

THE LEGAL RESPONSE TO TERRORISM: A LABOR PERSPECTIVE

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I INTRODUCTION

When al Qaeda struck in the United States on September 11 2001, Australia's laws did not deal with terrorism in any comprehensive way. As the Parliamentary Library observed in its legislative survey after September 11:

Australia has had experiences with related issues such as politically motivated violence, organised crime and national security. But we have had few real experiences widely accepted as *terrorism* per se. Similarly, we have enacted laws dealing with foreign incursions, serious offences, defence aid to the civil power, intelligence services and implementation of international law. But, with limited exception, there is no specific antiterrorism legislation in Australia.¹

While Australia had implemented some international conventions relevant to terrorism, we had yet to even sign two crucial United Nations conventions to suppress terrorist bombings and terrorist financing.²

Following September 11, the Labor Party immediately committed itself to redressing the absence of specific anti-terrorism legislation in Australia.³ We did so with a determination to confront this challenge in a bipartisan way, building on the tremendous solidarity of Australians in the face of this new threat to peace and security. Several weeks later, the United Nations Security Council called on all Member States to enact domestic legislation against terrorism.⁴

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1 Nathan Hancock, 'Terrorism and the Law in Australia: Legislation, Commentary and Constraints' (Research Paper No 12, Department of the Parliamentary Library, 2002) i.

2 *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 2149 UNTS 284 (entered into force 23 May 2001); *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 9 December 1999, 2178 UNTS 229 (entered into force 10 April 2002).

3 Kim Beazley MP, 'Fighting Terrorists Today – Ten Things Australia Needs to Do and Labor's Commitment to Do Them' (Press Release, 13 September 2001).

4 *Resolution on International Cooperation to Combat Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/Res/1373 (2001).

II AUSTRALIA'S LEGAL RESPONSE TO SEPTEMBER 11

Proposed anti-terrorism legislation has rightly generated vigorous public scrutiny and debate, focusing on the balance struck between security and human rights. With others in the Labor Party, I have long argued that this balance is not a zero sum game.⁵ Indeed, most Australians would share the common sense view that to protect citizens from terrorism is simply to safeguard their fundamental human rights to life, liberty and personal security.

At the same time, it is naïve to pretend that security and human rights will always be in harmony. We must be vigilant to ensure that insecurity is not exploited to enact measures that violate our basic human rights and freedoms in ways that are wholly disproportionate to the threat. The reality is that terrorists can kill, maim and cause massive destruction to property but only we, through an ill-conceived response to terrorism, can destroy our institutions and our values as a community.

Fortunately, through appropriate parliamentary scrutiny, Australia has largely been able to avoid such a disproportionate legal response. Much legislation introduced by the Executive has been significantly amended to incorporate better safeguards for citizens before it has been enacted by the Parliament. This process has resulted in superior legislation, which retains its effectiveness in fighting terrorism, but which allows greater community confidence that it will not be open to misuse. I will mention three examples.

A Terrorism Offences

On 11 March 2002 the Government introduced the Security Legislation Amendment (Terrorism) Bill 2002 (Cth) and a package of related Bills⁶ into the House of Representatives. The primary Bill, which proposed new terrorism offences, subsequently had to be withdrawn when it was found to bear the wrong title. It was reintroduced on 13 March, and the Government used its numbers to rush the Bills through the House that same day. When the Opposition indicated its intention to submit the Bills to more careful scrutiny in the Senate, Hansard records the following response by the first Government speaker:

The Australian Labor Party shows no commitment or patriotism. They are anti-Australian in every action they have taken today here. ... When they get a chance to pass it, what do they do? Give it to the Senate – no sense of responsibility or commitment at all. Not patriotic, not committed, not antiterrorist ...⁷

5 Robert McClelland, 'How is a Bill of Rights Relevant Today?' (2003) 9(1) *Australian Journal of Human Rights* 11; Robert McClelland, 'Are Rights and Security Inconsistent?' (Speech delivered at the International Law Association Twilight Seminar on 'Terrorism, Warfare and the New World Order', Sydney, 11 September 2002).

6 Suppression of the Financing of Terrorism Bill 2002 (Cth); Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (Cth); Border Security Legislation Amendment Bill 2002 (Cth); Telecommunications Interception Legislation Amendment Bill 2002 (Cth).

7 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1148 (Alan Cadman).

In the event, a Coalition dominated Senate Committee unanimously recommended major changes to the Bills,⁸ and the Government responded with amendments which substantially rewrote the proposed definition of 'terrorist act' as well as the new terrorism and treason offences, in order to address widespread concern they could be misused to target innocent members of the community.

As a result of proper parliamentary scrutiny, in June 2002 Australia gained an effective and safe package of anti-terrorism laws. Months later, even the Prime Minister was moved to observe: 'We have, of necessity, tightened our security laws. I believe, through the great parliamentary processes that this country has, I believe that we have got the balance right.'⁹

B ASIO Powers

A similar (though more complicated) process was followed in the case of proposed new intelligence-gathering powers for the Australian Security Intelligence Organisation ('ASIO'). The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth), introduced into the House of Representatives on 21 March 2002, proposed to give ASIO the power to detain and question persons with information about terrorist activity. In its original form, the Bill was an extreme and disproportionate response to the challenge of preventing a terrorist attack on Australian soil. The Bill would have enabled Australian citizens, including children, to be detained indefinitely without charge, though not suspected of an offence, and strip-searched and compelled to answer questions in secret without access to legal representation.

The Bill was subject to several reports by parliamentary committees, which were highly critical of the absence of appropriate safeguards in the legislation.¹⁰ The Parliament endeavoured to modify the Bill to address community concerns but on the final sitting day of 2002, the Government rejected the amended Bill and it was laid aside in the House. At a press conference outside Parliament, the Prime Minister raised the spectre of a terrorist attack and thundered:

if this Bill does not go through and we are not able to clothe our intelligence agencies with this additional authority over the summer months it will be on the head of the Australian Labor Party and on nobody else's head.¹¹

Despite the rhetoric, when the Attorney-General presented the Bill again the following March it contained significant amendments. After the Government

8 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills* (2002).

9 John Howard MP (Speech delivered at the National Press Club, Canberra, 11 September 2002) <<http://www.pm.gov.au/news/speeches/2002/speech1848.htm>> at 15 November 2004.

10 Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002); Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002).

11 John Howard MP, (Press Conference, Canberra, 13 December 2002) <<http://www.pm.gov.au/news/interviews/2002/interview2034.htm>> at 15 November 2004.

accepted further amendments by the Senate, the Bill passed the Parliament in June 2003.

The final legislation was radically different from that originally proposed, having been transformed from a detention regime into a genuine questioning regime. Gone was the denial of legal representation, the capacity to detain children not suspected of an offence, the capacity to detain someone indefinitely and in secret. Included was high-level supervision of questioning by a judge or presidential member of the Administrative Appeals Tribunal and the Inspector-General of Intelligence and Security. Included were proper protocols, clearly defined questioning periods, meal breaks and sleep breaks, and videotaping of interviews to protect people from improper conduct. Included were a three year sunset clause, a three year review by the Parliamentary Joint Committee on ASIO, ASIS and DSD, and a requirement for ASIO to provide detailed statistics in its annual report on the use of the new powers.

In stark contrast to the partisan recriminations of the previous December, the Attorney-General praised the outcome as 'a result appropriate for a democracy at work' and 'an example of how the law and our parliamentary and other democratic institutions can combine to ensure good government',¹² although several weeks later he was again attacking the Labor Party for producing a law that was 'not just second best' but 'third and fourth best'.¹³

It should not be forgotten that, even after the incorporation of substantial checks and balances, the powers contained in the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) are unquestionably as strong as those overseas and, in many respects, stronger.

C Proscription

Arguably, the most difficult issue for Parliament to resolve concerned the proscription of organisations. This is perhaps not surprising, given the historically polarising nature of the proscription debate in Australia. As the Prime Minister conceded before coming to office: 'The Liberal Party's civil liberties record is not without blemish. It disobeyed Voltaire's famous injunction when it attempted to legally proscribe the Communist Party in the early 1950s.'¹⁴

But the attempted proscription of domestic political groups was not the only concern. In addition, the demonstrated potential for intelligence material, on which proscription decisions are ultimately based, to be flawed or manipulated created the risk that public confidence in proscription decisions could be undermined. We have seen this vividly demonstrated in the way in which flawed intelligence relating to the presence of weapons of mass destruction has shaken public confidence in the justification advanced for Australia's participation in the Iraq war. No such weakness can be tolerated in a proscription regime,

12 Philip Ruddock MP, 'Check against Delivery' (Speech delivered at the 12th Annual Conference of the Australian Institute of Professional Intelligence Officers, Canberra, 22 October 2003).

13 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2003, 21727 (Phillip Ruddock, Attorney-General).

14 John Howard MP, 'Some Thoughts on Liberal Party Philosophy in the 1990s' (1994) 38 *Quadrant* 21, 22.

particularly as a primary objective of proscription is the expression of clear public revulsion towards the activities of terrorist organisations.

In the original proscription regime introduced by the Government in 2002, it was proposed that the Attorney-General could, by notice published in the Gazette, outlaw an organisation on the basis that it was either involved in terrorism offences or was 'likely to endanger the security or integrity of the Commonwealth or another country'.¹⁵ This regime would have empowered a single member of the executive to make proscription decisions in secret and without any accountability to the Parliament. It was unanimously rejected by the Senate Legal and Constitutional Legislation Committee – on which the Government held the Chair and the majority – which stated:

Based on the submissions made to and the evidence received by the Committee, the Committee believes that the proposed provisions are not acceptable to a large proportion of the Australian community and contain significant omissions.¹⁶

After considerable debate, the Senate passed a regime which enabled the Attorney-General to proscribe entities related to Osama bin Laden, al Qaeda and the Taliban that had been listed as terrorist entities through the United Nations Security Council.¹⁷

On 29 May 2003, the Government reintroduced its proscription legislation, citing advice from the Australian intelligence community that a number of organisations not listed by the Security Council posed a threat to Australian interests and should be proscribed in Australia.¹⁸ The Bill differed from the original regime in that it proposed proscription by disallowable regulation, lapsing after two years, rather than gazettal. However, flaws remained insofar as proscription decisions could still be made in secret, and Parliament had no effective way of properly informing itself whether to disallow a proscribing regulation.

The Labor Party presented the Government with a proposal for a regime of court-based proscription modelled on the existing Part IIA of the *Crimes Act 1914* (Cth), but when it became clear after many months that the Government would not consider this alternative, Labor again approached the Government with proposals to overcome the flaws that remained in its proposed regime. After several months of discussions, the Government agreed to amendments in four main areas.

First, decisions to proscribe organisations are not to be taken in secret, but can only follow proper consultation with the Leader of the Opposition, and State and Territory leaders. Second, the Attorney-General is required to formally consider applications by individuals and organisations in order to de-list an organisation, with the decision to be subject to judicial review. Third, the Attorney-General will be genuinely accountable to the Parliament, with proscription decisions

15 Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth).

16 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* (2002) [3.156].

17 Entities are listed by a Committee of the Security Council established under SC Res 1267 UN SCOR, 54th sess, 4051st mtg, UN Doc R/SC/1267 (1999) [6].

18 Criminal Code Amendment (Terrorist Organisations) Bill 2003 (Cth).

subject to inquiry and report by the Parliamentary Joint Committee on ASIO, ASIS and DSD,¹⁹ and if they are found to have no sound basis in security and intelligence material, to disallowance by the Parliament. And, finally, the legislation as a whole will be subject to triennial review by the Parliamentary Joint Committee.

In supporting the amended legislation, Labor publicly maintained the Government was wrong to reject a court-based proscription regime and that such a regime would enjoy greater public confidence than one which confers this power on a single member of the executive.²⁰ Nevertheless, the amendments secured by the Parliament will ensure that the executive will be genuinely accountable to the Parliament for proscription decisions.

III THE ONGOING THREAT

On present indications, the threat of international terrorism, particularly from groups related or sympathetic to al Qaeda, appears unlikely to decrease in the near future. While there have been successes in the war against terrorism, notably the apprehension of many al Qaeda and Jemaah Islamiyah leaders, experts warn that these groups continue to find and train new recruits, regrettably assisted by images of the military campaign in Iraq. In addition, these groups continue to be able to fund their activities. Despite putting in place domestic legislation to stop terrorist financing,²¹ Australia has yet to identify and freeze any al Qaeda-related funds.²² As a United Nations Monitoring Group recently warned: 'many Al-Qaida sources of funding have not been uncovered, and Al-Qaida continues to receive funds it needs from charities, deep-pocket donors, and business and criminal activities, including the drug trade'.²³

In facing this ongoing threat, we must not lose sight of the argument that adherence to and respect for the rule of law is itself a significant weapon in the fight against terrorism. In the context of a society experiencing the threat of violence on a daily basis, Justice Aharon Barak of the Supreme Court of Israel once observed in a judgment on the inhumane treatment of terrorist suspects:

We are aware that this decision does not make it easier to deal with the reality. This is the fate of democracy as not all means are acceptable to it, and not all methods employed by its enemy are opened to it. Sometimes a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitutes an important

19 The Parliamentary Joint Committee on ASIO, ASIS and DSD is established under the *Intelligence Services Act 2001* (Cth) and has unique information-gathering powers.

20 Commonwealth, *Parliamentary Debates*, Senate, 3 March 2004, 20521 (John Faulkner).

21 *Suppression of the Financing of Terrorism Act 2002* (Cth), *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth).

22 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 March 2004, 27370 (Alexander Downer, Minister for Foreign Affairs).

23 United Nations Monitoring Group established pursuant to resolution 1363 (2001), Second Report of the Monitoring Group pursuant to resolution 1455' (2003) UN Doc S/2003/1070.

component of its understanding of security. At the end of the day, they strengthen its spirit and allow it to overcome its difficulties.²⁴

The ongoing war against terrorism will continue to test our commitment to the rule of law. Key among the challenges Australia faces is to resolve the cases of Australian citizens who were detained without charge at Guantánamo Bay for more than two and a half years. Their continued detention, and the military commissions constituted to try them, fail basic tests of the rule of law. In the short term, these arrangements cause observers around the world to question the consistency of Western values. In the longer term, there is a risk other countries will seek to implement similar detention and trial regimes, using Guantánamo Bay as a precedent.

In Australia, it is deeply regrettable that the Government sought to use the Anti-terrorism Bill 2004 (Cth) to seek parliamentary approval of its policy of acquiescing in the use of these military commissions to try Australian citizens. In this Bill, the Government sought an amendment to the *Proceeds of Crime Act 2002* (Cth) to specify that the phrase 'offence against a law of a foreign country' includes offences triable by United States military commissions established under the President's military order of 13 November 2001. These offences are in fact written and promulgated by a single lawyer employed by the United States Department of Defence, under Military Commission Instruction No 2. The phrase 'offence against a law of a foreign country' appears numerous times in Commonwealth legislation but is deliberately left undefined, conferring on courts the role of identifying and recognising foreign criminal laws. The proposed amendment is therefore truly exceptional.

While Parliament had earlier agreed to a reference to United States military commissions in the *International Transfer of Prisoners Amendment Act 2004* (Cth), the Labor Party made clear on the parliamentary record that its support for that exceptional legislation was based on its humanitarian purpose, to enable Australian citizens detained without charge for more than two years to serve any possible future term of imprisonment closer to family and support networks. No such argument existed in the case of the Anti-terrorism Bill 2004 (Cth). The amendment has been unanimously rejected by a Senate Committee on which the Government holds the Chair and the majority.²⁵ Whatever the Government's response to the Committee's report, it remains that the amendment should never have been included in the Bill. This Bill contained important enhancements to the capacity of police to investigate terrorism offences, and should not have been used as a vehicle to seek some kind of rubber stamp on the Government's flawed policy regarding Guantánamo Bay.

Again, failure to adhere consistently to the principle of the rule of law significantly undermines the moral bedrock that is itself fundamental to the fight against terrorism.

24 Justice Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 148.

25 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Anti-terrorism Bill 2004* (2004).

IV CONCLUSION

The challenge we face is to take all necessary and appropriate steps to protect Australia from the ongoing threat of terrorism without compromising our freedoms and the rule of law. One of the most familiar statements of this challenge is that of Lord Atkin who said in his dissenting judgment in *Liversidge v Anderson*²⁶ during the height of World War II:

Amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by executive, alert to see that any coercive action is justified in law.²⁷

Unless we respect this principle and always keep it in mind, not only do we run the risk that important security measures will come undone for want of lawful authority, but we also risk sacrificing the very values on which our civilisation is founded.

26 [1942] AC 206.

27 Ibid 244.