AUSTRALIA'S LEGISLATIVE RESPONSE TO THE ONGOING THREAT OF TERRORISM

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I INTRODUCTION

The heightened security threat following 11 September 2001 has challenged our fundamental human rights in more ways than one. The most obvious challenge has come from protecting ourselves against the terrorist attacks themselves, in which thousands of lives have been lost. The less obvious challenge has involved enacting laws that sufficiently protect us against terrorism, but that do not impinge on the very rights and freedoms that we are seeking to protect in the first place. Traditionally, counter-terrorism laws have sought to balance the competing aims of increasing national security and protecting human rights.[1] According to this view, the protection of one aim undermines the protection of the other. However, a new theory is emerging whereby national security and human rights are not considered to be mutually exclusive.[2]

In combating terrorism, we should focus on creating 'human security' legislation that protects both national security and civil liberties. Human security requires not only the absence of violent conflict, but also respect for human rights and fundamental freedoms.[3] The tightening of security will have some effect on certain rights, and it is our duty to ensure that we employ measures to minimise the impact of counter-terrorism laws on human rights. It should not, however, be presumed that steps to enhance our national security will unduly jeopardise our civil liberties.

The Federal Government's legislative response to September 11 has involved enacting laws that both enhance our national security and protect our civil liberties. Along the way, the Government's efforts have sometimes been

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1 See, eg, Allan William Martin, *Robert Menzies: A Life, Volume 2 1944-1978* (1999) 178.

2 Irwin Cotler, 'Thinking Outside the Box: Foundational Principles for a Counter-terrorism Law and Policy' in Ronald J Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (2001) 111.

3 See, eg, Kofi Annan, 'Secretary-General Salutes International Workshop on Human Security in Mongolia' (Press Release, 8 May 2000) <http://www.un.org/News/Press/docs/2000/20000508.sgsm7382.doc.html> at 15 november 2004.

criticised for failing to adequately protect our civil liberties. These criticisms have generally arisen from the traditional analysis of counter-terrorism laws. Accordingly, they rely on the false assumption that counter-terrorism legislation is inevitably at odds with the protection of fundamental human rights. Nevertheless, the Government has sometimes compromised on these points to achieve the overriding goal of enacting new laws to combat terrorism. As new terrorist attacks occur, the Government has remained committed to combating terrorism to protect the Australian people.

This article demonstrates that the counter-terrorism laws enacted since September 11 achieve the twin objectives of targeting terrorism from all angles while possessing sufficient safeguards to limit the impact on fundamental freedoms and rights. This article is set out according to a number of broad aims of counter-terrorism laws, with each category listing the relevant pieces of legislation and the rationale underlying their creation or proposal. This article shows that Australia's counter-terrorism legislative regime contains sufficient measures and safeguards to protect our fundamental rights and freedoms from both the threat of terrorism and excessively intrusive laws.

II LAWS TO STRENGTHEN OUR BORDERS

The *Border Security Legislation Amendment Act 2002* (Cth) enhances the security of Australia's borders. It addresses many issues, including border surveillance, the movement of people, the movement of goods and the related controls of the Australian Customs Service. This Act was enacted to prevent terrorist attacks – of the kind witnessed in the United States on 11 September 2001 – from occurring in Australia.

III LAWS TO CREATE AND STRENGTHEN TERRORISM-RELATED OFFENCES

Several pieces of legislation have been enacted to create new offences or strengthen existing offences relating to terrorism. These laws were implemented either in response to specific events or to ensure that Australia complies with its international obligations. The offences serve the dual purpose of deterring terrorist acts and ensuring that perpetrators are adequately punished.

The *Security Legislation Amendment (Terrorism) Act 2002* (Cth) inserted new offences into the *Criminal Code Act 1995* (Cth). These offences include the conduct of engaging in a terrorist act, providing or receiving training connected with a terrorist act, possessing things connected with terrorist acts, collecting or making documents likely to facilitate terrorist acts and performing other acts in preparation for, or planning, terrorist acts. These offences attract maximum penalties of life imprisonment.

The *Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002* (Cth) expanded and strengthened the offences that apply to the use of postal or similar services to perpetrate hoaxes, make threats or send dangerous articles.

This legislation was enacted in response to the series of hoaxes that occurred in the United States in October 2001.

The *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth) contains offences for international terrorist activities that use explosive or lethal devices. This Act was enacted in order that Australia comply with the *International Convention for the Suppression of Terrorist Bombings*.[4]

The *Criminal Code Amendment (Espionage and Related Matters) Act 2002* (Cth) increased and improved the offences for espionage and related activities. Amongst other measures, this Act increased the maximum penalty available for these offences and made it easier to try espionage allegations. Specifically, this Act expanded the range of activity that may constitute espionage to include situations where a person communicated or made available information about the Commonwealth's security or defence with the intention of prejudicing the Commonwealth's security or defence, or to advantage the security or defence of another country.

The *Criminal Code Amendment (Offences against Australians) Act 2002* (Cth) makes it an offence to murder, commit manslaughter or intentionally or recklessly cause serious harm to an Australian citizen outside Australia. These offences were introduced to complement the other terrorism legislation by providing a further prosecution option for overseas attacks on Australian citizens and residents. The death of 88 Australians in Bali in October 2002 highlighted the need for this legislation.

IV LAWS TO CREATE OFFENCES INVOLVING TERRORIST ORGANISATIONS

Several pieces of legislation have established a process for listing terrorist organisations for the purposes of Australian law. The practical aim of this legislation is to deter Australians from becoming involved in the activities of those organisations. These laws create a number of offences to outlaw conduct associated with these organisations, and strengthen Australia's ability to prosecute for these offences – a dual preventative and punitive function.

The *Security Legislation Amendment (Terrorism) Act 2002* (Cth) established a framework for the Attorney-General to declare proscribed organisations. Pursuant to this framework, the Attorney-General could proscribe an organisation if the United Nations Security Council had identified it as a terrorist organisation.

The *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth) commenced on 10 March 2004 to amend the proscription process. Reliance on the United Nations to list organisations as 'terrorist' organisations – as a prerequisite for implementing domestic legislation – unnecessarily impeded the listing process, as it may not act quickly enough to respond to Australia's individual needs. Often United Nations decisions reflect international political

4 *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 2149 UNTS 284 (entered into force 23 May 2001).

considerations that are not relevant to the security of Australia and its people. The drawn-out process of listing Jemaah Islamiyah following the Bali bombings highlighted the inadequacies of this reliance. On another two occasions, specific legislation was used to list organisations that were not listed by the United Nations.[5] Again, this entailed an unnecessarily slow process. The Act overcomes these obstacles by enabling the federal government to list terrorist organisations based on Australia's national interest and security needs, as well as the advice of Australian intelligence organisations. In doing so, it places Australia in the same position as the United Kingdom, Canada, New Zealand and the United States who are able to determine for themselves which terrorist organisations pose a threat to their citizens and interests, and to act independently to list those organisations.

Concerns have been raised about the possibility of a future government proscribing legitimate protest movements and political opponents. However, the Act imposes a transparent listing process which should redress these concerns. Before an organisation can be listed, as Attorney-General, I must be satisfied that the relevant organisation is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act. The Act also provides that the leader of the opposition must be briefed about a proposed listing. Any regulation listing a terrorist organisation is subject to disallowance on the recommendation of the Parliamentary Joint Committee on ASIO, DSD and ASIS. The ordinary parliamentary processes still apply, and therefore a regulation may also be subject to review by other committees including the Senate Regulations and Ordinances Committee. In addition, the regulations are subject to a two-year sunset clause.

An organisation may be de-listed in one of two ways. First, if an individual or organisation makes a de-listing application on the ground that there is no basis for the conclusion that the listed organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act. Second, if I – as the Attorney-General – cease to be satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act.

The Parliament recently passed the *Anti-terrorism Act 2004* (Cth) to further strengthen these laws in a number of ways. First, the Act makes it easier to prosecute persons who commit hostile activities while serving – in any capacity – in or with the armed forces of a foreign state. The recent armed conflict in Afghanistan demonstrated that terrorist organisations may collaborate with the armed forces of a foreign state. Second, it increases the maximum penalty for engaging in such hostile activities to 20 years imprisonment. Third, it creates an offence for a person to be a member of an organisation that a court finds to be a terrorist organisation, even though not listed by regulation. This amendment accords with common sense; it brings the membership offence provisions into

5 The definition of terrorist organisation for the purpose of Australia's terrorist laws was amended by the *Criminal Code Amendment (Hizballah) Act 2003* (Cth) to include the Hizballah External Security Organisation, and by the *Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003* (Cth) to include the military wing of Hamas and Lashkar-e-Tayyiba.

line with the other offence provisions that apply to organisations that are designated as terrorist organisations either due to a regulation or by court finding. Finally, the Act modifies the offences of providing training to or receiving training from a terrorist organisation, placing an onus on the accused person to prove that they are not involved in training activities with a terrorist organisation.

More recently, the *Anti-terrorism Act (No 2) 2004* (Cth) established a new association offence that will apply to people who have links with a terrorist organisation or its members, but who themselves are not members of the organisation and who do not have an active involvement with the activities of the organisation.

The Government continues to look at additional measures to strengthen terrorism laws.

V LAWS TO ALLOW THE COMMONWEALTH TO LEGISLATE ON TERRORISM MATTERS

The *Criminal Code Amendment (Terrorism) Act 2003* (Cth) enacted federal counter-terrorism offences to give them comprehensive national application. It was introduced after the States and Territories referred to the Commonwealth the power to legislate on terrorism matters pursuant to s 51(xxxvii) of the *Australian Constitution*. These referrals overcame any existing limitations on the Commonwealth constitutional powers to enact counter-terrorism laws.

VI LAWS TO ENHANCE ASIO'S INVESTIGATIVE POWERS

Two pieces of legislation have sought to increase the powers of the Australian Security Intelligence Organisation ('ASIO') to obtain intelligence about terrorist activity in Australia and to investigate possible offences.

The *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth) enhances ASIO's power to obtain a warrant to question, and detain while questioning, people involved in, or who may have important information about, terrorist activity. Specifically, this Act enables a person to be questioned for up to 24 hours (or 48 hours where interpreters are used) and to be detained for up to seven consecutive days.

This Act contains a number of safeguards. Specifically, there are requirements about who can issue a warrant, who must attend the questioning, the maximum time for questioning or detention and the minimum age of the person subject to the warrant. A person subject to a warrant is generally able to contact a lawyer of his or her choice at any stage of the proceedings, as well as the Inspector-General of Intelligence and Security or the Commonwealth Ombudsman. If the Inspector-General is concerned about an impropriety occurring during questioning, he or she may advise the prescribed authority, who may suspend questioning until the concerns have been addressed. The Inspector-General also inspects warrants if a person has been detained under two or more warrants.

The *ASIO Legislation Amendment Act 2003* (Cth) addressed practical issues identified in the context of implementing ASIO's new powers.

VII LAWS TO STOP THE MOVEMENT OF TERRORIST-RELATED FUNDS

The *Suppression of the Financing of Terrorism Act 2002* (Cth) was implemented to prevent the movement of funds for terrorist purposes and to enhance the exchange of information about such financial transactions with foreign countries. Specifically, it contains an offence for those who provide or collect funds for terrorist activities, imposes reporting requirements on cash dealers who suspect a transaction relates to terrorist activities, enhances the ability to share financial transaction reports with foreign countries and agencies, and imposes higher penalties for related offences. These measures have assisted Australia in complying with its obligations under the *Resolution on International Cooperation to Combat Threats to International Peace and Security Caused by Terrorist Acts*[6] and the *International Convention for the Suppression of the Financing of Terrorism*.[7]

The *Anti-terrorism Act 2004* (Cth) seeks to amend the *Proceeds of Crime Act 2002* (Cth) to strengthen the restrictions on any commercial exploitation by a person who has committed a foreign indictable offence, such as involvement with terrorist activity. These amendments seek to discourage and deter crime by diminishing the capacity of offenders to finance future criminal activities. The amendments also prevent the unjust enrichment of criminals who profit at society's expense.

VIII LAWS TO ENHANCE THE AFP'S INVESTIGATORY POWERS

The *Anti-terrorism Act 2004* (Cth) is an example of the way in which the Government has identified and rectified weaknesses in existing counter-terrorism laws.

The close cooperation of the Australian Federal Police ('AFP') with Indonesian authorities after the Bali bombings highlighted several problems in the nature of the powers to investigate an alleged offence. Federal terrorism investigations in Australia tend to be more complex than in other countries due to the spanning of State, Territory and international borders. Furthermore, investigations are often hindered by the need to liaise with overseas agencies in different time zones. These considerations demand a more flexible framework in order to enable police to gather sufficient evidence and to properly question

6 *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/1372 (2001).

7 *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).

suspects. The *Anti-terrorism Act 2004* (Cth) addresses these issues. The Act extends the investigation period for suspected terrorism offences, and gives law enforcement agencies extra time to conduct international inquiries. These amendments would greatly improve the ability of Australia's law enforcement authorities to effectively enforce our terrorism laws.

The Government has taken care to ensure that questioning for the purpose of investigating offences is treated differently to questioning for the purpose of intelligence gathering. It is important to stress that questioning for investigation purposes involves gathering reliable evidence to use in court for prosecution. The Government is concerned to obtain evidence from a person in a manner which does not impinge on civil liberties through periods of long questioning or isolation. Consequently, this Act retains the existing investigatory safeguards in pt 1C of the *Crimes Act 1914* (Cth). These safeguards impose a maximum questioning time and requirements for magisterial approval of extensions beyond the initial four hours of questioning, allow time for rest and prescribe electronic recording of the interview. The interviewee also has the right to communicate with a legal practitioner, friend or relative, interpreter and a consular office, and retains the right to silence. These measures should enhance the reliability of the evidence that is gathered and the potential for a successful prosecution.

IV LAWS TO INCREASE OUR USE OF TECHNOLOGY

The Government has implemented or proposed three pieces of legislation to strengthen the use of technology in investigating possible terrorist activity. These laws are intended to aid law enforcement for serious crimes, such as terrorist acts.

Two pieces of legislation have strengthened the law governing the use of telecommunication interceptions. First, the *Telecommunications Interception Legislation Amendment Act 2002* (Cth) was enacted to allow law enforcement agencies to use intercepted material when investigating a range of criminal activities, including terrorism. Second, the *Telecommunications (Interception) Amendment Act 2004* (Cth), which came into effect on 28 April 2004, extends the availability of telecommunications interception warrants to additional serious offences, including further terrorism-related offences.

The Australian Parliament is currently considering the Surveillance Devices Bill 2004 (Cth). It seeks to consolidate, update and modernise the Commonwealth's surveillance device powers. The Bill aids law enforcement by allowing a wider range of devices to be used and making warrants available for a wider range of offences. It also enables senior law enforcement officers to authorise the use of surveillance devices in emergency circumstances.

X CONCLUSION

The ongoing threat of terrorism seriously threatens western liberal democracies. We must protect ourselves from attack and we must ensure the safety and security of our citizens. Our method of confronting this threat must

not compromise the integrity of our democratic traditions, processes and institutions. The Government's legislative response to terrorism has strengthened and reinforced the democratic processes so vital to both our national and human security. The safeguards in place demonstrate that the Government's response to this challenge is a measured one. We realise that, in the war on terror, our democratic traditions and processes are our greatest ally and our greatest strength. These traditions and processes are the tools that will help repel the terrorist threat and protect and preserve the rights that we value so highly.