

Terrorist Laws in NSW: disproportional and discriminatory

The 'war against terrorism' is lauded by dictators, authoritarians and neo-fascists around the world. The Pakistani and Burmese military dictatorships have signed up. The Malaysian regime, which has jailed most of its opposition leaders under preventive detention laws, claims its laws to be a 'best practice' model for the rest of the world. And Israeli 'settlers' in the Palestinian West Bank now claim they are fighting 'for the free world against terrorism' (O'Loughlin 2002). However, states that claim adherence to democracy must be more careful.

Opportunist policy-making in countries with weak formal rights guarantees (i.e. few constitutional rights, as in Australia and Britain) is undermining these countries' claims to be democratic. The new wave of terror laws around the globe may well destroy many of those claims. New South Wales has found it easy to join in this trend, as the legal denial of rights in this state is now accepted as commonplace despite politically marginalised criticisms.

However, the regular construction of laws that create arbitrary and discriminatory powers of arrest and detention is helping build a crisis of legitimacy in law-making. At some point those laws will begin to be publicly resisted and discredited. The 'rule of law' will not be respected — and should not be respected — when laws begin to routinely and flagrantly breach the international consensus on human rights.

This paper discusses that looming crisis of legitimacy by reference to the principles of proportionality and equality before the law, and by examining the latest rights-violating law in NSW, the *Terrorism (Police Powers) Act 2002*.

Arbitrary laws and democracy

One of the key principles of the International Bill of Rights, formulated in the two decades following the Second World War, was the prohibition on 'arbitrary' powers of arrest, detention and invasions of privacy (ICCPR Articles 9 & 17). Respect for this principle in many ways distinguishes a democratic from a dictatorial state. But all states arrest, detain and invade the privacy of their citizens, sometimes. So what does 'arbitrary' mean?

According to Nowak (1993:164), when the Covenants were being written, the interpretation of the word 'arbitrary' was contentious but was designed to avoid an exhaustive listing of all the permissible types of deprivation of liberty. The majority in the Human Rights Commission gave a broad meaning to 'arbitrary', saying it contained 'elements of injustice, unpredictability, unreasonableness, capriciousness and unproportionality', as well as a lack of due process (Nowak 1993:172). In the context of interventions in suspected criminal or terrorist activity, as well as in strategic matters of self-defence and war, responses that are 'proportionate' may avoid that arbitrary, unjust and unreasonable tag.

Yet proportionality has been lost in the US military response to the attacks of September 11 2001, leading to the dangerous declaration of an open-ended war. Characterisations of the world as 'good and evil' do not help. And in its traditional unthinking desire to please the US, the Australian Government has both joined in this dangerous war, and imposed

draconian new state powers and restrictions on civil rights (e.g. the *Security Legislation Amendment (Terrorism) Act* 2002, and associated Acts), out of all proportion to any actual threat. Yet as war escalates, real threats will be generated, and in the meantime the civil rights issues cannot be considered sensibly under the cloud of an apparently limitless war.

But the threat of escalating, aggravated violence ('terrorist' OR state-initiated warfare) can only be dealt with by working to remove the causes of aggravation. And in a practical sense, attempts to discipline and punish half the world are certain to fail, as are the attempts to set up new puppet governments in the Middle East. Domestically, new police detention, search and surveillance powers, perimeter and VIP protection measures, removal of airport lockers and railway rubbish bins — such measures can only diminish civil rights without reinforcing public security, so long as the dangerously undefined global war goals are pursued.

Yet even war does not abolish rights. Democracy involves more than just a vote for a representative every few years. In all countries (but especially in majoritarian voting systems, where large minorities are systematically disenfranchised) democracy must involve a citizen's effective right for self-rule and self-governance. This basic democratic capacity is snuffed out when state powers deny such first order human rights as equality before the law and freedom from arbitrary arrest and detention. In Australia, with a weak institutional culture of human rights, we are already a long way down this track.

In the current context Human Rights Watch (a US-based watchdog organisation) has drawn attention to 'repression in the name of anti-terrorism' and 'opportunism in the face of tragedy'. Human Rights Watch (2002) specifically cites Australia as a violator of rights through its extraordinary measures against asylum seekers. But the raft of sweeping new powers at both state and federal level are also making 'non-citizens' of Australian residents. In NSW, several discriminatory civil provisions against prisoners (e.g. the *Victims Compensation Act* 1996) and new systems of immunities from prosecution (for police) (the *NSW Law Enforcement [Controlled Operations] Act* 1997 — see Anderson 2001) have already undermined equal citizenship.

The proposed NSW terrorism law has to be read in this context, as well as in light of the unanimous UN General Assembly Resolution of 21 November, which demands that 'any measure taken to combat terrorism complies with [states'] obligations under international law, in particular international human rights, refugee and humanitarian law' (UN General Assembly 2002).

Provisions of the NSW Act

The NSW *Terrorism (Police Powers) Act* 2002 defines a 'terrorist act' (s 3) in identical terms to the final definition used in the federal law (the *Security Legislation Amendment (Terrorism) Act* 2002 — now Part 5.3, Division 100 of the *Criminal Code Act*), earlier this year. This is a long, convoluted and broad definition that appears to exempt 'advocacy, protest, dissent or industrial action'. Yet it is important to note why the definition of a 'terrorist act' must be broad and convoluted, and must threaten 'advocacy, protest, dissent or industrial action' — this is because virtually every conceivable terrorist act (bombing, kidnapping, hijacking, murder, wide scale destruction of property, etc.) is already illegal, and has been so for many decades.

The special feature of the NSW Act is that it gives senior commissioned police the power to 'authorise' intrusions without warrants (s 8) upon 'targets' (persons, vehicles or areas). These 'targets' seem likely to include whole groups of people (possibly defined as wide as

'Middle-Eastern looking people', in a certain suburb), and groups of premises. These intrusions (after an act of terrorism, i.e. during an investigation, or before an anticipated act of terrorism) in most cases require the concurrence of the Police Minister (s 9 — an unusual extension of ministerial power into operational policing); they are exempt from challenge by the courts (s 13); and they involve special powers that remain in force over several days (s 11 — the time varies, depending on the type of authorisation). The special powers are on top of ordinary police powers, and empower any police or 'law enforcement' officer: (i) to demand identification, (ii) to search persons, (iii) to search premises and vehicles, and (iv) to seize things, and (v) to use 'such force as is reasonably necessary to exercise the power.' There are various penalties for obstructing police carrying out such operations (s 22 — 2 years jail), or for failing to identify oneself (s 16 — 12 months jail). Police have a very broad indemnity from prosecution for any act carried under such operations — they cannot be held liable due to some fault in the authorisation process (s 29).

Several types of search are identified, including strip searches, which may be carried out on anyone over the age of 10. There are some guidelines for strip searches (Schedule 1), for example they cannot include touching or a search of body cavities (Schedule 1, s 6). Children between 10 and 18 'must, unless it is not reasonably practicable' be strip-searched in the presence of a parent or guardian (Schedule 1, s 6).

As with the Labor Government's earlier introduction of arbitrary search powers (under the *Crimes Legislation Amendment (Police and Public Safety) Act* 1998), the extension of arbitrary power in this Act is cloaked in the language of 'reasonable cause'. The *Police and Public Safety Act* attempted to redefine 'reasonable grounds' for searching for weapons, to include a person's mere presence 'in a location with a high incidence of violent crime'. A subsequent Ombudsman's investigation (*Policing Public Safety* 1999) confirmed that this power was being used arbitrarily, in certain areas and against very young people (Anderson 2001). The *Terrorism (Police Powers) Act* allows the authorisation of 'targets' if there are 'reasonable grounds for believing there is an imminent threat of a terrorist act' (s 5). The link between the 'imminent threat' and the target need not be made out, as the authorising police officer need only be satisfied that the power will 'substantially assist' (s 5), and in any case this consideration is not open to any judicial review (s 13).

In practice the subjects of the intrusions (arrest, detention, search, forcible seizure) will include those involved in the 'advocacy, protest, dissent or industrial action', which is supposedly excluded in the definition of a terrorist act. Preventive 'national security' measures in Malaysia (the *Internal Security Act*), for example, have been used exclusively against dissidents, protesters and miscellaneous 'troublemakers'. Such measures are virtually never used against armed groups. The way in which police will subvert the exclusion of 'advocacy, protest, dissent or industrial action' is quite simple. The exclusion does not apply (under both the federal and the NSW definitions) if the 'action' may be seen as 'intended' to 'cause serious harm' or 'create a serious risk to the health and safety of the public'. Once such an intention is suggested by police, the 'advocacy, protest, dissent or industrial action' can become 'terrorism'. Well, knowing as we do the NSW Police record of routinely lying about themselves as innocent victims, in a range of confrontations including demonstrations, and that Police Ministers and many media commentators routinely accuse disruptive protesters and dissidents of being 'violent', it is easy to see how terrorist threats will be constructed. Already Federal and NSW MPs have openly branded pro-asylum seeker demonstrators and anti-WTO demonstrators, as 'violent' and potential 'terrorists'. No need for guns or bombs to become a 'terrorist'.

Violations of human rights facilitated by this Act

'Arbitrary' detentions and invasions of privacy are unlawful under the *International Covenant on Civil and Political Rights*, which Australia has signed and ratified. International law therefore requires that there must be some specific reason to detain someone or invade his or her privacy. It is not enough to say there is some general 'reasonable cause' that allows the targeting of groups of people. Nor does the mere passage of a domestic law make police action legal under international law. Police use of a power (such as in Part 3 of this Bill) that enables them to search a person simply because he or she belonged to a 'target' group — without specific reason to suspect that person of specific wrong doing — would most likely breach international law.

Similarly, personal searches, and in particular strip searches, carried out on a person (including children between 10 and 18) with no specific cause (other than a general 'cause' that led to the 'authorisation' of action against target groups), would most likely breach international law. Strip searching is widely recognised as a repugnant practice akin to sexual assault, and is likely to traumatise or retraumatise individuals or (when used repeatedly) desensitise whole groups (such as prisoners). Institutionalisation of strip searching should be shunned in any civilised community. The relevant international law, which prohibits arbitrary searching, is the Australian commitment to *ICCPR* Article 9(1) and (in the case of children) the *Convention on the Rights of the Child* Article 37(b) (which prohibit arbitrary detention), and *ICCPR* Article 17 and *CROC* Article 16 (which prohibit arbitrary interference with privacy).

The extension of ministerial power into operational policing (s 9) is further reason for concern, as this appears to breach the Westminster convention on the separation of powers. It involves direct ministerial involvement in operational policing, and a form of arbitrary and probably discriminatory policing at that. Ministerial targeting of embarrassing demonstrations seems likely. In human rights terms, this would compound the arbitrariness of the police interventions in likely breach of the *ICCPR* (Article 9).

The provision in the Bill that denies even the possibility of legal challenge to the operation of these special powers (s 13) is also clearly in breach of the *ICCPR* (Article 3), which says that 'any person whose rights or freedoms ... are violated shall have an effective remedy ... [including to] have his right determined by competent judicial, administrative or legislative authorities.'

Individual victims of police actions under these new arbitrary powers are entitled under the First Optional Protocol of the *ICCPR*, and after they have exhausted domestic remedies (these seem to be denied at the outset, by s 13), to complain directly to the UN's Human Rights Committee. If the Committee issues an opinion against Australia, it would be up to the Federal Government to have the NSW Government change its law and practice. Such a process took place after the Human Rights Committee's decision in *Toonen v Australia* (1994), which led to the overturning of Tasmania's anti-gay laws.

Entrenching inequality before the law

Like many misconceived laws, it was difficult to imagine amending this law without lending it credibility and even enhanced legitimacy. Its basic purpose was to create a broad, arbitrary and unreviewable power of search and detention. In the event, attempts at minor amendment (e.g. to introduce judicial review of police actions) by Upper House crossbenchers failed, with the familiar pattern of both major parties rushing the Bill through the Parliament. Greens MLC Ian Cohen, one of the few voices raised in opposition,

compared the Bill to the Federal ASIO legislation (which provides for detention without charge for the purpose of interrogation), and expressed concern at the racial targeting the new law would facilitate. 'Fear breeds intolerance ... this Bill has been drafted hurriedly, is riddled with problems and is open to abuse,' he said (Cohen 2002).

The operation of this new law is likely to be discriminatory, just as the knife-searching powers under the *Police and Public Safety Act* 1998 have been used in a discriminatory way against Arab, Islander and Aboriginal youth (Anderson 2001). Under the 2002 terrorism law, demonstrators and Arab communities will become the targets of arbitrary and unreviewable police interventions. Even if they are Australian citizens, they will be made second-class citizens.

With the onset of a wide range of discriminatory laws in NSW — mostly pioneered by the Labor Government, but with the support of the conservatives — it is interesting to reflect on the chaos that would ensue were the Parliament to pass a simple law that said, 'All people shall be equal before the law — no exceptions.' Prisoners would be able to register to vote and, if they were the victim of a violent crime, to apply for victim's compensation. Police would not be able to commit serious crimes with impunity, under controlled operations or anti-terrorist operations regimes. And people would be able to complain of discrimination if they were targeted in police operations because of their race. What a nightmare scenario! Isn't it just as well we have 'the rule of law', instead of 'equality before the law'?

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