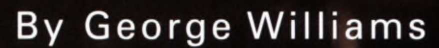

By George Williams

Ten years of ANTI-TERROR LAWS in Australia

Australia has experienced a turbulent 10 years of enacting laws to combat the threat of terrorism. Often enacted in great haste, the laws are stunning in scope and number. At the federal level alone, more than 50 new statutes, running to many hundreds of pages, have been passed. >>

The legislation has been of unprecedented reach, including laws providing for: restrictions on freedom of speech through new sedition offences and broader censorship rules; detention and questioning for up to a week by the Australian Security Intelligence Organisation (ASIO) of Australian citizens not suspected of any crime; detention without charge or trial for up to 14 days; the banning of organisations by executive decision; control orders that can enable house arrest for up to a year; and warrantless searches of private property by police officers. As these examples demonstrate, powers and sanctions once thought to lie outside the rules of a liberal democracy except during wartime have now become part of the Australian legal system.

Australia's anti-terror laws were enacted as a response to September 11 and subsequent terrorist attacks. As such, the laws were often portrayed as a temporary, emergency reaction to these attacks and the possibility that such indiscriminate violence might be repeated at home. However, it is now clear that Australia's anti-terror laws can no longer be cast as a transient, short-term legal response. This reflects the assessment of the Australian government and its agencies that terrorism remains a persistent threat to the community. The Australian National Counter-Terrorism Alert system has, since 2003, set its threat level at 'medium', indicating the assessment that a terrorist attack 'could' occur. In 2010, the Australian government reiterated that '[t]he threat of terrorism to Australia is real and enduring. It has become a persistent and permanent feature of Australia's security environment.'[1]

That Australia's anti-terror laws will seemingly be retained for the longer term has important implications. It means that such laws cannot be cast as a short-term aberration within the Australian legal system. Instead, they must be assessed on the basis that they can alter the way in which the legal system itself is understood. Such laws create new precedents, understandings, expectations and political conventions when it comes to the proper limits of government power and the role of the state in protecting human rights. Hence, despite the often exceptional nature of such laws, anti-terror measures are increasingly seen as normal rather than exceptional. This is due both to the passage of time and the fact that anti-terror strategies are now being copied in other areas of the law.

AUSTRALIA'S ANTI-TERROR LAWS

Australia has only a short history of enacting laws specifically aimed at the prevention of terrorism. In fact, before September 11, only the Northern Territory had such a law. In all other Australian jurisdictions, politically motivated violence was dealt with under the traditional criminal law. This all changed with the events of 11 September 2001. Those attacks provided a catalyst for the enactment of new laws, as mandated by Resolution 1373 of the United Nations Security Council.

Australia's response to September 11 was similar to that of many other countries. It emphasised the need to deviate from the ordinary criminal law – with its emphasis on punishment of individuals after the fact – to preventing terrorist acts from occurring in the first place. The result was an extraordinary bout of lawmaking that continues to challenge long-held assumptions about the proper limits of the law, particularly criminal law, and accepted understandings of the respective roles of the executive, parliament and the judiciary.

In the decade from 11 September 2001 to 11 September 2011, the Commonwealth Parliament enacted 54 pieces of anti-terror legislation. Forty-eight of these laws were enacted between 11 September 2001 and the fall of the Howard Liberal-National Party coalition government at the federal election on 24 November 2007 – an average of a new anti-terror statute every 6.7 weeks. Usually these laws attracted bipartisan agreement and were enacted with the support of the Labor opposition.

The pace at which anti-terror laws have been passed by the federal parliament has since slowed. During the time of the Rudd and Gillard governments from 24 November 2007 to 11 September 2011, only six anti-terror laws were passed. This is an average of a new anti-terror law every 32.8 weeks. However, these new laws have not significantly wound back the anti-terror regimes enacted under the Howard government. Indeed, those regimes remain almost completely intact. Instead, Acts passed since 2007 often clarified or remedied existing laws or provided further powers to government agencies.

The number of anti-terror laws passed by the federal parliament since September 11 is striking, and represents a more significant level of legislative output than even that of nations facing a higher level of threat from terrorism. In a comparative analysis of the anti-terror laws passed in a range of democratic nations over the past decade, Kent Roach has described Australia's response as being one of 'hyper-legislation' as a result of Australia getting 'caught up in the 9/11 effect'.[2] He found:

> 'Australia has exceeded the United Kingdom, the United States, and Canada in the sheer number of new anti-terrorism laws that it has enacted since 9/11 ... this degree of legislative activism is striking compared even to the United Kingdom's active agenda and much greater than the pace of legislation in the United States or Canada. Australia's hyper-legislation strained the ability of the parliamentary opposition and civil society to keep up with, let alone provide effective opposition to, the relentless legislative output.'[3]

AUSTRALIA NEEDED NEW ANTI-TERROR LAWS

The absence of national anti-terror laws in Australia before September 11 was not surprising. Apart from isolated incidents such as the 1978 bombing attack on the Commonwealth Heads of Government Regional Meeting at the Sydney Hilton Hotel, Australia had had little direct experience of terrorism. However, the rarity of such attacks was not itself a justification for the lack of law. Anti-terror laws should ideally be in place as a precursor to a possible attack, rather than enacted in haste after the event. Indeed, the worst possible time for enacting anti-terror laws can be

in the aftermath of a devastating terrorist attack. The fear and grief that such an event produces is hardly conducive to rational debate about the appropriate scope of such laws.

The attacks of September 11 provided the catalyst for Australia's first national anti-terror laws. Although it has been forcefully argued that such laws were not needed, primarily on the basis that terrorism could be dealt with adequately by the existing criminal law, that position is not sustainable. Australia needed new anti-terror laws to deal with specific aspects of the problem. For example, the nation needed a statutory framework directed at preventing the financing of terrorist acts overseas so as to ensure that Australians do not help to bring about such attacks.

The criminal law in place in 2001 was not sufficient for the task of preventing terrorism. It failed to adequately deal with matters such as terrorist organisations and was not adequately directed to the problem of prevention. It is not appropriate in the context of terrorism, as is often the case for other types of crime, to primarily apply the force of law once an act has been committed so as to bring the perpetrator to justice. Instead, given the potential for catastrophic damage and loss of life, intervention to prevent terrorism is justified at an earlier point in the chain of events that might lead to an attack. Such prevention can be seen as an act of political pragmatism given the pressing need for Australian governments to take action to protect the community from terrorism. It can also be seen as a measure designed to respect fundamental human rights, including the right to life and to live free of fear.

Anti-terror laws raise important questions as to how early the law should intervene to pin criminal responsibility on actions that might give rise to a terrorist attack. It is arguable that Australia's laws give rise to lengthy jail sentences for preparatory acts that are too far removed from the actual commission of an act of terrorism. However, this is not a persuasive argument against the existence of anti-terror laws per se, but for their recalibration to ensure that they criminalise actions that can be more realistically described as preparation for committing a terrorist act. Nor is the argument for anti-terror laws a case for departing from well-accepted principles of criminal law aimed at ensuring outcomes such as the right to a fair trial.

An effective prevention strategy requires laws that confer powers on agencies such as the Australian Federal Police and ASIO. These organisations require legal authorisation to collect information to head off an attack and the power to target not only individuals that might engage in terrorism but also groups or cells of potential terrorists. Again, the issue here is not so much one of justification, but of proportionality. Australia's law enforcement and intelligence agencies should have sufficient powers to dismantle and prevent threats to the community, but those powers should be carefully tailored to the level of the threat. They should also be subject to strict and transparent safeguards enforced by independent agencies.

Apart from the inadequacy of its existing national laws, Australia was justified in enacting new anti-terror laws after September 11 in fulfilment of its obligations as a member of the international community. For example, Resolution 1373 of the United Nations Security Council, adopted on 28 September 2001, determined that states shall 'take the necessary steps to prevent the commission of terrorist acts' by ensuring that 'terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts'.[4] This gave rise to a clear obligation on the part of Australia to enact laws directed at this problem. While Australia had laws in place that could have been used to *prosecute* individuals for acts of terrorism, it was unsustainable for Australia to argue that it already had sufficient laws in place directed at the *prevention* of terrorism.

Finally, Australia's anti-terror laws can be seen as having an important moral dimension. In an era punctuated by terrorist attacks starting with New York and Washington and followed by Bali, Madrid, London, Mumbai, Jakarta and elsewhere, it was appropriate that Australian law outlawed such forms of political violence. Enacting a specific crime of terrorism signalled that, as a society, Australia rejects the use of violence in the pursuit of a political, religious or ideological goal.

Australian governments and parliaments deserve credit for recognising that Australia required a body of law directed towards protecting the community from the threat of terrorism. These institutions are also correct in their assessment that such laws ought to be directed particularly to the prevention of such acts. In hindsight, our legal system >>

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To balance national security with people's rights, many democratic nations have provided legal protections for human rights. In Australia, we have relied on the willingness of political leaders to exercise good judgement and self-restraint when enacting anti-terror legislation.

before 9/11 reflected complacency about the potential for political violence in Australia and the region. On the other hand, the justification for new laws does not support legislation of every kind. Anti-terror laws must be carefully tailored to the problems posed by terrorism and must be proportionate, in the sense that they confer powers and sanctions consistent with the threat currently posed to the community.

DISPROPORTIONATE LAWS

Australia needed new anti-terror laws, but the laws actually enacted reflect major problems of process and political judgement. To a large extent, this was a result of many of the laws being enacted in haste as a reaction to catastrophic attacks overseas, especially those on 11 September 2001 and in London in 2005. It was also a result of laws being enacted without the checks and balances that normally come with strong national human rights protection. Australia is now the only democratic nation in the world without a national human rights law such as a human rights act or Bill of Rights. The absence of such a law has had a significant effect on the making and final content of Australia's anti-terror laws.

A difficulty in the anti-terror context in Australia over the past decade is that such laws have usually been made in reaction to overseas terrorist attacks that have provoked anger, fear and grief in the community. These have been magnified by the fact that a number of Australians have been killed in the attacks: 10 in the September 11 attacks; 88 in the 2002 Bali bombings; one in the 2005 London bombings and three in the 2009 Jakarta hotel bombings. It is not surprising that at such times people look to their political leaders for a strong response, including action that, because of its effect on democratic liberties, may prove to be disproportionate to the threat. This dynamic is well known, and was well stated by Alexander Hamilton in *The Federalist* (No 8) in the late 18th century:

> '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.'[5]

In such circumstances, effective protection of human rights can have an important role to play. Legally protected human rights standards can provide a yardstick against which to assess the making of new anti-terror laws. Even then, they may prove to be only of limited benefit in the face of what can be overwhelming political and community pressure in the aftermath of a terrorist attack for 'tough laws' that 'do whatever it takes' to stop a future terrorist attack. A more significant benefit of human rights protection may therefore be that it can provide a trigger and mechanism for post-enactment analysis. This is a means by which overbreadth in anti-terror laws in other democratic nations is now being reassessed, and sometimes remedied. Such a winding back may occur as a result of judicial decisions or through a fresh assessment by a government recognising the value and importance of protecting democratic freedoms.

The result in Australia is a body of anti-terror laws that undermines democratic freedoms to a greater extent than the laws of other comparable nations, including nations facing a more severe terrorist threat. For example, it would be unthinkable, if not constitutionally impossible, in nations such as the United States and Canada to restrict freedom of speech in the manner achieved by Australia's 2005 sedition laws. It would also not be possible to confer a power on a secret intelligence agency that could be used to detain and question non-suspect citizens.

A central challenge in enacting anti-terror laws is how best to ensure the security of the nation while also respecting the liberty of its people. In democratic nations, the answer is usually grounded in legal protections for human rights. In Australia, the answer is provided almost completely by the extent to which political leaders are willing to exercise good judgement and self-restraint in the enactment of new laws. This is not a check or balance that has proved effective in Australia when it comes to the enactment of anti-terror laws.

LAW IS ONLY PART OF THE ANSWER

Anti-terror laws have a role to play in the prevention of terrorist attacks. However, enacting such laws also comes with significant costs. In particular, the use of anti-terror laws can give rise to a sense of grievance in sections of the community if individuals and groups believe they have been unfairly ostracised or singled out. This sense of grievance can be magnified by the exceptional nature of the laws and what can be a heavy-handed government and media reaction to their use. It also reflects the fact that aspects of Australia's

anti-terror laws have been almost exclusively applied to members of the Muslim community and their organisations. For example, despite terrorism being a phenomenon across a large range of political ideologies and religions, 18 of the 19 organisations proscribed by the Australian government are in some way associated with Islamic goals or ideology.

The disproportionality of the laws can lead to similar reactions. Not only do overbearing laws have an undue impact on human rights, but also disproportionality can strike at the effectiveness of the laws by undermining social cohesion and support for Australia's anti-terror strategies. Thus, compromising human rights might have a negative effect on the capacity of the laws to prevent terrorism.

This is the dynamic that terrorists rely on. Terrorism as a political strategy requires nations to overreact in their attempts to prevent future attacks. After all, terrorist action cannot achieve its objectives through military might, and instead relies on its goals being assisted by the fear and reactions provoked within a state. Terrorism thus promotes a cycle whereby one attack feeds a reaction that contributes to bringing about a further attack. One way this can occur is by anti-terror laws causing resentment which acts to assist in the recruitment by terrorists. Such resentment may also mean that parts of the community are less likely to co-operate with the police and intelligence agencies seeking to prevent an attack.

Even where anti-terror laws are applied fairly and drafted appropriately, the exceptional nature of these laws means that there will always be a risk that they will produce a community counter-reaction. This is turn can contribute to radicalisation and the growth of domestic extremism. Justice Whealy of the NSW Supreme Court, himself experienced in overseeing terrorism trials, has made this point in stating that 'there is some danger that the imposition of stern sentences, no matter that it may be completely justified, has the capacity to inflame resentment and may encourage young Muslim men into an extremist position'. This risk can be especially evident in regard to the handing down of 20-year or more sentences for people involved only at the very early stages of preparing for what might or might not eventuate as a terrorist attack. As Justice Whealy concludes, the prevention of terrorism requires a broader range of strategies than new laws. Hence, his view is that 'western countries will have to give attention to the task of developing effective and reliable counter-radicalisation strategies'.[6]

Australia's federal governments have come relatively late to the realisation that anti-terror laws need to be complemented by a comprehensive national framework of community-based strategies. The federal government acknowledged the importance of such strategies in its 2010 Counter-terrorism White Paper and allocated $9.7 million over four years to addressing the issue of domestic violent extremism in its 2010 budget. A Countering Violent Extremism Taskforce has also been established within the federal Attorney-General's Department tasked with 'developing and implementing

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a sophisticated and co-ordinated national approach to countering violent extremism'. The aim is to 'reduce the potential for a homegrown terrorist attack through building a more resilient Australia that is less vulnerable to the processes of radicalisation and through assisting individuals to disengage from violent extremist influences'.[7] This reflects an assessment that there is a significant risk of 'homegrown' terrorism in Australia. As Federal Attorney-General, Robert McClelland, noted:

> 'Since 2000, there have been four major terrorist plots disrupted in Australia. To date, 38 individuals have been prosecuted as a result of counter-terrorism operations and 23 have been convicted. Significantly, 37 of the 38 people prosecuted are Australian citizens and 21 of the 38 were born in Australia.
>
> For this reason, the government has focused on the risk of vulnerable individuals in Australia becoming radicalised to the point of being willing to use violence.'[8]

These initiatives follow a mix of other strategies which have complemented the often blunt and coercive powers provided by anti-terror laws. Such measures go back to 2005, following the London bombings of that year, when the Council of Australian Governments held a special meeting on counter-terrorism at which it resolved to combat intolerance and violence within Australian Muslim communities by establishing a National Action Plan. That plan was released in July 2006, with its primary goal being to 'reinforce social cohesion, harmony and support the national security imperative in Australia by addressing extremism, the promotion of violence and intolerance, in response to the increased threat of global religious and political terrorism'.[9] Similar initiatives have continued under the federal Labor government's recent $77 million social inclusion and national security agenda. As part of this, the Australian Social Inclusion Board was established in May 2008, with one of its goals being to 'eliminat[e] the threats to security and harmony that arise from excluding groups in our society'.[10]

CONCLUSION

Australia needed to enact new anti-terror laws in the wake of the September 11 attacks. Those laws were required to ensure that the legal system offered protection to the community by seeking to prevent terrorist attacks from occurring. Passing new anti-terror laws also enabled Australia to live up to its international obligations, and signalled that as a nation Australia rejects such forms of political violence.

In the decade since September 11, the federal parliament has enacted 54 anti-terror laws, with many more made by the states and territories. This has given rise to a large and remarkable new body of legislation providing for powers and sanctions that were unthinkable before the 2001 attacks. Indeed, the rhetoric of a '*war* on terrorism' reflects the nature and severity of the laws enacted in response to the threat. While these laws were often cast as a transient response to an exceptional set of events, it is now clear that the greater body of this law will remain on the Australian statute book for the foreseeable future.

This poses a long-term challenge for the Australian legal system and Australian democracy. While new anti-terror laws were needed, the laws actually enacted diverge in too many respects from the laws that Australia should have achieved. This means that the nation has anti-terror laws which are not as effective as they should be in protecting the community from harm because their selective application and disproportionate impact can actually contribute to the growth of domestic extremism. A related cost is that the overbreadth of the laws may, over the longer term, erode the very democratic freedoms, including the rights to freedom of speech and liberty, that they are designed to protect. They bring this about not only through the direct impact of such laws, but also by creating new political and legal norms. These norms broaden the extent to which it is acceptable for Australian law to sanction extraordinary powers or outcomes, such as detention without charge or the silencing of speech.

Australia's new anti-terror laws expose structural problems with Australia's system of law. That system is dependent upon an effective parliamentary process and a culture of respect among political leaders when it comes to democratic values, rule-of-law principles and human rights. Anti-terror laws reveal how many of the bedrock principles of Australian democracy are actually only assumptions and conventions within the political system rather than hard legal rules that demand compliance. The laws reveal the capacity of politicians and parliaments to readily contravene these values and, in doing so, create new and problematic precedents for the making of other laws. This can happen because of weaknesses in political leadership and the fragile status of important values within Australian democracy. ■

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Notes: **1** Australian Government, *Counter-Terrorism White Paper: Securing Australia – Protecting Our Community* (2010) ii. **2** Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011), 309. **3** *Ibid*, 310. **4** SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001), Preamble and Article 2(e). **5** James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (Penguin, 1987), 112-13. **6** Justice Anthony Whealy, *Terrorism and the Right to a Fair Trial: Can the Law Stop Terrorism? A Comparative Analysis* (April 2010) 36 <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/whealy0410.pdf/$file/whealy0410.pdf>. **7** Attorney-General's Department, *Countering Violent Extremism* <www.ag.gov.au/cve>. **8** Robert McClelland, 'The 9/11 Decade' (Speech delivered at the United States Studies Centre, The University of Sydney, 7 June 2011). **9** Ministerial Council on Immigration and Multicultural Affairs, *A National Action Plan to Build on Social Cohesion, Harmony and Security* (2006) 6. **10** Australian Social Inclusion Board, *Social Inclusion in Australia: How Australia is Faring* (2010) 1.

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