Australia: NSW government extends “sunset clause” in terrorism law

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Last month, with almost no publicity, the New South Wales (NSW) state Labor government extended the operation of Part 6B of the state’s Crimes Act—which imposes jail terms of up to 10 years for “membership” of a “terrorist organisation”—until September 2013. Part 6B had been due to be automatically repealed on September 13, 2010, under a “sunset clause”.

Between 2002 and 2005, numbers of “sunset” clauses were inserted in the sweeping federal and state “anti-terrorism” legislation to politically justify the unprecedented measures as an exceptional response to the terrorist attacks in the US on September 11, 2001. In reality, none of the sunset clauses have been activated, and several have been extended. Extraordinary powers, such as detention without trial, the banning of organisations by executive order and semi-secret trials have, in effect, become permanent features of the legal system.

In last month’s instance, the offence of “membership of a terrorist organisation” is already covered by federal law. The extension of the state legislation was, therefore, clearly for other purposes. NSW Attorney General John Hatzistergos stated that the NSW offence had to be renewed because it forms the legal basis for police to use covert search warrant powers against organisations under the state’s Terrorism (Police Powers) Act.

The extension of these powers provoked a rare, and significant, critical comment in the corporate media. Experienced journalist and lawyer Richard Ackland expressed serious concerns in the *Sydney Morning Herald* on September 24. Ackland said the expansion of police powers under the auspices of the “war on terrorism” is leading to a return to an era of police powers that were “ill-defined and lightly supervised,” where accused could be “verballed, evidence planted, and fishing expeditions mounted”.

Furthermore, in exercising these laws, Ackland warned, the police “have become an enormous paramilitary force: special black uniforms bedecked with an overabundance of weaponry, massive vehicles emblazoned with Orwellian signs that say ‘Riot and Public Order Squad’ in the hands of menacing personnel. It all looks like we citizens are an enemy to be relentlessly fought”.

While Ackland was correct to draw attention to these developments, they cannot be explained, as he suggests, simply as the product of “power overreach” by colluding police and governments, intent on returning to a previous period of police abuses of power.

Instead, as the NSW laws themselves illustrate, the “anti-terror” laws have become the principal mechanism through which, since 2002, Australian federal and state governments have erected the framework of a police-state that can be used to suppress political opposition and curtail basic democratic and legal rights.

None of the laws was actually needed to combat terrorism. Before 9/11, all conceivable terrorist acts—such as murder, kidnapping and arson—were serious crimes, as were all attempts, plans and complicity in them. The police and intelligence agencies already had vast powers, such as to search and bug premises, intercept telecommunications and maintain covert surveillance.

However in 2002, the former federal Liberal government—with Labor’s full support—began to introduce a barrage of terrorist-related offences, some punishable by life imprisonment. “Terrorism” is defined extremely broadly, potentially covering many forms of protest and political dissent. In addition, the federal cabinet now has the power to proscribe groups as “terrorist organisations,” criminalising all those who associate with or financially support them.

In 2005, the Howard government, again supported by Labor and its state premiers—along with the Greens in the Senate—changed the word “the” to “a” in every terrorism offence. As a result, individuals can be prosecuted for allegedly planning a terrorist attack, without any evidence of a *specific* “terrorist act”. “Advocacy” of terrorism was also made a ground for proscribing organisations, a move that could easily be used against political groups, including for expressing sympathy for those resisting US-led forces in Afghanistan and Iraq.

There are now four forms of detention without charge for "anti-terror" purposes: for questioning by the Australian Federal Police (AFP); for interrogation by the Australia Security Intelligence Organisation (ASIO); under a “preventative detention order”; and under a “control order”—which can be a form of house arrest.

State governments have enacted complementary, equally

authoritarian, legislation. The Terrorism (Police Powers) Act of 2002 handed NSW police "special powers"—if a senior officer believes there is a "threat" of a "terrorist act" occurring in the "near future". These powers include to obtain people's identities, search persons, vehicles and properties, and to designate "target areas" for those searches. The Act expressly removes the authorisation for the use of powers from all judicial scrutiny.

In addition, the police may apply to the NSW Supreme Court for "preventative detention" orders against individuals. These can last 14 days, and are renewable. Applications can also be made to "eligible judges"—those selected by the attorney general—for "covert searches" of premises.

These secret searches allow police to "impersonate another person" and enter "adjoining premises" to gain access to the subject premises. Once inside, if police find anything "connected" to any "serious indictable offence" (not just a terrorism offence), they may seize it. Police can also replace seized items with substitutes, make copies of material, and do "anything else that is reasonable" to conceal the search from the occupier of the premises.

As Ackland concluded, police have virtually unrestrained powers to search "property and possessions" without their owner's knowledge, even in the absence of an "imminent threat" of terrorism.

NSW Attorney General Hatzistergos stated that the extension of the sunset clause in the NSW Crimes Act was a "temporary measure" before the introduction of a "national covert search warrant regime". This development demonstrates the close collaboration between the states and the federal Labor government in bolstering the ever-increasing array of "anti-terrorism" laws.

Prime Minister Julia Gillard's federal government is moving to introduce measures first proposed under her predecessor Kevin Rudd in 2009. These will grant the AFP the power—without requiring a judicial warrant—to enter, search, seize and use force in any premises, whenever an AFP officer suspects there is "material relevant to a terrorism offence" and a "threat to public health or safety". Other amendments will widen the definition of "terrorist act" to include actions causing any "harm", not just "physical harm". Non-violent conduct that allegedly frightens or psychologically traumatises someone, perhaps by threatening their economic interests, would become "terrorist" activity.

Ackland also correctly noted that "anti-terrorism" principles and methods are being expanded "into areas that have nothing to do with terrorism".

Following the Cronulla Beach riot in 2005, in which a racist mob, whipped up by government anti-Muslim rhetoric and egged on by right-wing media commentators, assaulted people of Middle Eastern appearance, the NSW government convened an "emergency" parliamentary session to pass laws enabling police to declare "lockdown zones", close off streets, erect checkpoints, conduct random searches and seize vehicles. Originally limited by a two-year "sunset clause," those powers were made permanent and expanded in 2007, and now apply to any "large scale public disorder".

Virtually every major public event in NSW sees the rolling out of draconian police powers, such as occurred in Sydney during an Asia-Pacific Economic Cooperation summit in September 2007, and in July 2008 during a papal visit for Catholic World Youth Day.

In 2009, virtually without parliamentary debate, the NSW government granted police secret search powers that can be used in regular policing operations, going even beyond the powers that can be used against alleged terrorist suspects. Under the Law Enforcement (Powers and Responsibilities) Act, police need only suspect that there is or "within 10 days will be" in or on premises a "thing" that that is "connected with" *any* serious "indictable offence" to get a covert search warrant from an "eligible judge". Police may then secretly enter private homes to collect material, remotely access computers for a month, and not tell their owners for up to three years.

Also last year, under the spurious pretext of protecting the public from "bikie" gangs, the state government introduced the Crimes (Criminal Organisations Control) Act. The Commissioner of Police can now ask an "eligible judge" to "declare" an organisation that associates for the purposes of "organising, planning, facilitating, supporting or engaging" in "serious criminal activity" and represents a "risk to public safety and order". Members or associates of declared organisations can be placed under "control orders," preventing them from associating, under threat of imprisonment.

Under this Act, in another extension of the "anti-terrorism" powers, courts can hear evidence in secret, and exclude the defendants, their lawyers, and the public from the hearing. This is like the federal legislation, which enables defendants to be excluded from their own trial, along with their lawyers, if evidence emerges relating to "national security".

There is no doubt that discussions have already been held in senior security and political circles about using this array of criminal laws and police powers to deal with political and social unrest. In March 2009, at a national security conference in Sydney, the then AFP Commissioner Mick Keelty warned that the consequences of the global financial crisis will "increase feelings of marginalisation and isolation," producing an increased risk of "demonstrations, strikes and riots".