

Responding to Terrorism without a Bill of Rights: The Australian Experience⁰

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Introduction

Terrorism is an attack on our most basic human rights. It can infringe our rights to life and personal security and our ability to live our lives free of fear. Our response to terrorism also raises important human rights issues. Should we protest that the Bali bombers received the death penalty in Indonesia? Should the death penalty be reintroduced into Australia for terrorism offences? Should the law provide for a “torture warrant” whereby a terrorist suspect might be tortured to gain information about a large-scale, imminent danger to the community? Should the police be able to detain terrorist suspects without charge for one or more days? Should ASIO, the Australian Security Intelligence Organisation, be able to detain journalists and other non-suspects to question them about what they might know about terrorism? Should governments be able to access emails without our knowledge?

Unfortunately, unlike other western nations, Australia must search for answers to these questions without the benefit of an agreed statement of our basic rights. This is made even more difficult when, after September 11, new laws have been made and old laws amended, often with great haste. These changes demonstrate how the Australian legal system, and underlying principles such as the rule of law and the liberty of the individual, can come under considerable strain in the aftermath of a terrorist attack. Bills of Rights can play an important role at such a time. They remind governments and communities of a society’s basic values and of the principles that might otherwise be compromised at a time of grief and fear. After new laws have been made, a Bill of Rights can also allow courts to assess the changes against human rights principles. This can provide a final check on laws that, with the benefit of hindsight, ought not to have been passed. The absence of such a check is one reason why, in some respects, Australian law after September 11 has restricted individual rights more than the equivalent regimes in Canada, the United Kingdom and the United States.

If Australia had a Bill of Rights, it would not mean that its response to terrorism must be timid or that new laws could not be justified. Responding to terrorism is also about protecting basic rights. Hence, human rights are not an absolute barrier to new anti-terrorism laws. Instead, in a Bill of Rights, they can serve as an anchor at times of crisis. After September 11, new laws on terrorism must strike a balance between national security, on the one hand, and important public values and fundamental freedoms on the other. We should not pass laws that undermine the very democratic freedoms we are seeking to protect from terrorism. After all, could it still be said that Australian’s live in a democratic society if we lack the most basic democratic rights? Clearly, the case for departing from accepted democratic rights must be fully justified and carefully scrutinised.

Australia's New Laws

Australia has enacted a host of new anti-terrorism laws. The federal government's legal response to September 11 was introduced into parliament in March 2002 in two packages of legislation. The first contained several new bills, the most important of which was the Security Legislation Amendment (Terrorism) Bill 2002. It sought to introduce a definition of "terrorist act" into federal law. Under section 100.1, a "terrorist act" was an act or threat done "with the intention of advancing a political, religious or ideological cause" that:

- (a) involves serious harm to a person;
- (b) involves serious damage to property;
- (c) endangers a person's life, other than the life of the person taking the action;
- (d) creates a serious risk to the health or safety of the public or a section of the public; or
- (e) seriously interferes with, seriously disrupts, or destroys, an electronic system.

The section provided an exception only for industrial action and *lawful* advocacy, protest or dissent.

This definition lacked a focus on the ultimate intent of a terrorist act – the very thing that distinguishes terrorist violence from other forms of violence. The definition was so wide that it would have criminalised many forms of unlawful civil protest (including where unlawful behaviour might be as minor as trespass onto land) in which people, property or electronic systems were harmed or damaged. The section could have extended to protest by farmers, unionists, students, environmentalists and online protesters. Moreover, a maximum penalty of "imprisonment for life" applied where a person engages in a terrorist act.

The Terrorism Bill failed to pass in this form and was substantially amended after a unanimous, and highly critical, report by the Senate Legal and Constitutional Committee. As finally enacted, the legislation contains a narrower definition of terrorism that includes the following element:

- the action is done or the threat is made with the intention of:
- (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.

Advocacy, protest, dissent or industrial action (whether lawful or not) is now excluded so long as it is not intended to, among other things, cause serious physical harm to a person or create a serious risk to the health or safety of the public.

In provisions seemingly modelled on the anti-communism legislation of the early 1950s, the Terrorism Bill also empowered the federal attorney-general to proscribe organisations, with the ban accompanied by a penalty of up to 25 years' imprisonment for their members and supporters. The bill would have

enabled the attorney-general to ban an organisation where, for example, it “has endangered, or is likely to endanger, the security or integrity of the Commonwealth or another country.” “Integrity” could include the geographical, or territorial, integrity of a nation, and hence this power could have been applied to proscribe an organisation that supported non-violent independence movements overseas. In recent years, a good example would have been bodies supporting independence for East Timor.

The power to ban organisations could have been exercised unilaterally by the attorney-general and not as part of a fair and accountable process. The attorney-general’s decision to ban would not have been subject to meaningful independent review. The separation of powers, including the notion that power should not be concentrated in any one arm of government, suggests instead that the decision to ban organisations should be made by an independent judge, or at least should be subject to strict scrutiny by a court. The dangers of not proceeding in this way were expressed by Justice Dixon 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.

As enacted, the Terrorism Bill did not grant the attorney-general a unilateral power to ban organisations. But the government continued to press for this power. After parliament passed specific legislation to ban the Hizballah, Hamas and Lashkar-e-Tayyiba organisations, it agreed to the *Criminal Code Amendment (Terrorist Organisations) Act 2004*. This Act gives the attorney-general the power to determine that a body is a terrorist organisation if “satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur).” While it would be difficult to challenge such a regulation in court, the law provides that it can be reviewed by a parliamentary committee and can be disallowed (that is, overturned) by parliament. Once an organisation is banned, its members, supporters and people who have provided training or been trained by it can be imprisoned if convicted by a court.

Australia’s second major package of anti-terrorism legislation contained only the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002. In its original form, the bill allowed adults and even children who were *not* terrorist suspects, but who may have useful information about terrorism, to be strip-searched and detained by ASIO for rolling two-day periods that could be extended indefinitely. The detainees could have been denied the opportunity to inform family members, their employer, or even a lawyer of their detention. There was no right to silence, and a failure to answer any question put by ASIO would have been punishable by five years in prison. The regime applied to all Australians; journalists, for example, would have been unable to protect the confidentiality of their sources. While the bill stated that detainees “must be treated with humanity and with respect for human dignity,” there was no penalty for ASIO officers who subjected detainees to cruel, inhuman or degrading treatment. In fact, the *Australian Security Intelligence Organisation Act 1979* provides that it is an offence (punishable by imprisonment for up to one year) to publish the identity of an ASIO officer.

The original ASIO bill was consistent with the Howard government's acquiescence in the indefinite detention without charge of David Hicks and Mamdouh Habib by the United States military at Guantanamo Bay in Cuba. But the bill went further: Australians could have been held not because it was suspected that they had engaged in terrorism or were likely to do so, but because they may have "substantially assist[ed] the collection of intelligence that is important in relation to a terrorism offence." It conferred greater powers of detention over *non-suspect* Australians than similar legislation in other nations such as Canada, the United Kingdom and the United States, where the focus is on the detention of *suspects*.

The original ASIO bill was one of the worst pieces of legislation ever introduced into the federal parliament. It would have conferred unprecedented new powers on a secret intelligence organisation – powers that could have been used in ten, twenty or even 50 years' time against the Australian people by an unscrupulous government. In its original form, the ASIO bill would not have been out of place in a former dictatorship like General Pinochet's Chile. Unfortunately, there are many examples of governments around the world seeking new powers in the pursuit of improved national security, only for those powers to be used against their own citizens or the political opponents of government. The experience of these nations should remind us that our own democratic processes and values must not be taken for granted and must be reaffirmed and respected.

The Parliamentary Joint Committee on ASIO unanimously found that the ASIO bill "would undermine key legal rights and erode the civil liberties that make Australia a leading democracy." With heavy amendment, the bill was finally passed fifteen months later after one of the longest and most bitter debates in Australian parliamentary history. At one point in a 27-hour debate in December 2002, the government and the Labor opposition each argued that the other party would wear the blame for any Australian blood spilt by a terrorist attack that occurred because of the deadlock on the bill.

As finally passed, the new Act applies only to people aged sixteen years and over. Detainees have access to a lawyer of their choice, although ASIO may request that access be denied to a specific lawyer where that lawyer poses a security risk. Australians may be questioned by ASIO for 24 hours over a one-week period. They must then be released, but can be questioned again if a new warrant can be justified by fresh information. A person can only be held and questioned under the Act when ordered by a judge, and the questioning itself will be before a retired judge. The questioning must be videotaped and the whole process will be subject to the ongoing scrutiny of the inspector-general of intelligence and security, who is effectively the ombudsman for ASIO. With these protections in the hands of independent people, some of the worst excesses of the original bill were blunted. But even in this form, the ASIO bill can be justified only as a temporary response to the threat posed by terrorism, and is akin to the one-off laws passed in Australia during the first and second world wars. Because the final legislation contains a sunset clause, which means that it will lapse after three years unless it is re-enacted, it does not create a long-term precedent for law enforcement and intelligence gathering in Australia.

The round of anti-terrorism legislation did not end with the passage of the Terrorism and ASIO legislation. In 2003, an Act was passed to increase the time allowed for the questioning of non-suspects by ASIO from 24 to 48 hours when an interpreter is involved. Another change made it an offence, for

two years after someone has been detained, to disclose operational information about the detention of that person under the Act. Even if the information is provided as part of a media story on the detention regime, the penalty for doing so is a maximum of five years' imprisonment. Another bill, the Anti-Terrorism Bill 2004, would enable terrorist suspects to be questioned without charge by the police for 24 hours, double the maximum time currently allowed for other criminal suspects.

Conclusion

The challenge is how best to ensure the security of the nation while also respecting the rights of its people. In other nations the answer is grounded in a domestic Bill of Rights. These instruments not only set out the fundamental rights of citizens. They also establish the means of balancing those rights against other competing demands such as national security. Without a Bill of Rights, Australia is alone among western nations in lacking both a list of protected rights and a formal process for determining whether rights have been unduly infringed by laws passed during the war on terrorism.

This means that Australian parliaments can depart from fundamental rights by passing a new law if it operates within constitutional limits and is clear in its 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, and the contours of debate may match the majoritarian pressures of political life rather than the principles and values on which our democracy depends. The only check on the power of parliaments or governments derives from political debate and the goodwill of our political leadership. This is not a safeguard that is regarded as acceptable or sufficient in other comparable nations.

The lack of a domestic reference point for basic rights in Australia means that it is difficult to determine the extent to which rights and the rule of law should be sacrificed – if at all – in the name of national security and in the fight against terrorism. As in many other debates, the absence of a domestic Bill of Rights means that Australians turn to international law. The United Nations has been a focus of debate and activity in responding to terrorism, and a number of international instruments are important. Resolution 1373 of the UN Security Council, made on 28 September 2001, determines that governments shall “Prevent and suppress the financing of terrorist acts” and “Take the necessary steps to prevent the commission of terrorist acts.” Other instruments, such as the International Covenant on Civil and Political Rights, 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. While international law again provides useful guidance, is not part of Australian law. Without an Australian statement of rights that has political acceptance and legal force, we lack the tool required to navigate our way through the current war on terror while maintaining our basic rights.

About the author

George Williams is the Anthony Mason Professor and Director of the Gilbert + Tobin Centre of Public Law at the Faculty of Law, University of New South Wales. He is the author of a number of books including *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (University of New South Wales Press: Sydney, 2004) and is an editor of *The Oxford Companion to the High Court of Australia* (Oxford University Press: Melbourne, 2001). George practises as a barrister and has appeared in the High Court of Australia in cases raising issues such as freedom of communication, freedom from racial discrimination and the separation of powers. In 2001 he appeared in the Court of Appeal of Fiji in *Fiji v Prasad*, in which the 1997 Fijian Constitution was upheld. Email: George Williams

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⁰ This article is developed from George Williams, **The Case for an Australian Bill of Rights: Freedom in the War on Terror**, University of New South Wales Press: Sydney, 2004).