REFLECTIONS OF A FORMER INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR

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In the three years from April 2011 that I discharged the office of Independent National Security Legislation Monitor (the Monitor),[1] I was performing a role intended to complement that of the Inspector-General of Intelligence and Security.[2] This was complementary in the sense that, while there was no general administrative function concerning national security inflicted upon the Monitor, it was emphatically required of the Monitor to consider and report upon what might be called the merits and policy of Australia's counterterrorism laws.

There are three headings under which the statutory requirements of the office of the Monitor can be seen. They may be summarised as the appropriateness, the efficacy and, believe it or not, the necessity of those laws. I say 'believe it or not' because it is broadly accepted by the community, politicians and administrative lawyers that something had to be done in relation to Australia's role in the countering of terrorism, including that there should be a system of law addressing that issue. However, once that point of easy consensus has been reached, thereafter it seems to me that under these headings there is, and I hope will remain, lively dispute about the best way for our laws to address terrorism.

One thing, however, is clear and that is treaty obligations dominate this area of law-making in Australia. There are two main treaties to which I had particular regard while I was the Monitor and to which the statute establishing my office required me, perhaps unusually in this country, to pay explicit attention in my reports.

The first is the obvious *Charter of the United Nations*. This requires, in ch 7, mandatory compliance by member states with Security Council resolutions. United Nations Security Council Resolution No 1373 (2001), made just 17 days after the Twin Towers were attacked, is not the only but is the main source of our treaty obligations in countering terrorism. It is quite explicit and, indeed, repetitive in its terms. It requires member states, in order for the response to be of preventive value, to have criminal legislation which is enforced and which has appropriate procedures for enforcement.

The second treaty to which constant recourse was made by me as the Monitor and which, I am happy to say, is more often explicitly referred to in Parliament than it used to be is the *International Covenant on Civil and Political Rights* (ICCPR) which, not coincidentally, contains many of the maxims of fair process and individual dignity and equality before the law that have been derived, perhaps mythically, from the Magna Carta and have been thrashed out over the centuries after 1215. In particular, the ICCPR seeks to preserve from arbitrary executive treatment matters of conscience, such as are involved in cultural and religious identity and practice. They are matters which are at the very centre of any consideration of, on the one hand, the efficacy and, on the other hand, the fairness of our counterterrorism laws.

Against those general remarks by way of preamble, the following discussion contains some impressions produced by reflection upon three years in the office of the Monitor and topical events in relation to new counterterrorism proposals.

The first is that there is in this country some clarity of mission in relation to counterterrorism laws, but that clarity should and could be greatly improved. Greater clarity is easily available. Resolution 1373 requires terrorism to be treated as a matter of criminal law, not as a matter of military force. In other words, terrorists in our streets are to be arrested, tried and, if convicted, imprisoned. They are not to be shot in the streets, as presumably we would want our soldiers to do if our country were to be invaded by a foreign enemy. That is the first thing.

The second thing is that it follows that our conduct with respect to those we call terrorists ought to be regulated by reference, ultimately, to the ends of criminal justice. In criminal justice, generally, great effort is taken to prevent suspects from escaping the administration of justice and, if they have escaped, to bring them back. The process is called extradition. There is, therefore, confusion in any agenda that appears to wish terrorists to leave the country uncharged, to prevent them from coming back and therefore to prevent them from ever being tried. That is a very dangerous recent introduction. These factors are contrary to the highly desirable clarity of mission. Terrorism is treated by all members of the United Nations as a crime with international dimensions. Laws should therefore properly involve means of preventing suspects from leaving jurisdictions and, if they do, the laws should also provide means of bringing them back to the relevant jurisdiction to face criminal justice.

The other clarity of mission in relation to counterterrorism laws that it appears to me is also easily available and perhaps has been lost sight of recently is the secrecy that is desirable for police and security investigations. Remarkably, journalists only recently discovered that there are laws that punish them as well as the rest of us for revealing certain official secrets. I say 'remarkably' because the laws in relation to controlled operations are not so old as to be overlooked as a relic of fusty history. They were introduced in the wake of *Ridgeway v The Queen*[3] — a High Court decision which vindicated the notion that criminal prosecutions should not be founded upon evidence gathered by criminal conduct on the part of police officers. A controlled operation was a law-abiding and rule-of-law inspired response. It was the expedient and principled means by which what would otherwise have been criminal was permitted to be undertaken.

Controlled operations legislation permitted courageous undercover officers to gather evidence in order to facilitate the prosecution of those who could be called the real criminals. It should not be surprising that there are and have always been, as part of a legislative package, secrecy provisions which apply primarily to police officers and their colleagues but also to anybody else, lawyer or journalist, who has come across information of such operations. The experience of undercover officers being assassinated is not melodrama; it is not confined to television.

It is for these reasons that I found it remarkable that there has been a controversy loudly produced and continued by some newspapers and broadcasters concerning s 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth). This provision follows an established tradition which requires certain secrets to be kept for the safety of operatives who are engaged in pending operations as well as for the good of all of us who benefit from their obtaining of evidence.

Increasingly, I have come to feel that the best laws we have for countering terrorism are not the plethora of criminal offences that have been created — not a single one of them was strictly necessary to fill a gap — but the laws that provide funding for, and regulate, the surveillance of terrorist conduct. There is no point in having elaborate criminal laws that we report on each year to the United Nations, and which are one of the best systems in the world in terms of the criminalisation of terrorism, if we do not give to our agencies, the police and the Australian Security Intelligence Organisation (ASIO) in particular, the means to carry

out relevant surveillance. It need hardly be said that there is no abundance of people who have security clearance, are fluent in languages of various dialectal kinds and, of course, have a willingness to engage in what is not always the most glamorous work in the world. This conclusion, expressed in my first report[4] and my report four years later,[5] I continue to urge as a matter of policy for counterterrorist laws in this country.

Some recent law-making provokes consideration of the level of clarity that is desirable for counterterrorism in light of treaty obligations and the rule of law values which administrative lawyers represent. It concerns, in sardonic shorthand, the Allegiance to Australia Bill. Its full name is the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth). It is, I hope, a work in progress rather than fully accomplished and perfect as a piece of law to be made by our Parliament.[6]

The purpose of the legislation is found in proposed s 4 of the Bill. It is a provision which will be interesting to practitioners, whether as criminal defence counsel or as administrative lawyers seeking judicial review. It is said that the Bill is to be enacted because 'the Parliament recognises that Australian citizenship is a common bond'. The preamble goes on to say 'and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia'.

This is not mere preambular language, because some of those phrases are picked up in the operative language. There is a danger that the legislative technique engaged includes features that were denounced by the majority of the High Court in *Australian Communist Party v Commonwealth*:[7] namely, the attempt by the Commonwealth Parliament to ascribe a character to certain conduct — in that case, of the Australian Communist Party — to bring it within the defence power. In turn the character would inform the legislative competence of the Parliament to enact the legislation. The High Court responded: you may enact whatever you like concerning the danger of international communism, but the Court will decide whether facts exist that engage the legislative power.

If this Bill is enacted it will insert into the *Australian Citizenship Act 2007* (Cth) a s 33AA(1) which will read as follows:

> Subject to this section, a person … who is a national or citizen of a country other than Australia renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in conduct specified in subsection (2) …

That conduct includes terrorism. The words 'subject to' are important, since the section contains significant qualifications and extensions. The section is aimed at those with dual nationalities.

The provision does not involve any exercise of discretion of a kind that can be judicially reviewed. It does not provide for a ministerial act or decision, let alone a disallowable instrument or any kind of instrument which accomplishes this renunciation. Unfortunately, the concept of renunciation is being used in a way which is like a waiver of privilege — that is, it includes the actions of a person even with an opposite intention to that which Parliament prescribes. You may waive privilege by doing something which, as a matter of fairness, requires the privilege to be regarded as waived even though quite explicitly you intended not to waive it and said you were not waiving it. Similarly, you will renounce your Australian citizenship if you do something which has that statutory character even if your activities were on the side, or for the cause, of groups explicitly supported by Australia's current foreign policy.

The statutory character in question is to be satisfied simply by engaging in certain conduct. This is based in pt 5.3 of the Commonwealth Criminal Code[8] – Terrorism. The provisions in s 100.1 of the Code define 'terrorist act'. The second item in proposed s 33AA(2) of the Australian Citizenship Act is simply 'engaging in a terrorist act'. The definition of a terrorist act has nothing to do with fighting against Australia. Some terrorist activity will, of course, have that character, but the definition does not require it. If you are not engaged in military activities and are killing in a cause strongly approved by the Australian Government — for example, one against Islamic State (IS) — that will still be terrorism.

Whether, as a matter of fact, you have acted inconsistently with your allegiance to Australia by engaging in such conduct — namely, violent acts for political motive against IS — is, I suspect, extremely doubtful. I doubt that the drafting has fully taken into account the difficulty posed by inserting these descriptions. They are intended to enlist political support for the measure, but the effect is that terrorist conduct has added to it the description that it is acting inconsistently with allegiance to Australia. Other relevant definitions in relation to terrorism in pt 5.3 of the Code are used in other proposed sections of the Australian Citizenship Act.

We are told that, like the tree falling in the forest with nobody to hear it, a person renounces their Australian citizenship upon the conduct being committed. We also know that the Minister is to be given a discretion in the public interest to exempt a person from the effect of this provision. This is a salutary and beneficial notion. The renunciation may be reversed after the event. Administrative lawyers, however, will be aware that consideration of a possible reversal of that kind is a function which cannot be the subject of any meaningful mandamus and is not the subject of compulsory provision of reasons. That is a consequence of various provisions which are part of the pattern of this Bill. The same thing happens under the proposed s 35A of the Australian Citizenship Act in relation to convictions. There can be an exemption in the public interest. This is salutary, because it somewhat improves the clarity.

However, full clarity is presently lacking. It is a quality that should be brought into the zone of counterterrorist law. Australia's role in counterterrorism is inseparable from our conduct of foreign relations. The conduct of foreign relations requires our compliance with relevant statutes and our adherence, in particular, to the principles espoused by the United Nations. Importantly, they include what might be called the pacifist trend of those principles.

This area could thus be greatly improved by greater clarity in relation to foreign fighters. I think the expression 'foreign fighters' is intended to mean Australians fighting abroad. Unfortunately, it may mean people who are to be regarded as not Australian by reason of fighting abroad. There are likely to be Australians fighting abroad who are fighting for causes which are favourably viewed in the Cabinet room and, with respect, rightly so. Fighting against IS would appear at the moment to be a relatively unequivocal good (subject to basic objections to violence). But Australians abroad who are combating IS are unquestionably breaching the law unless they are our soldiers, sailors or airmen, they are with the Australian Defence Force or they are seconded to other friendly forces.

For these reasons a desirable element of clarity would be to recognise that these issues involve foreign relations and it would generally be inappropriate to subject such issues to judicial review. The conduct of our foreign relations ought to be the subject of an executive certificate for the purposes of both criminal and judicial review proceedings. It should be for the executive, unexaminably, to say that IS is against us and anyone who is opposed to IS is involved in a position that Australia supports.

In my last report I tried to suggest that there were too many certificates in our counterterrorist laws that had merely prima facie effect. Ironically, this gave judges — and, even worse,

juries — the capacity to second-guess decisions by the Australian executive concerning what was, for example, to be regarded as part of the military forces of a government. Equally, they could decide who was the government in the territory which was being contested.

So far, at least, none of that friendly advice has been accepted. I look forward to some interesting criminal and administrative law litigation about whether or not, for example, the person taking up arms to fight against IS has thereby renounced his or her allegiance to Australia.

Another aspect of international import is the critical role of international humanitarian law (IHL) governing the conduct of war and warlike activities. IHL is best known in the Geneva Conventions, as is thoroughly reflected in our Criminal Code's coverage of war crimes and crimes against humanity. Policy decisions have not yet been made or published, let alone promulgated by statute, that clearly distinguish the areas of war and counterterrorism. Political rhetoric already confuses the two. It would be better if legislation clarified it.

Endnotes

1 Under the *Independent National Security Legislation Monitor Act 2010* (Cth).
2 Under the *Inspector-General of Intelligence and Security Act 1986* (Cth).
3 (1995) 184 CLR 19.
4 Independent National Security Legislation Monitor, *Annual Report 2011* (2012).
5 Independent National Security Legislation Monitor, *Annual Report 2014* (2014).
6 The Bill was passed: *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth). The provisions discussed in this paper were included in the Act as passed.
7 (1951) 83 CLR 1.
8 The Code is the Schedule to the *Criminal Code Act 1995* (Cth). Proposed s 33AA(6) of the Australian Citizenship Act makes this link to the Code.