

Tasmanian Bar Association

14 November 2005

RE: ANTI-TERRORISM BILL (NO 2)

The Anti-Terrorism Bill (No. 2) effects more or less substantial amendments to the Criminal Code Act 1995, the Crimes (Foreign Incursions and Recruitment) Act 1978, the Financial Transactions Reports Act 1988, the Australian Security Intelligence Organisation Act 1979, the Surveillance Devices Act 2004, the Administrative Decisions (Judicial Review) Act 1977, the Crimes Act 1914, the Migration Act 1958, the Aviation Transport Security Act 2004, the Proceeds of Crime Act 2002, the Customs Act 1901, and the Customs Administration Act 1985.

The Association considers that it is impossible, in any practical sense, to understand the intended impact (let alone the possible unintended impacts) of these changes in the time which has been allowed. It is deeply disturbing that what appear to be some very fundamental changes to the law which restrict freedoms traditionally enjoyed by Australians are proposed to be made without any meaningful opportunity being given for interested persons and organisations to consider those changes and to comment upon them.

According to the Explanatory memorandum the proposed bill provides for (*inter alia*):

- "a new regime to allow for 'control orders' that will allow for the **overt close monitoring** of terrorist suspects who pose a risk to the community;
- a new police preventative detention regime that will allow **detention of a person without charge** where it is reasonably necessary to prevent a terrorist act or to preserve evidence of such an act;
- updated **sedition** offences to cover those who **urge** violence or **assistance** to **Australia's enemies**;
- strengthened offences of financing of terrorism by better coverage of the collection of funds for terrorist activity;
- a **new regime of stop, question, search and seize powers** that will be **exercisable at airports and other Commonwealth places** to prevent or respond to terrorism;
- a new notice to produce regime to ensure the AFP is able to **enforce compliance with lawful requests for information** that will facilitate the investigation of a terrorism or other serious offence;
- amendments to ASIO's special powers warrant regime;

- amendments to the offence of providing false or misleading information under an ASIO questioning warrant;
- amendments to authorise **access to airline passenger information** for law enforcement and intelligence agencies;
- the creation of a legal basis for the use of **video surveillance at Australia's major airports and on aircraft**; and
- additional implementation of FATF Special Recommendations covering criminalising financing of terrorism, alternative remittance dealers, wire transfers and cash couriers." (emphasis added)

As an example, the proposed bill inserts a new definition of "seditious intention" into s 30A of the Crimes Act 1914 in the following terms:

"(3) In this section:

seditious intention means an intention to effect any of the following purposes:

- (a) to bring the Sovereign into hatred or contempt;
- (b) to **urge disaffection** against the following:
 - (i) **the Constitution**;
 - (ii) **the Government** of the Commonwealth;
 - (iii) **either House of the Parliament**;
- (c) to urge another person to attempt to procure a change, otherwise than by lawful means, to any matter established by law of the Commonwealth;
- (d) to **promote feelings of ill-will or hostility between different groups so as to threaten the peace, order and good government of the Commonwealth.**" (emphasis added)

The bill also amends the Criminal Code by the substitution of a new Division 80 and the insertion of s 80.2 in the following (extensive) terms:

Division 80-Treason and sedition

...

80.2 Sedition

Urging the overthrow of the Constitution or Government

(1) A person commits an offence if the person urges another person to overthrow by force or violence:

- (a) the Constitution; or
- (b) the Government of the Commonwealth, a State or a Territory; or
- (c) the lawful authority of the Government of the Commonwealth.

Penalty: Imprisonment for 7 years.

(2) Recklessness applies to paragraphs (1)(a), (b) and (c).

Urging interference in Parliamentary elections

(3) A person commits an offence if the person urges another person to interfere by force or violence with lawful processes for an election of a member or members of a House of the Parliament.

Penalty: Imprisonment for 7 years.

(4) Recklessness applies to the element of the offence under subsection (3) that it is lawful processes for an election of a member or members of a House of the Parliament that the first-mentioned person urges the other person to interfere with.

Urging violence within the community

(5) A person commits an offence if:

(a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and

(b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

(6) Recklessness applies to the element of the offence under subsection (5) that it is a group or groups that are distinguished by race, religion, nationality or political opinion that the first-mentioned person urges the other person to use force or violence against.

Urging a person to assist the enemy

(7) A person commits an offence if:

(a) the person **urges another person to engage in conduct**; and

(b) the **first-mentioned person intends the conduct to assist, by any means whatever**, an organisation or country; and

(c) the organisation or country is:

(i) at war with the Commonwealth, **whether or not the existence of a state of war has been declared**; and

(ii) **specified by Proclamation** made for the purpose of paragraph 80.1(1)(e) **to be an enemy** at war with the Commonwealth.

Penalty: Imprisonment for 7 years.

Urging a person to assist those engaged in armed hostilities

(8) A person commits an offence if:

(a) the person **urges another person to engage in conduct**; and

(b) **the first-mentioned person intends the conduct to assist, by any means whatever**, an organisation or country; and

(c) the organisation or country is **engaged in armed hostilities against the Australian Defence Force**.

Penalty: Imprisonment for 7 years."

Defence

(9) Subsections (7) and (8) do not apply to engagement in conduct by way of, or for the purposes of, the **provision of aid of a humanitarian nature**.

Note 1: **A defendant bears an evidential burden in relation to the matter in subsection (9)**. See subsection 13.3(3).

Note 2: There is a defence in section 80.3 for acts done in good faith.

80.3 Defence for acts done in good faith

(1) Sections 80.1 and 80.2 do not apply to a person who:

(a) **tries in good faith to show** that any of the following persons **are mistaken in any of his or her counsels, policies or actions**:

(i) the Sovereign;

(ii) the Governor-General;

(iii) the Governor of a State;

(iv) the Administrator of a Territory;

(v) an adviser of any of the above;

- (vi) a person responsible for the government of another country; or
- (b) **points out in good faith errors or defects** in the following, **with a view to reforming those errors or defects**:
 - (i) the Government of the Commonwealth, a State or a Territory;
 - (ii) the Constitution;
 - (iii) legislation of the Commonwealth, a State, a Territory or another country;
 - (iv) the administration of justice of or in the Commonwealth, a State, a Territory or another country; or
- (c) **urges in good faith** another person to attempt to lawfully procure a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country; or
- (d) **points out in good faith** any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters; or
- (e) **does anything in good faith in connection with an industrial dispute or an industrial matter.**

Note: **A defendant bears an evidential burden in relation to the matter in subsection (1).** See subsection 13.3(3).

- (2) In considering a defence under subsection (1), the Court may have regard to any relevant matter, including whether the acts were done:
 - (a) for a purpose intended to be prejudicial to the safety or defence of the Commonwealth; or
 - (b) with the intention of assisting an enemy:
 - (i) at war with the Commonwealth; and
 - (ii) specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth; or
 - (c) with the intention of assisting another country, or an organisation, that is engaged in armed hostilities against the Australian Defence Force; or
 - (d) with the intention of assisting a proclaimed enemy of a proclaimed country (within the meaning of subsection 24AA(4) of the Crimes Act 1914); or
 - (e) with the intention of assisting persons specified in paragraphs 24AA(2)(a) and (b) of the Crimes Act 1914; or
 - (f) with the intention of causing violence or creating public disorder or a public disturbance."(emphasis added)

It will be noted that subclauses (7) and (8) of clause 80.2 relate to conduct "by any means whatever" but that the absolute nature of that phrase is then qualified by subclause (9) (humanitarian aid) and by the "good faith" defences created by clause 80.3. - as to which an accused bears an evidential onus. That is (one assumes) it is for an accused to establish a *prima facie* "good faith" defence rather than for the Crown to establish the absence of good faith as an element of the offence. In practice, this means that if an accused cannot establish "good faith" by cross-examination of the Crown's witnesses, he or she will be obliged to give and/or adduce evidence.

Although it is impossible to predict how these provisions might ultimately be interpreted if enacted, they would appear, on their face, to carry with them a real potential to circumscribe public (and, in some circumstances, private) debate in relation to issues which have until now been traditionally regarded as being of great

public interest (e.g. Australia's involvement in the invasion of, and the continuing presence of members of the Australian Defence Force in, Iraq.)

On the other hand, the provisions of the bill may, upon careful examination, be shown to be justifiable.

However, the real point remains that this Association (and, it would seem, similar organisations) and the community generally, has not had sufficient time to understand and properly consider these very significant and complex proposed changes.

Yours faithfully

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