

New Anti-Terrorist Laws for Australia?

Balancing Democratic Rights Against National Security

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My starting point may be different to that of some people here. I believe that the Australian federal Parliament should enact new anti-terrorism laws. After September 11, such laws are required from the perspective of community confidence and also to fulfill Australia's international obligations. Before September 11, there were no federal laws dealing specifically with terrorism (in fact such laws could only be found in the Northern Territory¹).

While we need a national legislative response to terrorism, any new laws must strike a balance between national defence and security, and important public values and fundamental human rights. We must not pass laws that damage the same democratic freedoms we are seeking to protect from terrorism.

My paper today addresses whether the Government's legislative response to September 11 has achieved the right balance. I argue that it has clearly failed to do so. In fact, the Bills introduced in March 2002 into Parliament pose as great a threat to Australian democracy as Prime Minister Robert Menzies' attempt to ban communism in 1950. If passed, the new terrorism bills may do more to undermine the long term health of our democratic system than any threat currently posed by terrorism.

I will begin with an examination of the Security Legislation Amendment (Terrorism) Bill 2002 (Terrorism Bill). That Bill has now been enacted by Parliament, but only after being substantially amended to meet a number of objections. I then examine the ASIO Legislation Amendment

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¹ *Criminal Code 1983* (NT). The provisions are modelled on the *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK).

(Terrorism) Bill 2002 (ASIO Bill), which has yet to be passed and arguably poses the greater threat to our democratic system.

Security Legislation Amendment (Terrorism) Bill 2002

The first package of anti-terrorism legislation comprised five bills. The Bills failed to pass in their original form and were substantially amended after a highly critical and unanimous report by the Senate Legal and Constitutional Legislation Committee² and advocacy by the legal and community sectors.

The most important of the first Bills was the Terrorism Bill. It defined 'terrorist act' as an act or threat that:

- involves serious harm to a person or serious damage to property; or
 - endangers another's life or creates a serious risk to public health or safety;
 - seriously interferes with, disrupts or destroys an electronic system; and
- is done 'with the intention of advancing a political, religious or ideological cause'.³

This definition lacked a focus on the ultimate intent of the terrorist act or, put another way, what distinguishes terrorist violence from offences or forms of violence covered in other Acts. The definition was so wide that it would have criminalised (with life imprisonment) many forms of civil protest. For example, farmers, unionists or other protesters marching, blockading or mass e-mailing could fall within the definition (the legislation excepted only *lawful* advocacy, protest or dissent).

This aspect of the Bill has been amended. The definition of 'terrorist act' as enacted includes a new element:

the action is done or the threat is made with the intention of:

- (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
- (ii) intimidating the public or a section of the public.⁴

² Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002* et al (May 2002).

³ Security Legislation Amendment (Terrorism) Bill 2002 (Cth), s 100.1.

The reference to *lawful* advocacy, protest or dissent has been removed. Advocacy, protest, dissent or industrial action is now excluded from the definition of terrorism so long as it is not intended to, among other things, cause serious physical harm to a person or to create a serious risk to public health or safety.⁵

Section 102.2 of the original Bill would also have given the federal Attorney General the power to proscribe (or ban) an organisation, followed thereafter by criminal offences, including 25 years jail, for members and supporters of the banned organisation. This power would have enabled the Attorney General to ban an organisation for reasons including that the organisation ‘has endangered, or is likely to endanger, the security or integrity of the Commonwealth or another country’.⁶ ‘Integrity’ would at least have referred to the geographical, or territorial, integrity of a nation, and hence this power could have been used to proscribe an organisation that advocated or supported non-violent independence movements within other nations. Over recent years, a good example would be organisations supporting independence for East Timor.

The power to ban organisations could have been exercised unilaterally by the Attorney General and not as part of a fair and accountable process. The Attorney General need not have given any reasons for a decision, and any decision would not have been subject to meaningful independent review.

It was intended by the Government that a decision to proscribe an organisation could be reviewed under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). But this may not have always been available. The capacity to review a decision under section 102.2 could have been removed by regulation made under section 19B of the *Administrative Decisions (Judicial Review) Act* (which would be subject to disallowance, but only when Parliament next sat).

A judge might in any event have refused to review a decision made under section 102.2 where the decision related to a matter of national security. Such matters are usually seen by the courts as non-justiciable. Even if a Court was prepared to examine a decision, effective review would require that a

⁴ *Security Legislation Amendment (Terrorism) Act* 2002 (Cth), s 101.1(1).

⁵ *Security Legislation Amendment (Terrorism) Act* 2002 (Cth), s 101.1(1) and (2A).

⁶ *Security Legislation Amendment (Terrorism) Bill* 2002 (Cth), s 102.2(1)(d).

proscribed organisation could marshal the evidence needed to show that a decision had not been properly made. This would likely require access to sensitive national security information. This hurdle would almost always be insurmountable.

Even if a judge were to proceed to review a decision made under section 102.2, the grounds of review under the *Administrative Decisions (Judicial Review) Act* are narrow and procedural. There would be no scope for review on broader proportionality grounds. In other words, it could not be argued that a decision was wrongly made because it was not ‘reasonably appropriate and adapted’ to the relevant purpose or object. This is a serious limitation upon the scope of review under the Act.

If a wrongfully proscribed organisation was successful in having a decision under section 102.2 overturned, the process of review could take a considerable period during which its reputation and standing in the community could be tarnished irrevocably. Retrospective judicial remedies provide an insufficient means of controlling a power like that under section 102.2.

Clearly, the power to proscribe an organisation (and effectively to destroy it by prosecuting any person who continues to be associated with the organisation) should not be vested solely in a member of the executive.

The Terrorism Bill was similar in design to the *Communist Party Dissolution Act* 1950 (Cth). That Act granted the Governor General an unfettered, and unreviewable, power to declare an organisation to be unlawful or a person to be a communist. The Act was struck down by the High Court in the *Communist Party Case*⁷ because it granted the Governor General an unreviewable and unfettered power.

The Terrorism Bill may not have suffered from the same constitutional defect as the *Communist Party Dissolution Act* because review of a decision of the Attorney-General would have been available, even if it was ineffective. Despite this, its similarity with the *Dissolution Act* is of grave concern. Both give a very broad power to a member of the executive to ban an organisation. The separation of powers, including the notion that power must not be concentrated in any one arm of government, suggests that the proscription power should be vested instead in a Court, or at least must be subject to a more strict

⁷ (1951) 83 CLR 1.

form of scrutiny by an independent tribunal. The dangers of not doing so are obvious. As Sir Owen Dixon stated in the *Communist Party Case*.⁸

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.

The Terrorism Bill was amended to remove its proscription element. The legislation as enacted does not vest any general power in the Attorney General to proscribe organisations and to criminalise their members. Instead, it contains criminal sanctions for involvement with a terrorist organisation, including recruiting members, providing support or funds, directing their activities or being a member.⁹ The Act defines a terrorist organisation to be ‘an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)’.¹⁰ Under a very limited form of proscription, an organisation will also be a terrorist organisation where the Attorney General is satisfied that the Security Council of the United Nations has made a decision about terrorism identifying the organisation and ‘the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)’.¹¹

ASIO Bill

Despite a victory in achieving significant changes to the Terrorism Bill, the battle over the legislative response to September 11 has not been won.

The ASIO Bill as introduced on 21 March 2002 would allow adults, and even children, to be detained and strip searched, and to be held by ASIO for rolling two day periods that could be extended indefinitely. This is in contrast to the current eight hour maximum period of detention without charge.

⁸ (1951) 83 CLR 1 at 187-188

⁹ *Security Legislation Amendment (Terrorism) Act 2002* (Cth), ss 102.2 to 102.7.

¹⁰ *Security Legislation Amendment (Terrorism) Act 2002* (Cth), s 102.1(1).

¹¹ *Security Legislation Amendment (Terrorism) Act 2002* (Cth), ss 102.1(1) and 102.1(3)

While detained, Australians could be denied access to people outside of ASIO, and could not inform family members, their employer or even a lawyer of their detention. Section 34F(8) of the Bill states: 'A person who has been taken into custody, or detained, under this Division is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention.'¹²

ASIO would require a warrant from a 'prescribed authority' to detain a person. The Bill enables a warrant to be granted by a Federal Magistrate or member of the Administrative Appeals Tribunal (AAT). The AAT is an administrative body whose officers are members of the executive. Moreover, members of the AAT, other than Presidential members, are now appointed for fixed periods and lack entrenched independence or tenure.¹³ They are dependent upon the favour of the executive if seeking reappointment.

The ASIO Bill would authorise the detention of Australians without charges being laid, or even the possibility that they might be laid. Australians could be held not because they have engaged in terrorism or are likely to do so, but because they may 'substantially assist the collection of intelligence that is important in relation to a terrorism offence'.¹⁴ People could be held without access to legal advice and without the normal rights to silence and to avoid self-incrimination (a five year jail term applies for refusing to answer a question and information may be used in the prosecution of a terrorism offence¹⁵).

While the Bill says that detainees 'must be treated with humanity and with respect for human dignity', there is no penalty for ASIO officers who subject detainees to cruel, inhumane or degrading punishment.¹⁶ In fact, under section 92 of the *Australian Security Intelligence Organisation Act 1979* (Cth), it is an offence to even publish the identity of an ASIO officer.

¹² The section does, however, allow the person to contact the Inspector-General of Intelligence and Security and the Ombudsman while in detention.

¹³ *Administrative Appeals Tribunal Act 1975* (Cth), s 8.

¹⁴ ASIO Legislation Amendment (Terrorism) Bill 2002, s 34C(3)(a).

¹⁵ ASIO Legislation Amendment (Terrorism) Bill 2002, s 34G.

¹⁶ ASIO Legislation Amendment (Terrorism) Bill 2002, s 34J.

Report of the Parliamentary Joint Committee on ASIO, ASIS and DSD

The Parliamentary Joint Committee on ASIO, ASIS and DSD reported in May 2002. The Joint Committee unanimously found that the ASIO Bill ‘would undermine key legal rights and erode the civil liberties that make Australia a leading democracy’.¹⁷ Despite this, the fifteen recommendations made by the Committee were limited to the operational aspects of the legislation, including that it not apply to children and that people be detained for a maximum of seven days. The Committee did not address the central issue of whether a government should possess the power to detain Australian citizens where there is no suspicion that they have committed an offence. It has never been accepted in the past that Australians should be detained in secret for an indefinite period to help ASIO with its inquiries.

Proposed Government Amendments

On 27 August 2002, the Government issued a news release announcing its proposed amendments to the ASIO Bill.¹⁸ While the amendments adopt many of the recommendations of the Parliamentary Joint Committee, such as that detention be limited to a maximum of seven days, they also reject some key findings.¹⁹ As a result, the amendments further highlight, rather than remedy, the problems with the ASIO Bill.

The Parliamentary Joint Committee recommended that detained people be given access to legal advice, if necessary by security cleared lawyers. Instead, the Government is proposing that a detained person only be guaranteed access to legal advice after the first 48 hours of detention. This raises questions about what may happen to a detained person in that critical two day period. Moreover, even when legal

¹⁷ Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (May 2002) at vii. See also Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (June 2002).

¹⁸ Attorney-General Daryl Williams, ‘Sir Humphrey Would Be Proud’ (News Release, 27 August 2002).

¹⁹ Brendan Nicholson, ‘Tough Stand on ASIO Powers’ *Sunday Age* (18 August 2002).

advice is available, the lawyer will only be able to discuss matters with the detainees in the presence of an ASIO officer. This may undermine the value of having access to a lawyer.

The amendments also provide limited concessions in how they deal with children. As the Parliamentary Joint Committee found, children clearly should not be held by ASIO for days at a time away from their parents and subjected to coercive questioning. The amendments, however, retain the right to detain and question children as young as 14. While the amendments would limit the total period of detention of any person to seven days, the detention and questioning of a 14 year old by ASIO for a week remains disturbing.

The amendments also fail to adopt the Parliamentary Joint Committee recommendation that the legislation be subjected to a three year sunset clause. Without such a clause, this Bill cannot be seen as a short term, immediate response to September 11. It will bring about a permanent change to law enforcement in Australia, and will entrench the notion that the detention of people who may have useful information is an appropriate tool for the gathering of information about criminal activity. The dangers of such a development in any law and order debate are obvious.

The Political Debate over the ASIO Bill

An important victory was achieved with the amendment of the first set of anti-terrorism legislation, and in particular of the Security Legislation Amendment (Terrorism) Bill 2002. However, despite its draconian aspects, the ASIO Bill may be a more difficult fight. It may be more of a challenge to engage Australians and the media in debate on anti-terrorism measures a second time. The politics of the Bill will also be more difficult. Objections to the Security Legislation Amendment (Terrorism) Bill could be met through careful amendment. By contrast, the flaws in the ASIO Bill are more fundamental and require outright rejection rather than piecemeal change.

Why the ASIO Bill Should be Rejected

Reason One: We should not legislate for the detention in secret of Australian citizens who are not suspected of any crime

The ASIO Bill is inconsistent with basic democratic and judicial principles. Australians should not be detained beyond an initial short period (currently eight hours) except as a result of a finding of guilt by a judge or as part of the judicial process (such as being held in custody pending a bail hearing).

Australians are unlikely to accept the detention of citizens except as part of a fair and independent judicial process resulting from allegations of criminal conduct. There are grave dangers in allowing a government to bypass the courts, especially where a secret government organisation is involved. The possibilities of abuse of such a power are obvious and real. For example, the *Sun Herald* on 25 August reported that American judges had found that the FBI and United States Justice Department supplied 'false information' in regard to 'more than 75 applications for search warrants and wire tapping' for terrorist suspects.²⁰ Information had also been improperly shared with prosecutors in charge of criminal cases, thereby raising the issue of misuse of intelligence information to gain criminal convictions.

It would not be acceptable to the community for a State police force to detain people in secret for some days, nor should it be for ASIO. Whatever the view of the detention of David Hicks by the United States without trial for an indefinite period, we are unlikely to support the detention of Australians without trial within our borders.

Reason Two: ASIO is not a suitable body to be given police powers

ASIO is a covert intelligence gathering agency. It is not a law enforcement body. If ASIO is to be granted coercive police powers it must be subject to the political and community scrutiny and controls that would apply to any other police force. However, this is not compatible with the current intelligence gathering work of ASIO and its organisational structure (such as in regard to the secrecy applying to the identity of its employees). It would be difficult, if not impossible, for ASIO both to be sufficiently

²⁰ Tom Kelly, 'Court Reveals FBI Deceit' *Sun Herald* (25 August 2002).

secretive to adequately fulfil its primary mission, as well as to be sufficiently open to scrutiny to exercise the powers set out in the ASIO Bill.

Reason Three: The Bill is constitutionally suspect

There are two grounds for a constitutional challenge to the ASIO Bill in the High Court. First, it breaches the separation of powers in conferring a power on the Executive to detain Australian citizens who have not committed an offence (or even are suspected of having committed an offence). This aspect of the Bill is inconsistent with the decision of the High Court in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27, where Justices Brennan, Deane and Dawson, with whom Justice Gaudron agreed, held that ‘the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt’. There are exceptions to this rule, such as in regard to detention due to mental illness and infectious disease, but otherwise detention must be authorised as part of the judicial process.

Second, it is doubtful whether a Federal Magistrate can be a prescribed authority. The High Court has held that non-judicial powers (such as granting a warrant) can be conferred on a federal judge in his or her personal capacity. However, according to Chief Justice Brennan and Justices Deane, Dawson and Toohey in *Grollo v Palmer* (1995) 184 CLR 348 at 365, this is also subject to the principle that ‘no function can be conferred that is incompatible either with the judge’s performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power’. A power cannot be granted to a federal judge that is incompatible with the nature of the judicial office because it threatens the integrity of the judicial system or public confidence in that system. It is arguable that involving judges in a investigative process by which Australian citizens are detained in secret for unprecedented periods would undermine public confidence in the judiciary.

These arguments are sufficiently strong that a High Court challenge is probable in the event of a detention (assuming of course that there is knowledge of the detention). The law may be declared invalid at the very time it is being applied, and may in fact provide no protection against terrorist activity. The Government has not released legal advice on whether it sees the Bill as likely to be upheld in the High Court.

Reason Four: The ASIO Bill goes further than similar legislation in other countries

Despite the fact that Australia has not been the subject of recent terrorist activity and that no direct threat to Australian security has been established, the ASIO Bill goes further than equivalent legislation in the United Kingdom (*Terrorism Act 2000*), Canada (*Anti-Terrorism Act 2002*) and the United States (*USA PATRIOT Act 2001*).²¹ Only Australia has sought to legislate to authorise the *detention in secret of non-suspects*. In the United Kingdom and Canada, the police may detain suspected terrorists (in the United Kingdom for 48 hours extendable for further 5 days, and in Canada for 24 hours extendable for a further 48 hours). In the United States, legislation provides for the detention of ‘inadmissible aliens’ as well as for any person who is engaged in any activity ‘that endangers the national security of the United States’ (detention is for renewable 6 month periods).

Reason Five: The Bill may not be targeted at the problem

No policy justification for the ASIO Bill has been offered, nor has the Government set out the nature and extent of the danger posed to Australians by terrorism. Unfortunately, the Bill has the appearance of being a hasty over-reaction to the tragedy of September 11, rather than being an appropriate response to the issues facing Australia.

Australians have the right to ask: how will this Bill assist in dealing with the threat of terrorism facing our nation? The answer may be that the Bill will not be particularly helpful. Unlike legislation in the United Kingdom, Canada and the United States, this Bill is not aimed at terrorists, but at non-suspects who may have useful information.

Recent debate in the United States after September 11 has questioned whether the problem facing intelligence services is one of analysis of information rather than information gathering. It seems that United States intelligence services had information about the September 11 plot before the incident, but were unable to ‘connect the dots’.²² The ASIO Bill, in providing coercive new means of information

²¹ See Nathan Hancock, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (Bills Digest No 128 of 2001-02, 1 May 2002), 20-22.

²² See, for example, Gary Alcorn, ‘Calls for Account of Failure to Connect the Dots’, *Sydney Morning Herald* (18 May 2002); Roy Eccleston, ‘Clues Aplenty, but FBI Failed to Connect Dots’, *Weakened*

gathering, may miss the more significant issue of whether ASIO possesses the resources and capacity to analyse adequately the information it already has. Increasing the volume and intensity of information gathering through such methods may redirect the work and resources of ASIO in a way that does not meet the problem. It may also lead to the gathering of information that may not be admissible in a court of law. The lack of procedural fairness resulting from how the evidence has been collected may prejudice a fair trial and lead to questioning of the reliability of the evidence.

Conclusion

The federal Government's legal response to September 11 is some of the most important legislation ever introduced into the federal Parliament. The Terrorism Bill has now been passed with sufficient amendments to allay the strongest concerns. However, debate over the ASIO Bill continues.

The ASIO Bill is rotten at its core. It would confer unprecedented new powers upon ASIO that could be used against the Australian people by an unscrupulous government. It is unfortunate that it has come to this, but the ASIO Bill would establish part of the apparatus of a police state. It is a law that would not be out of place in former dictatorships such as General Pinochet's Chile. The powers to be given to ASIO may not be used against the Australian people today, or even over the next decade, but we cannot guess at the wisdom and motives of a government or of ASIO in 10, 20 or even 50 years time.

While laws dealing with the problem of terrorism are necessary and important, this Bill cannot, and has not, been justified. The Bill would affect the basic rights of every Australian. Even if amended, it would subject citizens, including children, to lengthy detention by ASIO in secret. Instead of going down this path, we should first determine the nature of the threat to Australia, and then explore ways of strengthening our defences by improving the operational capacity of ASIO and by improving the effectiveness of our current policing framework.

Australian (18 may 2002); Dan Eggen, 'Revealed: FBI Told of Hijack Suspect a Month before Planes Hit', *Sydney Morning Herald* (3 January 2002).