation also strengthens the surveillance powers of ASIO, federal and state police and other security agencies. The use of telecommunications intercept warrants will be broadened to permit phone tapping and interception of email and mobile phone messaging services on the pretext of investigating terrorism, arson and child pornography. The warrants will be easier to obtain from federal magistrates and will permit secret entry onto premises.

Other provisions will allow funds and property to be seized from individuals and organisations on the grounds that they are the proceeds of terrorist activity or are intended to be used for terrorism. Customs officers and federal protective service officers will also be armed with weapons and greater powers to arrest, remove or seize goods from people at airports and ports, together with access to airline and ship passenger lists.

Not only have the state Labor leaders agreed to refer their counter-terrorism powers to the Howard government, but the federal Labor leadership has pledged its support. “Labor believes that as a nation we must be tough on terrorism,” Labor leader Simon Crean told parliament. “We do not oppose these bills. Our national security agencies must have the power to tackle terrorism but with clear laws and without political interference. It is crucial that we get these bills right and that they have broad community support.”

Labor’s main concern is to prevent a wide discussion of the legislation, which has been given little publicity in the media. Civil liberties groups, lawyers’ associations and some legal academics have criticised the laws as draconian and insidious but Crean and his colleagues are anxious to head off further public opposition. Crean criticised the government for delaying the legislation for so long after the events of September 11, declaring that “we could have put this legislation through in the last parliament” six months ago. He appealed for a cooperative approach to allow Labor to ease the passage of the laws, as it did with the military call-out bill in 2000.

With parliament currently in recess until next month, a Senate

committee will review the legislation over the next few weeks, giving the government the chance to incorporate any modifications proposed by Labor. Just half a year on from September 11, the terrorist attacks are being exploited to bring forward measures normally associated with military juntas. Whatever cosmetic amendments are made to the bills, the central thrust will remain—the introduction of unprecedented powers to outlaw, interrogate and jail opponents of the ruling political establishment.



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