

Counter-Terrorism and Australian Law

James Renwick

Whichever party wins the next federal election will be faced with significant challenges in the field of terrorism and the law. The new government will need regularly to consider the adequacy and appropriateness of counter-terrorism laws by reference to then current threats, but also by reference to questions of legal policy, the ultimate policy question being 'what principles or rights are non-negotiable in the 'war' on terror'? The new government will also need to consider how to reconcile a system of normally open justice with the need to protect classified information and secret identities; and the proper division of responsibilities between intelligence organisations and police in counter-terrorism operations, and in resulting court cases. Before considering these questions, this article outlines the most important new laws and their rationale, and considers some problems and concerns in their operation.

Anyone who doubts the impact of the 'war' on terror need look no further than the remarkable range of counter-terrorism laws enacted since 2001. Six years ago the new regime of terrorism offences, proscription of terrorist organizations, questioning and detention powers for the Australian Security Intelligence Organisation (ASIO), control orders and limited detention without trial, would have been regarded as unthinkable, but all of these laws now exist, and most have been used.

While the extent of these laws is remarkable, the same is true of the essential bipartisanship between the two major Australian political parties (leaving aside such relatively minor matters as the Labor Party's stated policy of creating a Department of Homeland Security, and its opposition to existing sedition laws).¹ That bipartisanship is likely to continue regardless of who wins the next federal election.

Leaving aside the questions of detention without trial at the federal level and that of ensuring that criminal trials of alleged terrorists are sufficiently fair, there is little that the third branch of government—the judiciary—can do to invalidate these laws: that is the consequence of an absence of a federal bill of rights in Australia.² However, there is continuing pressure on governments to introduce bills of rights. Such laws now exist in the Australian Capital Territory and in Victoria.

¹ That is not to ignore the fact that many amendments were secured to the bills which led to these acts.

² There are very few entrenched constitutional guarantees.

The Key Counter-Terrorism Laws and Their Rationale

Of the many laws enacted by the Australian Parliament, the following are perhaps the most significant:³

- a) *The Anti-Terrorism Act (No. 2) 2005* amends the Criminal Code to allow for the listing of organisations that advocate the doing of a terrorist act, establishes procedures for preventative detention and control orders⁴ and updates the offence of sedition.
- b) *The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* empowers ASIO to obtain a warrant to detain and question a person who may have information important to the gathering of intelligence in relation to terrorist activity.
- c) *The Criminal Code Amendment (Offences Against Australians) Act 2002* makes it an offence to murder, commit manslaughter or intentionally or recklessly cause serious harm to an Australian outside Australia, thus making extradition easier.
- d) *The Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* makes it an offence to place bombs or other lethal devices in prescribed places with the intention of causing death or serious harm or causing extensive destruction which would cause major economic loss.
- e) *The Security Legislation Amendment (Terrorism) Act 2002* creates new terrorism offences, modernises treason offences and creates offences relating to membership or other specified links to terrorist organisations.
- f) *The Suppression of the Financing of Terrorism Act 2002* creates a new offence which targets persons who provide or collect funds and are reckless as to whether those funds will be used to facilitate a terrorist act.
- g) *The Telecommunications Interception Legislation Amendment Act 2002* permits law enforcement agencies to seek telecommunications interception warrants in connection with their investigation of terrorism offences.

³ A full list appears at: <<http://www.nationalsecurity.gov.au/>>.

⁴ The control orders were recently held to be constitutionally valid in Thomas v Mowbray [2007] HCA 33.

- h) *The Criminal Code Amendment (Terrorism) Act 2003 (Constitutional Reference of Power)* seeks to remove any uncertainty regarding the constitutional status of the counter-terrorism legislation.
- i) *The National Security Information (Criminal and Civil Proceedings) Act 2004* seeks to protect information from disclosure in federal criminal proceedings where the disclosure would be likely to prejudice Australia's national security.

This article can only consider a selection of these new acts.

'A Terrorist Act' and a 'Terrorist Organisation'

One of the most significant changes to the law involves the enactment of a series of offences, each of which involves the notion of a 'terrorist act' or a 'terrorist organisation'. Thus it is an offence to perpetrate such an act, provide or receive training for it, possess things connected with it, collect or make documents likely to facilitate it, or prepare for or plan for such an act. Similarly, there are offences for those who (variously) direct the activities of a terrorist organisation, are knowingly members of, recruit for, raise funds for or provide support to such organisations.⁵

As a terrorist organisation is one which⁶ is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs), the notion of a 'terrorist act' itself is central to all of these offences and requires analysis.

The definition is complex but essentially it involves four parts.

- a) First, there must be an act or acts which intentionally causes death, serious physical harm, serious damage to property, serious risk to the health and safety of the public or a section thereof (and that includes a foreign public);
- b) Secondly, there is a carve out, since the action must *not* comprise advocacy, protest, dissent or industrial action;
- c) Thirdly, and this is one of the distinguishing features of this criminal offence from general criminal offences of murder, for example, the act must be done "*with the intention of advancing a political, religious or ideological cause*"; and

⁵ Criminal Code Part 5.3. As this is not a legal journal, reference is not made to detailed sections of the statute nor to reported cases. Interested readers are referred to specialist texts and sources such as Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws*, Sydney, UNSW Press, 2006.

⁶ Either proved to be or deemed by regulation to be.

- d) Fourthly, it must be done with the intention of coercing or influencing by intimidation, an Australian or foreign government or the public or a section of the public.

There was much opposition from commentators to these new offences and concepts, mainly upon the grounds that the threats to Australia did not justify the new laws, and that, in any event, existing criminal laws were sufficient to deal with all conduct so prescribed.⁷ Although those arguments did not prevail, it is useful to record why the new laws were justifiable, by reference to the threats, relevant international law and the adequacy and appropriateness of existing laws.

THE THREAT

While the severity of the threat is in the end a policy rather than a legal judgment, the following matters may be noted.⁸ A distinguished United States' judge has recently described terrorism in the 21st century, in terms which are largely applicable to Australia, as "*global, diffuse, fanatical, alien, protean, mobile, elusive and indistinct*".⁹ Further, while at least some of those characteristics are shared with terrorist groups of the past, such as the anarchists of the 19th century or the assassins of the early part of the last millennium, 21st century terrorists have mutated into something genuinely new and dangerous, first, because of their mobility in movement and communication, and thus their ability to strike; and second because of the asymmetric effects of the modern weapons available to them, and thus the ability of a small group to cause huge loss of life: the events of 11 September 2001 being a paradigm example.

INTERNATIONAL LAW IMPETUS

There was a powerful international law impetus for the new laws in Resolution 1373 of the United Nations Security Council, which was binding upon all nation states by virtue of Chapter VII of the *Charter of the United Nations*. The resolution required all states to:

- a) prevent and suppress terrorist acts;
- b) deny safe havens to terrorist actors, financiers, planners, and supporters;
- c) "ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist

⁷ Space does not permit detailed reference to the many commentators, and interested readers are referred to Williams and Lynch, *op. cit.*, and to the various Parliamentary Committee reports for the Bills for these Acts: see <www.aph.gov.au>.

⁸ In the (presently unlikely) event of the threat receding, the rationale for the response would similarly diminish.

⁹ Richard A. Posner, *Uncertain Shield, the US Intelligence System in the Throes of Reform*, Lanham MD, Roman & Littlefield, 2007.

acts is brought to justice and ensure that...such terrorist acts are established as serious criminal offences in domestic laws...and that the punishment duly reflects the seriousness of such terrorist acts.”¹⁰

Resolution 1373 thus contains at least implicit justification for the creation of separate criminal acts by statute.

ADEQUACY AND APPROPRIATENESS OF EXISTING LAWS

There are both policy and technical arguments available here. First, as to policy, a terrorist act is different in nature from other criminal acts because of its ideological component. Secondly, a major terrorist act such as 9/11 has such horrific consequences that prevention is far more important than is the case in the normal law enforcement context. For this reason there are a whole series of new laws which seek to criminalise all terrorist associations, and to criminalise terrorist planning at an early stage. Technically, Australian law prior to 2002 would not have caught either of those matters.

Thus the new laws make it a criminal offence to conspire to plan for a terrorist act, even where a precise target has not been decided upon.¹¹ As Chief Justice Spigelman of New South Wales said in *Lodhi v R* [2006] NSWCCA 121:

It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct. ... The courts must respect that legislative policy.

Detection and Prevention of Terrorism

Perhaps the two most controversial new laws are the laws which permit ASIO, the domestic intelligence agency, to question (and if necessary to ensure the questioning power is effective, to detain) persons, and the provisions concerning control orders and detention without trial.

ASIO'S NEW POWERS

ASIO has expanded rapidly since 9/11. Although it already had extensive powers,¹² by warrant, to capture telephonic, postal and computer communications, it was given power¹³ to seek warrants to question (and if necessary to ensure the questioning power is effective, to detain) where there were reasonable grounds for believing that:

¹⁰ UN Security Council Resolution 1373 (2001), para. 2(e).

¹¹ Criminal Code s 101.6.

¹² Part III, Division 2 of the *Australian Security Intelligence Organisation Act 1979*.

¹³ Part III, Division 3 of the *Australian Security Intelligence Organisation Act 1979*.

- a) issuing the warrant will both substantially assist the collection of intelligence that is important in relation to a terrorism offence, and
- b) relying on other methods of collecting that intelligence would be ineffective.

The questioning power is controversial because ASIO has previously attracted bad press, and because it is thought unusual to have an intelligence organisation with this type of questioning power. The latter point should not be a reason for controversy, however, as the Commonwealth and almost all of the States now have standing or permanent commissions with questioning powers, such as the Australian Crime Commission, the Criminal Justice Commission, the NSW Crime Commission, and the Independent Commission Against Corruption. The detention power (albeit for a very short period) is particularly controversial, as it is unique for an intelligence organisation. The public versions of ASIO's recent annual reports¹⁴ show that the power to question is being used, but that the power to detain has not yet been used.

Although the power was only conferred upon ASIO for five years initially, it was recently re-conferred. Attorney-General Ruddock stated that

These powers are used as a last resort where they would substantially assist a terrorism investigation. They have yielded valuable information and are proving to be a useful tool in the fight against terrorism.¹⁵

DETENTION WITHOUT TRIAL AND CONTROL ORDERS

The other powers, which are considerably more controversial, are those which authorise control orders¹⁶, and also, briefly, detention without trial.¹⁷

A control order is an order made by the Court—for up to 12 months at a time—that imposes obligations, prohibitions or restrictions on a person's movements or activities to protect the public from a terrorist act. The types of restrictions—on movement, association, possession and communication—are frequently imposed as bail conditions on persons charged with a criminal offence. The court may only make the order if

- a) making the order would substantially assist in preventing a terrorist attack; or the person to be the subject of the order has provided training to, or received training from, a listed terrorist organization; and

¹⁴ See <www.asio.gov.au>.

¹⁵ See: 'ASIO'S Questioning And Detention Regime To Continue', *Media Release 109/2006*, 5 June 2006, <www.ag.gov.au>.

¹⁶ Criminal Code Division 104.

¹⁷ Criminal Code Division 105.

- b) it is satisfied that each aspect of the order is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.

The constitutional validity of the control order regime was challenged by Mr Jack Thomas in the High Court, but a majority of the Court found the law to be valid.¹⁸

Finally, there is power to detain a person for 48 hours under federal laws, and 14 days under corresponding State laws¹⁹ in order to prevent a terrorist act or to preserve evidence of a terrorist act which has occurred.

Again, the emphasis here is on prevention of a terrorist act, rather than punishment when an act has occurred. That is not to say that these powers are not controversial. Plainly, they are. The right to personal liberty—that is, to freedom from arbitrary detention—has been described as “the most elementary and important of all common law rights”.²⁰ It is a right which has been considered during the past three years by the Supreme Court of the US, the House of Lords and the High Court of Australia. The US cases (*Rumsfeld v Padilla*,²¹ *Hamdi v Rumsfeld*²² and *Rasul v Bush*²³) and the leading English case of *A v Secretary of State for the Home Department*²⁴ concerned the legality of the detention without a conventional criminal trial of suspected terrorists or enemy combatants. The Jack Thomas case gives the High Court the occasion to decide this question for the first time outside of the two World Wars.

The technical constitutional issues involved are considered elsewhere.²⁵ Here it is sufficient to note that non-punitive detention without trial can be authorised in limited circumstances (such as migration or quarantine detention) by federal laws, but there are far fewer limitations upon the State parliaments. Thus, for example, the High Court in *Fardon v Attorney-*

¹⁸ The author appeared as junior to the Solicitor-General for NSW in the High Court.

¹⁹ E.g. the *Terrorism (Police Powers) Act 2002 (NSW)*.

²⁰ In *Williams v R* (1986) 161 CLR 278, 292, Mason and Brennan JJ said: “The right to personal liberty is, as Fullagar J described it, ‘the most elementary and important of all common law rights’: *Trobridge v Hardy* (1955) 94 CLR 147 at 152”. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England ‘without sufficient cause’ (*Commentaries on the Laws of England* (Oxford, 1765), Bk 1, pp. 120–21, 130–31). He warned: “Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper there would soon be an end of all other rights and immunities.”

²¹ (2004) 542 US 426.

²² (2004) 542 US 507.

²³ (2004) 542 US 466.

²⁴ [2005] 2 AC 68.

²⁵ For example, my article: ‘Constitutional aspects of detention without trial in Australia, the United States and the United Kingdom’, *Constitutional and Public Law Review*, vol. 9, no. 2 (2006).

*General (Queensland)*²⁶ recently upheld a law which provided for the annual but, because renewable, possibly indefinite detention in gaol of serious sex offenders whose term of imprisonment had ended, because they were considered by a court to be an 'unacceptable risk to society' if released.

It may be noted that the issue of detention without trial has been intensely controversial in the United Kingdom, with the power of indefinite executive detention of non-nationals whom the Home Secretary considered were international terrorists being declared incompatible with the *Human Rights Act* by the House of Lords in *A v Secretary of State for the Home Department*,²⁷ and later repealed. There are new powers to detain for up to 28 days (the government had sought power to detain for 90 days). These have many safeguards and avenues for challenge.²⁸

On 11 July, new English Prime Minister Gordon Brown announced to Parliament that:

Because we are committed to building a broad consensus on the right balance between protecting our national security and safeguarding civil liberties, the Home Secretary plans to consult—and we are seeking an all party consensus on:

- new measures to ensure more successful prosecutions against terrorist suspects;
- increased penalties for terrorists charged with other criminal offences;
- the period of pre-charge detention where, for terrorism alone, exceptional circumstances make it necessary—while ensuring rigorous judicial oversight and Parliamentary accountability.²⁹

Issues for the New Government

There are a number of issues which the new federal government will have to deal with. It is certain to face pressure—from the courts, from human rights groups (both international and domestic), bar associations and law societies, and from the effects of future terrorist incidents and threats—to amend current laws and policies or enact or implement new ones. There will be significant challenges not only in the nature and extent of the threats faced, but in determining the appropriate legal responses.

WHAT PRINCIPLES OR RIGHTS ARE NON-NEGOTIABLE?

Australia, like comparable democracies such as the United States and the United Kingdom, has the difficult, and perhaps impossible, task of making

²⁶ (2004) 210 ALR 50.

²⁷ [2004] UKHL 56

²⁸ <<http://www.homeoffice.gov.uk/security/terrorism-and-the-law/checks-on-laws2/>> [Accessed 13 July 2007].

²⁹ <<http://www.number-10.gov.uk/output/Page12422.asp> > [Accessed 13 July 2007].

their legal responses both effective and proportionate. There are useful precedents to consider, three of which are discussed below.

First, at the time of the Cold War, Chief Justice Latham wrote in *Australian Communist Party v The Commonwealth*³⁰, (albeit in dissent):

The preservation of the existence of the Commonwealth and (its) ... constitution ... takes precedence over all other matters with which the Commonwealth is concerned. As Cromwell said, 'being comes before well-being' ... The Commonwealth cannot perform (its) ... functions unless the people of the Commonwealth are preserved in safety and security.

Secondly, nearly two centuries earlier, Alexander Hamilton when debating 'The Consequences of Hostilities Between the States' stated the problem in the *Federalist Papers* (No 8) as follows:

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates ... to be more safe (nations) at length become willing to run the risk of being less free.

Thirdly, and more recently, a United Kingdom Home Office Discussion Paper *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society* said:³¹

There is no greater challenge for a democracy than the response it makes to terrorism. The economic, social and political dislocation which sophisticated terrorist action can bring, threatens the very democracy which protects our liberty. But that liberty may be exploited by those supporting, aiding, or engaging in terrorism to avoid pre-emptive intervention by the forces of law and order. The challenge, therefore, is how to retain long held and hard won freedoms and protections from the arbitrary use of power or wrongful conviction, whilst ensuring that democracy and the rule of law itself are not used as a cover by those who seek its overthrow. The growth in the use of non-negotiable means of conflict and the use of terror methods has transformed the way in which we need to respond. Those for whom prosecution and punishment hold no fear, and who are prepared to take their own lives in destroying others, do not recognise normal processes of law or fear the consequences of detection.

In his Foreword to the counter-terrorism paper just quoted from, former UK Home Secretary David Blunkett wrote:

There always certain rights which are non-negotiable. There are some—for example the right to life, the prohibition on torture, the presumption of innocence, the right to a fair trial—where we cannot compromise on the principle. But it is right to debate the way in which these principles are safeguarded and the processes through which they are secured.

³⁰ (1951) 83 CLR 1 at 141.

³¹ Cm 6147.

One starting point for the new Australian Government is to identify principles or rights which are truly non-negotiable, and then to consider whether to entrench them, either in a human rights statute or, perhaps, by constitutional amendment.

OPEN JUSTICE V PROTECTING CLASSIFIED INFORMATION AND IDENTITIES

Prosecuting terrorist cases inevitably causes conflict between a system designed for open justice openly administered, and the need to protect necessarily confidential or secret information (whether that information relates to sources or methods or otherwise).

The problem arises at a number of levels.

First, there is the question of how to protect information from disclosure to the accused at all. The doctrine of public interest immunity³² and the powers given under the *National Security Information (Criminal & Civil Proceedings) Act (Cth)* provide a method of doing this, although the Act has never been tested in the High Court and the doctrine of public interest immunity has not received close examination by the High Court for many years. These methods are relatively unsophisticated, and they are contrary to the normal approach of adversarial justice, as only the judge and the agency making the claim (and its lawyers) gets to see the material it is sought to protect. It may be that the time has come to ensure that some security cleared lawyer—called a ‘special advocate’ in England—gets to see the material, and can thus fully contest the immunity claim.³³

Next, where evidence which includes sensitive intelligence information is vital to a conviction, difficult decisions may need to be made between the primacy of the intelligence as opposed to the law enforcement system. In other words is it more important to obtain convictions in a particular case, or to protect the sources or methods involved? A further complicating factor, given that Australia is a recipient of intelligence information from its allies, is that caveats may be put by other countries upon the use of intelligence information. These questions in turn focus attention on:

- a) whether intelligence or law enforcement agencies or both are involved at the criminal investigation and at what stage;
- b) where there is a joint intelligence and police operation, who questions a suspect first;
- c) should intelligence rather than police surveillance personnel be used in such operations if the consequence is at least some risk of

³² See, e.g. *Sankey v Whitlam* (1978) 142 CLR 1.

³³ The issues are discussed in *R. v Lodhi* [2006] NSWSC 586.

exposure of the 'real' identities of intelligence operatives who may then need to give evidence.

Third, in an environment where the federal government willingly provides classified information to other governments, contractors or, with increasing frequency, the private sector (so that, for example, that sector may protect its infrastructure) an issue is how further dissemination, including to the media, can be prevented. Criminal prosecution is a blunt instrument, and rarely used. The key is to identify all copies of the information and then to obtain a civil injunction (enforceable by the contempt power with gaol and fines) to prevent its dissemination. However, the civil courts will not prevent a breach of the criminal law—in this case the provisions concerning official secrets in the *Crimes Act 1914 (Cth)*—unless a law expressly permits a court to do so. Such a provision is going to be controversial because one of the likely targets is the press and the media. The recommendations on this topic by Sir Harry Gibbs³⁴ and by Mr Justice Samuels and Michael Codd,³⁵ that there should be such a law, should be carefully re-considered.

ONLY LITIGATE WHEN NECESSARY

A final point, sometimes forgotten, is that government should only litigate, as opposed to legislate or agree, when absolutely necessary. Courts will, quite properly, err on the side of liberty and against the power of government when they can, as the United States' government is finding in the cases concerning Guantanamo Bay, and concerning its attempts to hold US citizens without trial. Precedents adverse to governments (except in constitutional cases) can be overturned by Parliament, but, in truth, are better avoided: as Oliver Wendell Holmes wrote a century ago "Great cases, like hard cases, make bad law."³⁶

Dr James Renwick is a Fulbright Scholar, a Barrister practising in Sydney, and an Adjunct Lecturer at the University of Sydney. He has appeared in a number of terrorist prosecutions, and is a leading national security lawyer. james.renwick@12thfloor.com.au.

³⁴ *Review of Commonwealth Criminal Law*, Fifth Interim Report, June 1991.

³⁵ Commission of Inquiry into the Australian Secret Intelligence Service, 1995.

³⁶ Mr. Justice Holmes, dissenting in *Northern Securities Co. v. United States*, (1904) 193 U.S. 197, 400-401 said: "Great cases, like hard cases, make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."