

Control Orders:

A sword or a shield?

Robert Cornall

If the Australian Government had to classify control orders as a sword or a shield, it would say they are a shield. In his second reading speech introducing the Anti-Terrorism Bill (Number 2) in November 2005, the Attorney-General, Philip Ruddock, noted: *...the bill ensures we are in the strongest position possible to prevent new and emerging threats, to stop terrorists carrying out their intended acts.*

This legislation is part of Australia's comprehensive evolution of new laws in response to radical terrorism over the last five years

Criminal law evolves and adapts all the time – like any other area of law – to meet changing circumstances. Recent examples include legislation outlawing people trafficking, child sex tourism and cyber-crime. Current proposals for change include toughening our laws against money laundering and reconsidering the rule against double jeopardy. This capacity for change is one of the great strengths of our legal system.

While Australia had some counter terrorism laws prior to 2002, changes were plainly necessary. Our existing laws had been drafted to meet different threats, such as aircraft hijacking. They had become inadequate to the task.

As Irwin Cotler, the former Canadian Attorney-General, has observed: *The domestic criminal law/due process model – standing alone – is inadequate, if not inappropriate to deal with some modern terrorism offences.*

Paul Kelly put it this way in an article in *The Australian* last September: *One sign of a mature democracy is its ability to change its security laws in response to an unprecedented threat to its society. What else would a mature nation do? Denial is not an option.*

Control orders

A control order is an order made by a court under Section 104.1 of the *Criminal Code*. The order imposes obligations, prohibitions or restrictions on a person's movements or activities to protect the public from a terrorist act. Applications for control orders are made by the Australian Federal Police (AFP), not the Government. However, the application requires the consent of the Attorney-General. If a control order is made, it is made by the court.

The control order regime contemplates that an interim control order will be made initially. The interim order can be made ex parte but the court could choose to require the respondent to be present before an order is made. In either case, the person who is subject to the order may contest the order when the court is required to confirm, void or revoke the interim order.

The control order does not come into effect until the person is notified. A person who is subject to a control order can apply for it to be revoked, varied or declared void as soon as he or she is notified that an order has been confirmed.

The AFP can only make an application for a control order if a senior AFP member considers, on reasonable grounds, that the order in the terms to be requested would substantially assist in preventing a terrorist act. The applicant is required to provide an explanation why each obligation, prohibition or restriction should be imposed *and* any known facts relating to why it should not be imposed.

The court may only make the order if it is satisfied on the balance of probabilities that making the order would substantially assist in preventing a terrorist attack or that the person who is to be the subject of the order has provided training to, or received training from, a listed terrorist organisation. In addition, the court must be satisfied that, on the balance of probabilities, each of the obligations, prohibitions and restrictions to be imposed by the order is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.

A control order can be made for a period of up to 12 months. However, the AFP can apply for further orders if they can be justified.

This short summary sets out the essential features of the 25 pages of detailed provisions regulating control orders which are contained in Division 104 of the Criminal Code.

Types of controls

The types of controls which could be placed on an individual who is subject to a control order include a prohibition or restriction on the person:

- being at specified areas or places or leaving Australia;
- communicating or associating with specified individuals;
- accessing or using specified forms of telecommunication or other technology (including the Internet);
- possessing or using specified articles or substances, and
- carrying out specified activities, including in respect of his or her work or occupation.

Control orders may also include a requirement that the person:

- remains at specified premises between specified times each day or on specified days;
- wears a tracking device;
- reports to specified persons at specified times and places;
- allows himself or herself to be photographed; and

- if the person consents, participates in specified counselling or education.

The counselling and education requirement recognises that control orders can last for a long period and that the individual may be able to gain some benefit that could take them away from association with terrorists through appropriate counselling or education. For example, lack of literacy skills could be holding the person back from general employment and an opportunity to participate in an education program could address this shortcoming.

Safeguards

The legislation contains a number of safeguards. To my mind, the most significant of these safeguards is the fact that the orders are made and supervised by judges. Specific safeguards include:

- the order does not commence until it is served personally on the subject of the order;
- the AFP must explain the order to the person, taking into account the person's age, language skills, mental capacity and any other relevant factor;
- the person can apply for the order to be varied, revoked or declared void as soon as the person is notified that an order is confirmed, or at any time thereafter;
- the person and his or her lawyer are able to obtain a copy of the order which contains the summary of the grounds for the order;
- normal judicial review processes apply to decisions to issue or revoke control orders;
- when determining the obligations, prohibitions and restrictions to be imposed on the person, the court must take into account their impact on his or her circumstances, including the person's financial and personal circumstances; and
- control orders do not apply to young people under the age of 16 and may only be granted for a maximum of three months for young people between 16 and 18 years.

In the second reading debate on the 2005 Anti-Terrorism Bill (Number 2), the then Shadow Attorney-General, Nicola Roxon, MP, commented on the purpose of the legislation and the safeguards in it. She stated: *Labor is convinced that the terrorist threat does require tough new laws, but we demand that their use be circumscribed carefully.* Later on, talking about amendments to the process for obtaining a control order, the Shadow Attorney-General observed: *These are very important improvements. They protect our basic freedoms without in any way compromising the effectiveness of the regime to fight terrorists.*

It is also worth noting that the Australian control order regime is not unique. The United Kingdom has adopted similar sorts of provisions.

Other constraints on individuals

One of the concerns expressed about control orders is that the people who are likely to be subject to them have not been convicted of any criminal offence. There are precedents for placing controls on a person arising from their danger to the community without them having been convicted of a criminal offence.

Recognisances to keep the peace have been available under the law to protect the community from violence for over a hundred years. Persons released on bail are subject to restrictions on their activities which the court making the order feels are appropriate. In addition, State and Territory regimes of non-association orders can be used to break up criminal gangs, while apprehended violence orders (AVOs) are used to protect people from violence from a spouse, neighbours, bullies at school or from gang members.

I have read criticisms of this type of comparison to the effect that there are significant differences between, for example, AVOs and control orders. That is correct. There are significant differences brought about by the different nature of the orders. However, their effect is substantially the same. They allow a court to prescribe restrictions on an unconvicted person's liberty. The purpose of the restriction is to protect the community or a particular person or group from the danger they represent.

Co-operative and consultative lawmaking

The Australian Government has been criticised – strongly in some quarters – for control orders and its counter-terrorism laws generally. It is important to recognise that those laws (including the control order legislation) have been the subject of intense parliamentary scrutiny and public debate.

There have been a number of parliamentary inquiries into the major pieces of counter terrorism legislation over the past five years. Draft laws as originally put forward have been amended by the Government in the light of the parliamentary committee reports. They have also been amended as a result of internal party consideration and negotiation with the Opposition.

In other words, the recent counter-terrorism legislation has been negotiated through a complex process that meant there was a considerable level of support for the final form of the new laws. Look, for example, at the major package of counter terrorism laws passed by the Senate on 27 June 2002. The four Bills passed at that time recorded 51 Ayes, 12 Noes – a majority of 39. Three years later, on 7 December 2005, the House of Representatives accepted Senate amendments to the Anti-Terrorism Bill (Number 2) 2005 and the question was put. As only Mr Andren, Mr Quick and Mr Windsor voted 'No', the Deputy Speaker declared the question resolved in the affirmative.

In addition, the States referred power to deal with terrorism to the Australian Government and a number of its counter-terrorism laws have been supported by decisions of all governments at the Council of Australian Governments and by complementary State and Territory legislation. So they are laws which have cross-party and cross-jurisdictional support.

Public attitudes

There are also clear indications that these new laws are supported by the broader public, against a background of general concern about security. For instance, the UNISYS Security Index based on the Newspoll survey for the September quarter in 2006 found that 52 per cent of

Australians or eight million people are very, or extremely concerned, about Australia's national security in relation to war or terrorism. That figure had grown by 1.7 million people in the past quarter.

An AC Nielsen/Age poll reported in *The Age* on 11 September 2006 found that: *Almost two in every three Australians believe the world is less safe than it was before the September 11 attacks in the US ... and half believe a terrorist attack in Australia is more likely than it was in 2001.*

It is hard to detect these broader community views in the criticisms of the new counter terrorism laws that have been published in the media over the last five years.

General rationale

The rationale underpinning the legislation introducing control orders is the same rationale underpinning all of the counter terrorism legislation passed by the Australian Parliament since 2001. Put simply, the Australian Government has a responsibility to protect Australian citizens.

ASIO assesses Australia's threat level at medium which means that a terrorist attack is possible and could occur. That threat level is expected to continue indefinitely into the future. While we have fortunately not had a terrorist attack on Australian soil, there have been attacks against Australian interests in Bali, Jakarta and other places.

The recent convictions of Jack Roche and Faheem Lohdi, the conviction of Willie Brigitte in France, and the forthcoming prosecutions of more than 20 defendants arising from Operation Pendennis, indicate that there is serious cause for concern about the possibility of a terrorist act here at home.

Arguments for and against

As a consequence, much of the argument about our terrorism laws is about the appropriate balance between protecting the community at large and preserving individual rights. A number of commentators have observed that the aim to protect the safety of our community as a whole and, in that process, to protect the rights of individuals within society, is totally consistent with the universal Declaration of Human Rights which states, in Article 3, that every person has the right to life, liberty and security of person.

This point was made very eloquently by Irwin Cotler. Mr Cotler is a leading civil rights lawyer who has acted in the past for Nelson Mandela. He said this: *Indeed, as the United Nations puts it, terrorism constitutes a fundamental assault on human rights – a threat to international peace and security – while counter terrorism law involves the protection of the most fundamental of rights – the right to life, liberty and the security of the person – and the collective right to peace.*

It is also worth noting this finding from the AC Nielsen/Age poll discussed above: *Asked about the Federal Government's response to the threat of terrorism, almost one in two voters (49 per cent) believe the Howard Government had shown the right amount of respect for civil liberties, 29 per cent believe the Government had not shown enough respect and 15 per cent thought the Government had shown too much respect.*

Judge Whealy, who conducted the Lohdi trial, said: *... the obligation of the Court is to denounce terrorism and voice its disapproval of activities such as those contemplated by the offender here ... The community is owed this protection even*

if the obstinacy and madness of extreme views may mean that the protection is a fragile or uncertain one.

In the Jack Thomas trial, Justice Philip Cummins said: *Australia has a deep duty to protect its citizens from terrorism and so far as in its power to protect humanity from terrorism. That is why the Commonwealth Parliament enacted the laws against terrorism ... and why the States of the Commonwealth likewise have enacted laws. The most fundamental right is the right to life. The law must protect that right. Australians are entitled to security. However, security is a necessary but not sufficient condition for a just society. Security is not enough. There must also be justice – for all citizens, including the weak, the marginalized, the unpopular and the alienated.*

In a wide-ranging address delivered on 12 September 2006 at James Cook University, the Hon John von Doussa, QC, the President of the Human Rights and Equal Opportunity Commission, provided an interesting analysis of what he called the crucial challenge of reconciling human rights and counter terrorism. In the course of those observations he said: *It is self-evident that terrorism is a gross violation of fundamental human rights. Only the mad or the bad would suggest otherwise. The threat of terrorism is patently legitimate. The Government has both a right and a duty to take action to protect its citizens.*

One of the most interesting arguments I have seen against control orders is that a better alternative is this: *ASIO and other agencies have very extensive powers to engage in surveillance – covert – they can issue tracking devices. ASIO can even call in (a person of concern) for questioning and he can go to gaol if he does not answer those questions.* I found that proposal quite surprising. A process of seeking a control order through a properly defined statutory process, where the order is made by a judge and can be challenged on appeal is, to my mind, a more acceptable process for general use than covert surveillance by security intelligence agencies, particularly when the conduct is potentially related to criminal offences.

One final observation is that some of the critics of control orders were, prior to his guilty plea before the US military commission, calling on the Government to bring David Hicks home from detention at Guantanamo Bay on the basis that he could be subjected to a control order on his return.

Hard national decisions

The control order provisions are a carefully considered measure, designed to ensure a fair, judicially supervised process for controlling people suspected of possible terrorist activity, or associated with them, in the broader interest of protecting the community as a whole.

We can argue about how that is best achieved. However, ultimately, governments – and parliaments – have to make decisions. That is what they are elected for. They cannot sit on the fence. Unlike outside critics, they have a responsibility to take every reasonable, available step to protect our community from terrorism. ♦

Robert Cornall, AO, has been Secretary of the Commonwealth Attorney-General's Department since 2000. His last article in 'Defender', also on the subject of balancing legal measures, freedoms and terrorist challenges, was in the Winter 2005 issue. This article is based on an address to the Australian Legal Convention in Sydney on 24 March 2007.