

Human Rights in an Age of Terrorism

On 3 June this year, **Prof Ivan Shearer**, Challis Professor of International Law at the University of Sydney, delivered for the Castan Centre a public lecture entitled 'Human Rights in an Age of Terrorism'. The following is a condensed version of the draft paper on which Prof Shearer based his talk. The full speech can be found at www.law.monash.edu.au/castancentre.

There can be little doubt as to the necessity of legislation against terrorism. Some have argued that its very existence creates a climate of fear and lays the groundwork for future repression; that existing legislation regarding crimes of violence is sufficient. In my view focused legislation is both necessary and desirable to respond adequately to the need, while embracing international standards of human rights.

Australian Anti-Terrorism legislation, at both Commonwealth and State level, defines "terrorist acts" as acts of violence which cause serious physical harm to persons or property, or constitute a collective danger, committed for a political, religious or ideological cause, and intended to coerce, influence, or intimidate a government, or to intimidate the public generally. Expressly excluded from the definition are advocacy, protest, dissent or industrial action which are not intended to cause serious harm to persons or public safety. The Minister of Foreign Affairs, on the advice of the Special Committee established under Security Council resolution 1267, can also declare prohibitions on organisations and corporations known to have terrorist connections. A current debate on this question surrounds the status of the Hezbollah organisation, which has not been listed by the Special Committee.

The heart of the matter lies in the exercise of powers by the authorities against the individual under this legislation. The general rule of the common law, as amended by statute in varying degrees among the States and Territories of Australia, is that a person may not be detained for questioning by police. If arrested on reasonable suspicion of having committed an offence, the person may be detained for up to about four hours (with some exceptions) before being formally charged. The person is not required to answer questions (except under certain legislation when required to give name, address and proof of identity.) Anything said before the warning against self-incrimination is given at the time of arrest may not be used in evidence against the person.

The powers given to police under the legislation respecting terrorism so far mentioned does not significantly diminish the basic common law protections of the rights of the individual. For example, under the Terrorism (Police Powers) Act, 2002 (NSW) there is authorisation to exercise what is termed "special powers".

These powers do not, however, provide for detention without charge, nor do they extend the period allowed for questioning. The Act requires that a person who is the subject of an authorisation given by senior police disclose his or her identity and provide proof. The Act also provides for extensive powers of search of the person, vehicles and of premises.

Attention has also been focused on the, as yet unenacted, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill, 2002. As originally proposed, the Bill would have enabled persons suspected by ASIO of having information about a terrorist offence, and with the concurrence of the Commonwealth Attorney-General, to be held for questioning for considerable periods of time, as authorised by a warrant issued by a judge. On this basis they could be held incommunicado and without access to a lawyer, and required to answer questions on pain of committing an offence. The Bill received much criticism, in the face of which the Attorney-General has announced significant amendments, including that any evidence taken from a detained person cannot be used against them in prosecution for a terrorism offence. This is a significant concession, since the right to silence is not constitutionally protected in Australia as it is in the United States.



Prof Ivan Shearer delivering his lecture on 3 June 2003

What are the international human rights law implications of the ASIO Bill? Under the bill a person may be detained for questioning under a warrant for up to 48 hours, which may be extended by a Federal Court judge for periods of up to a maximum of 7 days. This sits uneasily with article 9 (1) of the International Covenant on Civil and Political Rights, which requires that "no person shall be subjected to arbitrary arrest or detention". It is an open question whether the flexibility of the word "arbitrary" (reasonable) in article 9 would extend so far as to enable a lengthy period of detention such as proposed under the ASIO Bill to be justified.

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It may be that the length of the detention is not on its own the sole relevant factor; the availability of judicial review of the detention and access to legal assistance would also come into account.

Article 14 (3) (b) of the Covenant provides that in the determination of any criminal charge the person shall be entitled to “communicate with counsel of his own choosing”. This right of communication is wider than the right to legal assistance at the trial itself and has been held by the UN Human Rights Committee to apply in cases of incommunicado detention before charges have been laid. The ASIO Bill in its present form proposes that a person detained shall have access to a “security-cleared” lawyer, except where specific grounds exist for denying that right during the first 48 hours of detention. This means that a panel of lawyers in private practice, each granted appropriate security clearances, must be established. They will, however, not be permitted to consult with their clients in private: contact must be carried out within the hearing of a “warrant holder”, in practice an officer of ASIO. Questions of reasonableness, having regard to all the circumstances, also arise here.

So far, neither Australia nor the United States have made a proclamation of emergency under Article 4 of the Covenant which would allow them to derogate from certain of its provisions. There would be an understandable reluctance to proclaim an emergency, even after such catastrophic events as those of 11 September 2001, for fear of spreading panic in the community, or appearing to confess the inability of the government to take effective measures against terrorists within the existing law or within the framework of special laws considered by it to be compatible with the Covenant. The fact that the UK has done so may be a reflection of the fact that the UK has, in the past, made declarations of emergency in relation to Northern Ireland, and to that extent the public is not unused to them.

Even if an emergency were proclaimed, Articles 9 and 14 of the Covenant cannot be set aside entirely. The Human Rights Committee made an important pronouncement on this subject in 2001, just prior to the events of 11 September, in General Comment No. 29 on Derogations During a State of Emergency:

“...the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from, will be entirely inapplicable to the behaviour of a state

party....The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes for both states parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation”.

The Committee also emphasised that measures derogating from the provisions of the Covenant “must be of an exceptional and temporary nature”. It must be wondered whether, in an age of terrorism, special measures, if they are of such a nature as to require formal notification as derogations, could ever be regarded as “temporary”. It is likely that they are here to stay.

Knee-jerk reactions of horror at restrictions on certain rights are not helpful to the general cause of human rights in an age of terrorism. There must be a sober analysis of the dangers and of the measures necessary to combat them. Nevertheless, while we may feel ourselves to be qualified and equipped to face these challenges, useful guidance is to be found in international human rights standards. Above all, the considerations of strict proportionality set out in General Comment No. 29 of the Human Rights Committee should be taken into account, and weighed heavily against the objectively assessed present dangers to our society.

To a large extent, we in Australia are more alive than most to the importance of civil liberties. Our society has benefited from the common law inheritance that has provided a more effective protection of those liberties in the past than paper guarantees in charters of human rights. Perhaps at this stage of our development a written bill of rights could supplement and enhance those liberties and to that extent play a useful role. But the right instincts were planted long ago. Fortunately, we enjoy the benefits of a free and democratic society, in which the need for special measures to deal with terrorism can be openly debated.

Professor Shearer will be producing a full article based on this draft paper for inclusion in a festschrift in honour of Professor Alice Tay due to be published later in 2003.

[UPDATE: Since Professor Shearer delivered his paper on 3 June, political events have moved on in relation to the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No. 2]. On 25 June 2003 the Opposition in the Senate agreed to pass the Bill after several rounds of amendments had been agreed upon. The key compromises were that ASIO cannot detain anyone younger than 16, that detainees will get immediate access to a lawyer and that, once released, people cannot be detained again unless that is justified by additional or materially new information. The minor parties in the Senate have opposed the passage of the legislation. The Bill will return to the House of Representatives where it is expected to be passed in its amended form.]