Legislating for **security**

With federal parliament debating new laws to protect against terrorism, Nathan Hancock considers the issues involved with legislating for security.

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For most of the last century people have tried to define 'terrorism'. While there is no consensus, the core elements are likely to include: *acts or threats of violence or criminality motivated by political objectives with the intention of influencing the government or intimidating the public.*

Australia has had little or no experiences of terrorism. We have had experience with related issues such as politically motivated violence, organised crime and national security. We have enacted laws dealing with a range of related issues but there is really no specific anti-terrorism statute in Australia.

Following the '11 September Attacks' on the United States, Australia has been forced to consider the nature and extent of terrorist threats and the appropriate responses in Australia. In particular parliament is being drawn into a debate about whether it should go further and, for example, enact specific anti-terrorist laws.

In part the pressure for legislative action in Australia stems from recent counter terrorist measures in the United Kingdom and the United States. The key laws are the *Terrorism Act 2000* (UK) and the *PATRIOT Act of 2001* (US). Both allow terrorist organisations to be proscribed, making membership or support an offence and placing duties of disclosure on third parties. Both confer strong law enforcement powers, particularly in relation to search and seizure warrants.

Areas of particular interest have been preventive detention and particular terrorist offences. The UK has a broad power to detain whereas the US detention regime is largely limited to aliens. The UK has no specific terrorist offence whereas the US has strong, specific and extraterritorial terrorist offences.

As overseas comparisons show, anti-terrorist laws invariably deal with issues such as control over terrorist organisations, specific terrorist offences and enhanced law enforcement powers. But there is a broader set of laws dealing with intelligence gathering, preventive measures, crisis management and investigative/ enforcement powers.

Key Australian legislation includes:

- entry and deportation of aliens (*Migration Act 1958*);
- intelligence services agencies (*Intelligence Services Act 2001*; *Australian Security Intelligence Organisation Act 1979*);

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- proscribed organisations (*Crimes Act 1914*; *Charter of the United Nations Act 1945* (via UN Resolutions));
- suspect transactions (*Proceeds of Crime Act 1987*; *Financial Transaction Reports Act 1988*);
- investigation and enforcement (*Australian Federal Police Act 1979*; *National Crime Authority Act 1984*);
- criminal procedure (*Extradition Act 1988*; *Mutual Assistance in Criminal Matters Act 1987*); *and*
- specific offences (*Crimes (Foreign Incursions and Recruitment) Act 1978*; *Crimes (Hostages) Act 1989*; *Crimes (Biological Weapons) Act 1976*; *Crimes (Internationally Protected Persons) Act 1976*).

Key legislative measures proposed to date by the government include:

- control over terrorist finances;
- extraterritorial application of laws;
- questioning of non-suspects by ASIO before a 'prescribed authority';
- arrest of persons by state and federal police 'to protect the public'; and
- specific terrorist offences.

The first two proposals would make minor adjustments to a relatively extensive legislative regime. The remaining three proposals, however, may give rise to various questions.

For example, do we need a separate terrorist offence? Virtually all terrorist acts involve some offence known to the law. The key is investigation and prosecution. Those processes may be frustrated if, noting the *core elements* above, police and courts are also required to prove political motivation or intention to influence government.

Second, should ASIO be allowed to question persons and before whom should they be questioned? There are few precedents, although the National Crime Authority (NCA) does have powers to compel people to give evidence in hearings. Compulsory questioning is usually done after arrest, with a right of representation and before a judge.

Third, are there dangers in protective detention? Ordinarily, a person is not detained unless arrested under a judicial warrant. Also, generally, detention should be reasonably necessary. It should not be arbitrary. These principles are inherent in the common law and in international law. Yet there is no guarantee that the detention model proposed will have these features.

However, even before these specific questions arise, there may be more general questions asked about the power of the Commonwealth to take the proposed anti-terrorist measures

The Commonwealth may derive legislative power over terrorism from a mosaic of direct and indirect sources, including the powers in relation to defence, external affairs and corporations and the powers derived from its 'inherent right of self-protection' or its 'character and status as a national government'.

But the Australian Constitution does not give the parliament 'complete constitutional power' to deal with terrorism. It has no general power to deal with crime and, consequently, it may have limited power to deal with non-federal acts of terrorism.

Moreover, the Constitution does not give the government unlimited authority to determine what is in the interests of national security. Parliament and the executive will face scrutiny from the judiciary regarding the scope of their powers, the scope of judicial review and the integrity of the judicial process.

Questions about the scope of legislative and executive power and the assessment of national security are likely to be asked. But, so too will questions about whether the laws are necessary, sufficient or proportionate in relation to the particular threat facing Australia.

The major issue for parliament is that it may be enacting strong laws largely in response to overseas events. And while overseas measures may offer some suggested approaches, they should be placed in context. The United Kingdom laws had a very specific context: the conflict in Northern Ireland during which threats to civilian targets became a sometimes daily experience. Likewise, the United States laws were enacted in the aftermath of September 11.

Comparative approaches to counter-terrorism are a relevant part of the debate in Australia just as is a measured appreciation of the specific terrorist threat in Australia.

Arguably the way forward would be to approach 'terrorism' as if there were no precedents, simply lessons. A clear appreciation is needed of:

- the subject matter of the laws: what distinguishes terrorism from other offences or national security issues?;
- their purpose or object: are they to be proactive or reactive?; and
- the standards against which they will be measured in terms of:
  - intended effects: to what extent will the laws guarantee security?; and
  - incidental effects: to what extent will they infringe civil liberties?

Balancing liberty with safety is one of the strongest themes in anti-terrorism discourse. In theory, it is possible to achieve security objectives without threatening individual liberty and the protection of the rule of law. But there has been a tendency toward intractable conflict and sacrifice. The standard practice in the United Kingdom and the United States has been simply to acknowledge the complex competing interests of safety and liberty. Prime Minister John Howard recently said: "What I can promise you and promise the Australian public is that we will do everything we fairly and reasonably and practically can to minimise the risk consistent with not trampling on what are valuable rights of the Australian people."

Justice Michael Kirby (in a speech to the Law Council of Australia 32nd Legal Convention) also said: "Every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause. Always it is wise to keep our sense of proportion and to remember our civic traditions as the High Court Justices did in the *Communist Party Case* of 1951."

In that case the High Court rejected a law which attempted to outlaw the Australian Communist Party, based on parliament's view that it posed a threat to national security. The court held that the judiciary is to determine issues such as the nexus between a set of facts and the national security aspect of the defence power not the parliament. The 'civic tradition' is essentially that of adherence to the rule of law. ■

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The above Research Note (and other Parliamentary Library publications) can be found at: www.aph.gov.au/library

Counter terrorism inquiry

Legislation that would allow ASIO to detain and question people in order to prevent terrorist attacks is being reviewed by the parliamentary committee responsible for oversight of Australia's intelligence services. The Parliamentary Joint Committee on ASIO, ASIS and DSD* is examining the provisions of the Australian Security Legislation Amendment (Terrorism) Bill 2002.

Measures in the new legislation include custody and detention incommunicado for a period of up to 48 hours. Public submissions have been sought.

For more information

Visit: www.aph.gov.au/house/committee/pjcaad
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* ASIO: Australian Security Intelligence Organisation
ASIS: Australian Security Intelligence Service
DSD: Defence Signals Directorate