

National security, terrorism and Bills of Rights

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Introduction

The law, and the idea that it should be used to combat terrorist activity, has played a prominent role around the world in responses and reactions to September 11.¹ This is equally true in Australia where the Federal Parliament has enacted new anti-terrorism laws. After September 11 and the Bali attack, such laws are needed to ensure community confidence. They are also required to fulfil Australia's international obligations, as expressed in instruments such as the International Convention for the Suppression of Terrorist Bombings (implemented by the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth)) and resolution 1373 of the UN Security Council. Resolution 1373, made on 28 September 2001, determines that States 'shall', for example, 'Prevent and suppress the financing of terrorist acts' (UN Security Council, r 1373, para 1) and 'Take the necessary steps to prevent the commission of terrorist acts' (above, para 2).² Before September 11, there were no laws in Australia dealing specifically with terrorism except in the Northern Territory (*Criminal Code Act* (NT), Pt III Div 2).

While Australia needs a national legislative response to terrorism, any new laws must strike a balance between defence and national security, and other important public values such as fundamental human rights and the rule of law. Australia should not pass laws that damage the very democratic freedoms we are seeking to protect from terrorism. We should also be careful not to overstate the role that the law

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1 The US, for example, has enacted the USA PATRIOT Act 2001, the UK the *Terrorism Act 2000* and Canada the *Anti-Terrorism Act 2002*.

2 See in regard to the implementation of this resolution the *Suppression of the Financing of Terrorism Act 2002* (Cth).

can play in combating terrorism. It is not surprising that our political leaders, as members of Parliament and lawmakers, turn to new laws in reaction to September 11 and the Bali attack. New legislation is at least within their control and is a symbolic and potentially practical response. However, it is important to acknowledge that new laws will not provide long term solutions. Legislation cannot tackle the causes of terrorism and will not deter a terrorist from a premeditated course of action. Further, lawmaking may also redirect attention away from debate over other responses to terrorism. Worse still, enacting draconian laws may lead to a sense of complacency on the part of the public and may also compromise the same democratic freedoms that are meant to be the subject of protection.

In drafting new laws, a balance must be struck whereby any diminution of the rule of law or human rights is proportionate to the threat faced. The case for derogating from accepted rights and key elements of our democracy must be fully justified and carefully scrutinised. The protection of national security is not an end in itself. It can only be justified to the extent that it protects our democratic freedoms and way of life. National security at the cost of living in a totalitarian State is not something that Australians would accept. In this context, 'security' means the protection of our democratic rights from external and internal threats. 'Security' does not mean abrogating basic freedoms in the name of fighting such threats.

There are many examples of governments around the world, including in our own region, seeking new powers over national security only for those powers to be used (perhaps some years in the future) against the people or the political opponents of the government. As Sir Owen Dixon, a judge of the High Court of Australia, stated in 1951 in the *Communist Party* case:

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.

Of course, this does not mean that values such as human rights are an absolute barrier to new anti-terrorism laws. As Alexander Hamilton wrote in *The Federalist* (No 8) in the late eighteenth century on the topic of 'The Effects of Internal War in Producing Standing Armies and Other Institutions Unfriendly to Liberty':

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. The violent destruction of life and property incident to war, the continual efforts and alarm attendant on a state of

continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free (Madison et al 1987: 112–113 quoted by Renwick in 'The War Against Terrorism, National Security and the Constitution').

A domestic reference point for upholding human rights?

The question then is how best to balance the security of the nation against the rights of its citizens. In nations such as Canada, New Zealand, the US, South Africa and the UK the answer is grounded in a domestic Bill of Rights. A Bill of Rights sets out basic principles of law having popular, political and legal legitimacy with which government must comply. The rights in such an instrument are not absolute. For example, s 1 of the Canadian *Charter of Rights and Freedoms* 1982 states that it 'guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. Moreover, s 33 provides that the Canadian Parliament or a legislature of a province can override certain Charter rights, and that an override law 'shall operate notwithstanding' those rights. A declaration made under s 33 has an operation of five years and may be renewed.

Bills of Rights such as the Canadian Charter not only set out the fundamental rights of the citizens of a nation. They also establish the means of mediating those rights against other competing demands such as national security. In some nations, independent judges are given the role of determining whether the balance achieved by the legislature or the Executive in meeting such demands is valid.

In Australia, the rule of law is an important part of our political culture and we have an independent High Court. However, Australia is alone among western nations in not having a Bill of Rights (see generally Williams 1999: 250–270). This means that we lack a domestic reference point setting out the basic rights that attach to Australian citizenship. Further, we do not have the mechanisms, judicial or otherwise, for determining whether rights have been unduly undermined by national security laws. There is occasionally a role for judges in this process, but this is usually at the margins of the debate, such as where constitutional provisions are relevant to human rights enforcement or in the interpretation of legislation. In the latter context, the courts have developed the common law so that the infringement of rights is minimised. According to Chief Justice Mason and Justices Brennan, Gaudron and McHugh in *Coco v The Queen* (see also Kenny (1996) Vol 2, pp 233–237): 'The courts should not impute to the legislature an intention to interfere with fundamental

rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.' Hence, 'a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right' (Brennan J in *Re Bolton; Ex parte Beane* 1987 at 523).

However, Parliament is capable of abrogating a fundamental right via legislation if it operates within constitutional limits and is express and unambiguous in its legislative intent. There is no mechanism through which to analyse whether such abrogation is appropriate. Unlike in every other western nation, the issue in Australia is purely political. Moreover, without a Bill of Rights, political and legal debate is usually unconstrained by fundamental human rights principles and the rule of law. Instead, the contours of debate may match the majoritarian pressures of Australian political life rather than the principles and values upon which our democracy depends. In these circumstances, any check upon the power of Parliament or Government to abrogate human rights derives from political debate and the goodwill of our political leadership. This is not a check that is regarded as acceptable or sufficient in other comparable nations.

International law dimension

The lack of a domestic reference point for basic rights in Australia means that it is difficult to determine the extent to which our rights and the rule of law should be sacrificed in the name of national security and in the fight against terrorism. As in many other debates, such as that over mandatory sentencing, the absence of a domestic Bill of Rights means that Australians turn to international law.

The UN has been a focus of debate and activity in responding to terrorism (see generally 'UN Action Against Terrorism' <www.un.org/terrorism>), and a number of international instruments are of potential importance in this regard. Some are directed at aspects of terrorism, such as the International Convention for the Suppression of Terrorist Bombings. Other instruments and resolutions affirm that governments have an obligation to take action to protect their citizens from terrorism, but that any such action must be in accordance with accepted human rights principles. For example, the International Covenant on Civil and Political Rights (ICCPR), ratified by Australia in 1980, recognises rights such as the following.

- Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life (art 6(1)).
- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law (art 9(1)).

- Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence (art 12(1)).

Article 4(1) provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Even if any 'war against terrorism' does amount to a 'public emergency' under art 4(1), art 4(2) states that 'No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.' Hence, the ICCPR recognises that public emergency or national security laws may derogate from art 17(1), which provides: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.' On the other hand, no derogation can be justified in regard to art 7, which states that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment', or art 18(1), which provides: 'Everyone shall have the right to freedom of thought, conscience and religion.'

In setting up a hierarchy of rights, the ICCPR provides guidance of what may be regarded as permissible or impermissible in the Australian national security context. However, this guidance is not binding. Although Australia has voluntarily accepted an obligation under art 2 of the ICCPR 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant', this obligation is not binding under Australian law and the Federal Parliament has not legislated to fully implement the ICCPR. Other than making a complaint to the UN Human Rights Committee (which even if successful still has no legal effect in Australia),³ Australians are unable to have such principles enforced as part of our legal system.

Further guidance on the balance between national security and our domestic freedoms has been provided by the Council of Europe, which has 44 Member States,

³ This mechanism is provided by the (First) Optional Protocol of the International Covenant of Civil and Political Rights, which came into force in Australia in 1991.

including all members of the European Union. On 11 July 2002 the Council adopted *Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism* (<www.coe.int/T/E/Communication_and_Research/Press/Theme_Files/Terrorism/>). According to the Secretary General of the Council of Europe, Walter Schwimmer, the Guidelines 'enable our Member States, and other countries, to combat terrorism whilst also observing the Council's fundamental values of human rights, democracy and the rule of law' ('Council of Europe Adopts the first international guidelines on human rights and anti-terrorism measures' at <[press.coe.int/cp/2002/369a\(2002\).htm](http://press.coe.int/cp/2002/369a(2002).htm)>). In a resolution made on 16 December 2002 the UN General Assembly commended the Council of Europe 'for its contribution to the implementation of Security Council resolution 1373', taking note in this context of the Council of Europe Guidelines.

The preamble to the Guidelines recognises that 'it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law'. The Guidelines then establish in art 1 that 'States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life'. Under art 3(2): 'When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.' Moreover, art 15 states:

When the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation, a State may adopt measures temporarily derogating from certain obligations ensuing from the international instruments of protection of human rights, to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law. The State must notify the competent authorities of the adoption of such measures in accordance with the relevant international instruments.

The Guidelines also suggest approaches on specific human rights issues and, like the ICCPR, establishes a hierarchy of rights. For example, while the Guidelines state that 'The use of torture or of inhuman or degrading treatment or punishment, is absolutely prohibited, in all circumstances', they also provide in art 6 that a person's right to privacy may be interfered with.

Although international law provides useful guidance on human rights issues and national security, guidelines such as those set out by the Council of Europe have not been implemented or even generally accepted in Australia. In the absence of such guidelines, we lack parameters within which the Government and community can

consider and assess the balance between human rights and national security.

Assessing Australia's anti-terrorist legislation

This paper does not comprehensively assess the Federal Government's legal response to September 11 in the form of its new anti-terrorist legislation.⁴ The *Security Legislation Amendment (Terrorism) Act 2002* has been enacted by Parliament, but only after being substantially amended to meet a number of objections. The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (ASIO Bill) has, at the time of writing, yet to be enacted.

Because Australia lacks a Bill of Rights and has developed no other domestic guidelines, it is useful to assess these legislative responses according to the approaches taken in other comparative nations and under international law. These approaches suggest that such legislation can be justified where it is proportionate to the threat faced and where any diminution of the rule of law or human rights principles is no more than is 'strictly required by the exigencies of the situation'. In addition, any such legislation must be a temporary response. It must not permanently derogate from the rule of law and human rights principles. Anti-terrorism legislation should be limited by a sunset clause.

The ASIO Bill is of particular concern. It would enable the detention in secret, without trial, of Australian citizens who are not even suspected of having committed an offence. Children as young as 14 could be detained, although only where the child is a suspect. A detained person is liable to a five year jail term for refusing to answer a question, but is only 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 advice is available, a detainee will only be able to discuss matters with a lawyer in the presence of an ASIO officer. In many cases this would undermine the value of having access to a lawyer. It would be difficult, if not impossible, to justify the ASIO Bill even during a period of war in which the life of the nation is threatened.

I do not argue that there is not a threat to Australia, only that the threat is not proportionate to the diminution of the rule of law and human rights contained in the ASIO Bill. In fact, if passed in its pre-amended form, the sections providing for the indefinite

⁴ For a comprehensive assessment of the legislation see generally Carne (2003) 13 *Public Law Review* 154; Head (2002) 27 *Alternative Law Journal* 121; Tharn (2002) 27 *Alternative Law Journal* 216; Williams (2002) 27 *Alternative Law Journal* 212.

detention incommunicado of adults and children could have done more to undermine the long term health of our democratic system than any threat currently posed by terrorism.

It is significant that the ASIO Bill (at 18–20) goes further than equivalent legislation in the UK (*Terrorism Act 2000*), Canada (*Anti-Terrorism Act 2002*) and the US (*USA PATRIOT Act 2001*). Only Australia has sought to legislate to authorise the *detention in secret of non-suspects*. In the UK and Canada, the police may detain suspected terrorists (in the UK for 48 hours extendible for a further five days, and in Canada for 24 hours extendible for a further 48 hours). In the US, 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 six month periods). While the *Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism* recognise that detention of up to seven days may be justifiable, this is only in regard to suspects after their arrest (see ‘Texts of Reference Used for the Preparation of the Guidelines on Human Rights and the Fight Against Terrorism’ at <www.coe.int/T/E/Communication_and_Research/Press/Theme_Files/Terrorism/>). There is no suggestion in the Guidelines that the detention of non-suspects for the purpose of assisting with intelligence gathering can be justified. Moreover, such provisions are not found in anti-terrorism legislation in comparable nations.

Conclusion

The Government’s legal response to September 11 is some of the most important legislation ever introduced into the Federal Parliament. Unfortunately, insufficient regard has been given to the need to balance the rule of law and human rights against our national security concerns. Without a Bill of Rights, Australia is now faced with an ASIO Bill that that would not be out of place in former dictatorships such as General Pinochet’s Chile. As the bipartisan Parliamentary Joint Committee on ASIO, ASIS and DSD unanimously found in May 2002, the ASIO Bill ‘would undermine key legal rights and erode the civil liberties that make Australia a leading democracy’ (*An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (May 2002) at vii <www.aph.gov.au/house/committee/pjcaad/terrorbill2002/terrorindex.htm#content>).⁵ ●

5 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) <www.aph.gov.au/senate/committee/legcon_ctte/asio/report/report.pdf>; Senate Legal and Constitutional References Committee, *Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (December 2002) <www.aph.gov.au/senate/committee/legcon_ctte/asio_2/report/report.pdf>.

References

Australian cases

Australian Communist Party v Commonwealth (1951) 83 CLR 1 (*Communist Party case*)

Coco v The Queen (1994) 179 CLR 427

Re Bolton; Ex parte Beane (1987) 162 CLR 514

Australian legislation

Criminal Code Act (NT)

Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002 (Cth)

Security Legislation Amendment (Terrorism) Act 2002

Suppression of the Financing of Terrorism Act 2002 (Cth)

Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (in Bills Digest No 128 of 2001-02, 1 May 2002)

US legislation

USA PATRIOT Act 2001

Canadian legislation

Anti-Terrorism Act 2002

Canadian Charter of Rights and Freedoms 1982

UK legislation

Terrorism Act 2000

International legal material

Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism at <www.coe.int/T/E/Communication_and_Research/Press/Theme_Files/Terrorism/> [accessed at 7 April 2003]

International Covenant on Civil and Political Rights (ICCPR)

(First) Optional Protocol of the International Covenant of Civil and Political Rights

United Nations Security Council Resolution 1373

Books and articles

Carne G 'Terror and the ambit claim: Security Legislation Amendment (Terrorism) Act 2002 (Cth)' (2003) 13 *Public Law Review* 154

Head M 'Counter-terrorism laws threaten fundamental democratic rights' (2002) 27 *Alternative Law Journal* 121

Kenny S 'Principles of Statutory Interpretation Relating to Government' in P D Finn (ed) *Essays on Law and Government: The Citizen and the State in the Courts* LawBook Company, Sydney (Vol 2) 1996 at 215

Madison J, Hamilton A and Jay J *The Federalist Papers* 1997. Quoted in Renwick J 'The war against terrorism, national security and the Constitution' Speech delivered to NSW Bar Association Constitutional Law Section, 3 October 2002

Tham J C 'ASIO and the Rule of Law' (2002) 27 *Alternative Law Journal* 216

Williams G *Human Rights under the Australian Constitution* 1999 Oxford University Press, Melbourne 1999

Williams G 'One Year On: Australia's Legal Response to September 11' (2002) 27 *Alternative Law Journal* 212.

Internet sources

<www.un.org/terrorism>

'Council of Europe Adopts the First International Guidelines on Human Rights and Anti-Terrorism Measures' (Media Release, 15 July 2002) at <[press.coe.int/cp/2002/369a\(2002\).htm](http://press.coe.int/cp/2002/369a(2002).htm)>

An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (May 2002) at vii <www.aph.gov.au/house/committee/pjcaad/terrorbill2002/terrorindex.htm#content>

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) at <www.aph.gov.au/senate/committee/legcon_ctte/asio/report/report.pdf>

Senate Legal and Constitutional References Committee *Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (December 2002) at <www.aph.gov.au/senate/committee/legcon_ctte/asio_2/report/report.pdf>