Australian legal experts condemn Anti-Terrorism Bill

Mike Head
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Eminent lawyers, and even the government's own Human Rights and Equal Opportunity Commission president John von Doussa, have condemned the Howard government's new Anti-Terrorism Bill 2005 as a violation of international human rights law and the Australian Constitution.

Prime Minister John Howard and the Australian state Labor premiers are nevertheless standing together to push the legislation, and complementary state laws, through their respective parliaments as rapidly as possible.

At the centre of the Bill are two new sweeping forms of detention without trial—"preventative detention" and "control orders"—both of which can be imposed in closed-door hearings using secret evidence without the detainee's knowledge.

Von Doussa, a former Federal Court judge, said the provisions were akin to those of a police state. "If you think about the nature of a police state, it is police officers exercising the executive power of the state without their actions being subjected to review through the legal system," he told ABC radio. "That is exactly what is proposed here. It is proposed that the executive can exercise restraining powers that put people in detention for up to 14 days with no realistic opportunity of questioning that through the court system."

Earlier, von Doussa told a parliamentary forum in Canberra that the federal government was seeking extraordinary powers to deprive people of their liberty while asking to be trusted not to abuse that authority. "The difficulty of that approach, as experience has shown not only in places like South Africa but here in Australia, is that reality turns out otherwise. The revelations of the Palmer report demonstrate how abuses of power can occur where there is no acceptable and realistic way that people can question what is happening to them."

The Palmer report examined the wrongful immigration detention for 10 months of Australian resident Cornelia Rau, who was denied medical and mental health treatment and subjected to weeks of solitary confinement.

Writing in the *Sydney Morning Herald*, two senior barristers, Ian Barker and Robert Toner, said the Bill violated two key articles of the 1966 International Covenant on Civil and Political Rights. Article 9.2 says: "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

Article 9.4 says: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

Barker and Toner wrote: "The proposed anti-terrorism bill creates control and preventive detention orders which will give the Government the ability to control, monitor and jail people who have not committed a crime. These people will not be charged with a crime.

"Fundamental to the concept of the rule of law is that citizens are entitled to due process which necessarily includes a right to know what is alleged against you and the facts that are said to support that allegation and to have the allegation determined by a court of law which stands independent of the executive government.

"Neither the person subject to the control order nor anybody acting on his or her behalf is given documentation other than the order itself which describes the basis upon which the order was made. The information that the Australian Federal Police provides may be inaccurate, maliciously informed, biased or little more than rumour or gossip clad as reliable information.

"Today we are on the edge of a slide into our own 21st-century form of fascism: secret arrest, secret detention, secret interrogation, by secret people. This will be a product of the Anti-Terrorism Bill, itself kept secret until the last minute to avoid scrutiny by those it will put at risk: the Australian public. The premiers and chief ministers are largely compliant in the process, beguiled by secret information derived from the untested assertions of secret intelligence agents."

In a Memorandum of Advice sent to the Australian Capital

Territory government, two barristers, Lex Lasry and Kate Eastman, concluded that many aspects of the Bill would be inconsistent with the ACT Human Rights Act 2004, which draws on a range of international human rights treaties.

Control orders would infringe sections of the Act dealing with freedom of movement, arbitrary detention, privacy, freedom of expression, freedom of assembly and association, freedom to take part in public life, rights of minorities, freedom of religion and fair trial and access to lawyers.

Preventative detention would breach section 18(1) of the Act, which states: "Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained." In addition, the imposition of "prohibited contact orders" on detainees, thus holding them incommunicado, would infringe the freedom of expression, which "includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way."

These conditions would also break the Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which say: "Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits."

Lasry and Eastman noted that further features of the Bill would violate a list of other measures, including those relating to access to lawyers, children's rights, use of lethal force and denial of a fair trial.

All the state premiers have received legal opinions warning of the likely invalidity of the agreement they struck with the Howard government to help it evade the Constitution. The Constitution bars the federal government from imposing "punishment" on Australian citizens without trial. Apparently on legal advice, the Howard government limited preventative detention by the Australian Federal Police to 48 hours, but the states and territories have agreed to extend this to 14 days for their respective police forces.

Not even these limits have been placed on control orders, which can last for 12 months and be continuously renewed. This is despite the fact that they are another form of internment—they can include house arrest, the fitting of personal tracking devices and bans on travel, communication and employment.

While the Australian Constitution falls far short of guaranteeing basic democratic rights, lawyers have pointed out that it does enshrine the separation of legislative, executive and judicial power. As a result, only properly constituted courts can incarcerate people. Furthermore, judges cannot be asked to assume powers that would prejudice the independent functioning of the courts.

To give the appearance of judicial oversight and hence a semblance of constitutionality, the premiers requested that detention and control orders be granted by courts or individual judges, even if behind closed doors without the detainee being present. But this could also be ruled unconstitutional, because it amounts to asking judges to exercise executive power.

In a written opinion for the ACT government, senior barrister Stephen Gageler pointed to three constitutional grounds on which the Bill could be challenged. The first was the principle, affirmed in the 1992 Chu Kheng Lim case, that citizens enjoy a "constitutional immunity" from involuntary detention except by an order of a court exercising the "judicial power of the Commonwealth".

Secondly, the High Court reiterated in the 2004 Fardon case that the federal government could not confer on a court any detention power that was preventative and not punitive. In the words of Justice Gummow, "detention by reason of apprehended conduct" is "at odds with the central constitutional conception" of detention occurring after "judicial determination of criminal guilt".

Thirdly, by asking courts or individual judges to issue secret detention and control orders, the government was breaking another rule emphasised in Fardon: courts cannot be "called upon to act ... effectively as the alter ego of the legislature or the executive," because that would compromise the "integrity and independence" of the courts.

This legal advice makes it plain that the federal Liberal-National Coalition government and the state Labor governments have entered into a compact to subvert the Constitution, as well as to tear up fundamental precepts of international human rights law.

The fact that they have continued on this path, in defiance of strong legal opinion, and without any serious objection in the mainstream media, is a serious warning of the lack of support in ruling circles for even the most elementary democratic rights and civil liberties. With both major parties increasingly discredited in the eyes of ordinary working people, constitutional and legal norms are being ripped aside in order to erect the framework for a police state.