

AUSTRALIAN TERROR LAWS: AN HISTORICAL CRITIQUE¹
NATIONAL FORUM: THE WAR ON TERRORISM AND THE RULE OF LAW
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In the 2 years since the tragic events in America of September 11 2001, we have seen the war on terrorism become “one of the defining conflicts of the early 21st century”² internationally and ‘counter-terrorism’ become the spearhead for a resurgence and expansion in security practice nationally.³ In this post-September 11 security environment, many western nations have enacted dramatic and unprecedented domestic counter-terrorism measures to deal with the threat of international terrorism. And Australia has been no exception.

In 2002 the Australian parliament passed legislation which introduced crimes of ‘terrorism’ for the first time in federal law, we have debated and ultimately rejected a proposal to allow the Attorney-General the power to proscribe or ban, on his own determination, terrorist organisations, and have instead introduced an attenuated form allowing for the proscription of organisations listed by the United Nations as ‘terrorist organisations’. Finally, of most recent and continuing controversy, in June this year the Australian parliament passed amendments to the Asio Act which would allow Asio, under warrant, to detain for up to 7 days and interrogate for up to 24 hours within that 7 day period, Australians not suspected of any involvement in a criminal offence but who may have information relating to terrorism.

Nevertheless, Australia remains the only liberal-democratic nation to have proposed the detention and interrogation of non-suspects in this way. You can see why the Joint Parliamentary Committee which examined the Bill, described it in its original form as ‘one of the most controversial pieces of legislation considered by the Parliament in recent times’ and one ‘[which] would undermine key legal rights and erode the civil liberties that make Australia a leading democracy’.⁴

There is no doubt that these counter-terrorism measures represent the greatest contemporary challenge to relations between the arms of government (the judiciary, the parliament and the Executive) and to long established civil and political rights since the liberal Prime Minister Robert Menzies’ several failed attempts, through three spheres of governance, to pass the Communist Party Dissolution Bill. First through legislation, in the face of a successful High Court challenge and then through referendum in 1951.

¹ This paper draws on the author’s recently published *Terror Laws: ASIO, counter-terrorism and the threat to democracy* UNSW Press, Sydney, 2003

² Michaelson, C. ‘International human rights on trial – the United Kingdom’s and Australia’s legal response to 9/11’ *Sydney Law Review* 2003 Vol.25 pp275-304; p.276

³ Steinberg, J. ‘Counter terrorism: a new organizing principle for American national security?’ *Brookings Review* Summer 2002 Vol.20 No.3 pp.4-8

⁴ Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organization Legislation Amendment (Terrorism) Bill 2002*, May 2002, Report 1, foreword.

In the debate which surrounded the Communist Party Dissolution Act's provisions, then and since, what was highlighted was not so much the potential for an Executive abuse of a power to outlaw political organisations in this way, but that such a power was *itself* an abuse through its disavowal of judicial review in this process, one which endangered the often fragile relations between the arms of government.⁵ Menzies view, expressed following the High Court's disallowance of the Act, was that, "the judgment of the relationship between [this] law and national defence and security ... is to be that of this Parliament and of no outside body".⁶ Justice Williams perhaps had this in mind when he queried during argument, "Does this mean that Parliament could say that the existence of John Smith, an ordinary citizen, is a menace to the security of Australia and require that he be shot at dawn?".

These concerns to maintain judicial protections and the trial process are particularly clear in the historic judgments of the 6 majority High Court justices in this case in 1951. It is a decision which asserted the finality of the axiom of judicial review which permeates our Constitution and which, in doing so, protects all of us from the arbitrary abuse of executive power. It was, as Professor George Winterton has described it, "truly an 'epochal' decision, probably the most important ever rendered by the Court".⁷ The central issues raised throughout that intriguing struggle over the Communist Party Dissolution Act, "about the limits of legislative and executive power and supremacy of the judiciary in deciding such question",⁸ also remain at the heart of the current debate over national security needs and democratic practice.

And yet, despite the obvious political parallels between arguments for enhanced and exceptional security powers during the Cold war, and those of the current day, the widespread community concern over the passage of the proscription provisions in particular, has not been matched by a widespread public debate. What this silence represents is the inevitability, the necessity, of national security imperatives. That, in the aftermath of September 11, the interests of national security have been unassailable and arguments to the contrary are largely seen as off the scale and scarcely worth reporting.

The current counter-terrorism response rests on a universalised notion of threat rather than any specific threat, in this way the justification for extreme measures is shifted away from the present and into the fear of an unknown future. In this intellectual fortress in which anything is possible and therefore we must guard against everything, arguments for an expanded security sector are no longer based in present day realities but in the threat of the unknown, and debate on these terms becomes difficult, if not impossible. The current security environment neither encourages such debate nor would willingly accept its conclusions.

⁵ See Hocking, J. 'Robert Menzies' 'fundamental authoritarianism': The 1951 Communist Party Dissolution referendum 1951' in Love, P. & Strangio, P. *Arguing the Cold War* Vulgar Press. Melbourne. 2001

⁶ Menzies, R. *Hansard* House of Representatives 5 July 1951 :1080

⁷ Winterton, G. 'The significance of the *Communist Party* case' *Melbourne University Law Review* Vol.18 June 1992 :630-658; :653

⁸ Galligan, B. *Politics of the High Court* University of Queensland Press. Brisbane. 1987 :203

Nevertheless, there is now the means for such detailed debate and consideration to take place particularly in relation to the Asio Act. Thanks to substantial Senate amendment of the original Asio Bill, there is now a 3 year sunset clause which is preceded by a process of review of the Act's provisions and enforcement. Several key features of the debate that we have not had, remain and ought now to be addressed: what has the Australian experience of terrorism been; what is the level of terrorist threat in Australia; what are Australia's existing powers and structures to counter terrorism and are they adequate to meet this level of threat? These questions mirror the legal concerns for the introduction of exceptional measures, or for the derogation from established criminal justice procedures, that such measures be proportional, appropriate and proximate. These requirements need to be considered politically as much as legally before we determine on a path which takes us into the uncharted terrain, for Australia, of introducing exceptional powers to deal with terrorism.

In a sense we are witnessing what might be called a 'second wave' of counter-terrorism in Australia, one which further develops a network and structure of counter-terrorism first set in place in the mid-1970s and cemented following the Hilton Hotel bombing of 1978. Two distinct models of domestic counter-terrorism in liberal democratic states can be identified in this first wave of counter-terrorism: a militarised strategy which draws clearly from counter-insurgency theory and practice and which treats terrorism as a war-like domestic insurgency; and secondly a counter-terrorism structure developed within the existing criminal justice system and which treats terrorism as essentially a peace-time, criminal, matter.⁹

In the earlier development of counter-terrorism, Australia drew heavily on the British model, despite clear differences in the nature and extent of political violence. The British model in turn has been essentially a militarised one, reflecting its focus on Northern Ireland, drawing clearly on five main aspects of counter-insurgency theory and practice: the use of exceptional legislative measures; the maintenance of vast intelligence collections; the development of pre-emptive controls on political activity; military involvement in civil disturbances and the development of a strategy of media management in times of crisis.¹⁰

The exception to the wholesale adaptation of this model in Australia's counter-terrorism strategy however had been, to date, in our continued use of the existing criminal law against terrorist offences. Unlike Britain, Australia's broadly counter-insurgency based approach has retained this important element of the 'criminal justice model' and, until the events of September 11 2001, had not adopted the particularly problematic use of

⁹ Hocking, J. *Beyond Terrorism: the Development of the Australian Security State* Sydney: Allen & Unwin, 1993. Crelin (1998) similarly terms these a criminal justice model and a war model, 'The discourse and practice of counter-terrorism in liberal democracies' *Australian Journal of Politics and History* vol44 no.3 1998 pp.389-413

¹⁰ Hocking, J. *Beyond Terrorism: the Development of the Australian Security State* Sydney: Allen & Unwin, 1993. P.21

‘exceptional powers’.¹¹ The recent developments in domestic counter-terrorism differ from the first wave of the 1970s in this critical respect. What has now been utilised for the first time in Australia’s counter-terrorism procedures is the introduction of the ‘exceptional’, legislative provisions which would ordinarily be neither proposed nor accepted within the existing criminal justice system.

There are two aspects in particular that currently hold sway: that we now face a new level of threat of terrorism and that civil and political liberties must ‘bend’ to allow for a similarly ‘new’ response. Only last month the Prime Minister reiterated the apparently unproblematic view; “the events of the 11th of September ... changed forever the world in which we live. And it changed the way in which we must ... respond”. This latter point, the argued need for a new, changed response to terrorism, leads inevitably to the notion of ‘balance’ between national security and legal protections, a view which too readily suggests that civil and political rights are to be imperceptibly wound back to accommodate the over-arching needs of national security. This argued need for balancing apparently competing interests has become a dominant theme in recent developments in counter-terrorism.

Historically however, there is nothing new either in this view, nor in its invocation during times of perceived crisis. The interests of ‘national security’ have long been seen as generating critical tensions for values which are fundamental to the political and legal systems of contemporary liberal democracies. It can be seen also in the growing view politically and legally that “the maintenance of national security underpins and is the foundation of all our civil liberties”, rather than the other way around.¹² Every expansion in security reach has been accompanied by the claim that competing needs in national security considerations – the need for secrecy, for protection of sources, the urgency of conviction for instance - require a less than strict observance of what would otherwise be seen as untouchable, indeed elemental, political and civil rights. It is view which the new Attorney-General Philip Ruddock reiterated just last week in his comment that; “the unavoidable fact is that any tightening of security arrangements does involve some diminution of rights”.¹³

It is, in my view, a flawed equation. And it is the dichotomy suggested in this popular view, the argued trade-off between liberty and security, that lies at the heart of what has been described as the “startling surrender of fundamental democratic principles” in the heightened security environment of post-September 11. National security and individual liberties, far from being in competition with one another in a simplistic zero-sum game, are in fact mutually reinforcing;

¹¹ Crelinsten, R. ‘The Discourse and Practice of Counter-Terrorism in Liberal Democracies’ *Australian Journal of Politics and History* Vol.44 No.3 1998 pp. 389-413.p.390.

¹² Lord Donaldson, *R. v. Secretary of State ex. p. Cheblak* in Lustgarten, L. & Lee, L. *In from the cold: National Security and parliamentary democracy* Oxford University Press. Oxford. 1994 p.9

¹³ Ruddock, The. Hon. Philip ‘Opening Address’ 12th annual conference Australian Institute of Professional intelligence Officers. Canberra. 22 October 2003

*“We guarantee the right to confront one’s accusers ... not only as an element of human dignity but also because cross-examination exposes lies and forces the government to continue looking until the truly guilty party is found. ... We protect freedom of speech not only because it allows room for personal self-expression, but also because it promotes the stability that comes from the availability of channels for dissent and peaceful change ... surrender of freedom in the name of fighting terror is not only a constitutional tragedy, it is also likely to be ineffective and worse, counterproductive”.*¹⁴

Rather than seeing national security and democracy as being in perpetual friction (as if each exists somehow independently yet in tension with the other), political and civil rights and a robust democratic process are the key elements in the maintenance of national security itself.¹⁵

If we consider the core requirements of contemporary democratic practice to be, “responsible government, the rule of law, and freedom of legitimate political dissent”, then the dangers to civil and political rights that attach to the arbitrary use of power and in particular the arbitrary and expansive use of Executive power, are clear.¹⁶ A democratic state, underpinned by these fundamental principles, cannot compromise those principles without at the same time also compromising the democratic nature of the state itself. These three requirements, responsible government, the rule of law, and freedom of legitimate political dissent, are indispensable, the sine qua non of democratic states, and it is because of their non-negotiability that the preservation of rights and liberties through steadfast constitutionalism can never undermine security but will constitute the very means of sustaining it. In this view, democracy “is not limited by the rule of law but rather is defined by it”.¹⁷

Taken overall the current revised security powers establish a new orthodoxy in Asio’s activities, moving it clearly into the arena of ‘security policing’, merging its activities with those of domestic policing. It also marks the closure in Asio’s gradual shift towards a universalised strategy of pre-emptive surveillance of an ever-present internal ‘enemy’, an end to the political struggle waged really since Asio was established in 1949 but particularly during the 1970s, to maintain a more focused, more democratic, a transparent and accountable notion of national security.

Yet the need for such ‘formidable powers’ has been questioned by one of Australia’s most experienced security officers. The former senior security adviser to the Defence and Attorney-General’s departments, Allan Behm, has expressed grave concerns about such a dramatic expansion in Asio’s already extensive powers and over the removal of fundamental rights such as independent legal advice during detention and the capacity to

¹⁴ Dempsey, J. ‘Civil liberties in a time of crisis’ *Human Rights* Vol.29 No.1 Winter 2002 pp. 8-10

¹⁵ See the discussion in Lustgarten, L. & Lee, L. *In from the cold: National Security and parliamentary democracy* Oxford University Press. Oxford. 1994

¹⁶ Thacker Committee in Lee, H.P.; Hanks, P. & Moribito, V. *National Security* Law Book Company. Sydney. 1995 p.15p.15

¹⁷ Abbott, T. ‘The world since September 11’ Address to the first plenary session of the Australian Academy of Forensic Sciences 13 February 2002. P.3

detain without charge. Behm has also raised the question of whether Asio's existing 'special powers' were already adequate to meet this current security environment, arguing that; "Asio has enough in the way of powers to meet the current terrorist threat ... What it needs to do is extend itself fully within those current rights".¹⁸

The enactment of Asio's new powers was the result of a protracted 18 month period of negotiation, debate and compromise. Its eventual form reflected some degree of compromise over the major concerns expressed by several parliamentary inquiries into its original

provisions, widespread community debate and the hard-won political compromises fought out on the floor of the parliament. Not everyone was happy with the Act's eventual form, some aspects of the original Bill remained as unduly oppressive as they had been when the Parliamentary Joint Committee on Asio, Asis and DSD described it as "undermining key legal rights and eroding civil liberties". Other aspects however, such as the Bill's original proposal that detention be incommunicado, that no legal representation be permitted during detention and that detention and interrogation include children as young as 10, had been improved. The process of parliamentary scrutiny and public consultation had been significant and extensive and the final Bill was one which the Opposition, whose support was crucial to the Bill's passage, felt it could support.

The recent claims of the Attorney-General, that Asio needs even stronger powers, disregard this parliamentary process and reflect an impatience with the workings of democracy itself. It suggests a determination on the part of the government not only to expand the power of the Executive through the powers already given to Asio but to supercede carefully constructed parliamentary compromises in order to achieve this goal. In a sense the substance of the Asio legislation has been matched by executive form. This is a particularly disconcerting aspect of the lengthy and continuing debate around the security legislation. It is indicative of a mode of government which sees in parliamentary compromise only an obstacle to governmental dominance rather than the essential workings of democratic practice.

It can be seen also in the process of the proscription legislation. In a similar trajectory the government, never happy with the Parliament's removal of the minister's power to proscribe and its replacement with a United Nations listing process, has proposed an amendment to the Act as negotiated through the Parliament. The proposal, which is still before the Parliament, would simply remove the United Nations Security Council basis for listing terrorist organisations in Australia and replace it with the ministerial discretion originally proposed. It would overturn, in other words, the negotiated Parliamentary compromise over proscription and simply reinstate the original proposal for ministerial discretion. The Greens Senator Bob Brown strongly criticised this aspect of the mode of government, in the final hours of the parliamentary session late last year following the Senate's initial rejection of the Asio Bill: "When ... the Prime Minister and the government won't brook amendments, then it is democracy itself that is being questioned by the PM".¹⁹

¹⁸ in Schubert, M. 'Questions of fear and safety' *The Australian* 16 December 2002

¹⁹ Senator Bob Brown *Hansard*. Senate. 13 December 2002

Nor is the Asio Act an isolated example of the growing dominance of the interests of security over individual rights. The Act continues the pattern established elsewhere in the government's counter-terrorism legislative package of a dramatic expansion of executive power and a significant recasting of the balance between the Executive and the judiciary. It is also entirely consistent with the government's reluctance to intervene in the detention without charge and without access to lawyers of the Australian citizens Mamdouh Habib and David Hicks at Guantanamo Bay by American military authorities. The Labor member Daryl Melham, an early outspoken critic of the Asio legislation, suggested that such a proposal for domestic detention was more in keeping with the authoritarian practices of other countries; "This isn't Pinochet's Chile. This is Australia 2002. We don't pinch our citizens off the street, keep them incommunicado".²⁰

At issue in all of these aspects of the corrosive effects of an expansive counter-terrorism national security structure, beyond their more quantifiable effects on democratic, judicial and governmental institutions, is the effect of these developments also on political behaviour, their impact on citizens' ability, willingness and freedom to speak openly, to debate and to agitate. In his minority judgment in the *Church of Scientology* case in 1982 Justice Lionel Murphy reflected on the need for adequate legislative control and oversight of security organisations, recognising in particular that the practice of political surveillance in the civic arena and the public awareness of this practice, generates what he termed; "a climate of apprehension and an inhibition of lawful political activity even at the highest levels of government ... Experience thus shows [Murphy continued] that for a free society to exist intelligence organizations must be subject to administrative supervision and amenable to legal process".²¹

Justice Dixon had also noted precisely this tendency of the state to protect itself through an executive superseding of democratic institutional power, in his powerful judgment in the Communist Party Dissolution case in 1951; "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."²²

The perception expressed throughout the current legislative developments in counter-terrorism, is that issues of national security should not be dealt with by the courts, that it is for ministers not judges, to determine what the interests of national security require. This is a critical issue in any attempt to reconcile national security needs with democratic principles. It gets to the very heart of the concept of the rule of law, itself a fundamental tenet of liberal democratic practice and a protection from the arbitrary use of the State's coercive powers; that no individual, no organisation, should be beyond the reach of the

²⁰ Daryl Melham in Crabb, A. 'Labor blamed for holiday peril as Asio Bill fails' *The Age* 14 December 2002

²¹ Justice Lionel Murphy *Church of Scientology Inc. v. Woodward* (1982) in Jean Ely and Ron Ely, *Lionel Murphy: The Rule of Law* Sydney: Akron Press, 1986 pp. 71-78.

²² Australian Communist Party v. Commonwealth *Commonwealth Law Reports* 83 1951 :1 Dixon, J. :187-8

law and conversely that all citizens have the right to its protections, equally, as a consequence of judicial determination through the courts.²³

Asio's detention power is a perfect example of contemporary challenge to the rule of law coming from the actions of the State itself. Heinrich described it as displaying "what can be dubbed the 'fight fire with fire' phenomenon. That is, the State responding to lawlessness by acting also with characteristics of lawlessness"²⁴

The struggle over the state's perceived need for broader security power highlights the need to protect our basic legal and political rights in the face of these revised security priorities. Within 3 months of September 11 the abrogation of rights and legal protections, the erosion of established procedures in the name of countering terrorism, had become so pronounced that the United Nations Commission on Human Rights expressed deep concern over what it called, this 'reckless approach towards human life and liberty' which would only weaken counter-terrorism and, ultimately, democracy itself.

These counter-terrorism developments raise concerns also for the pre-emptive control of political conflict and dissent, which may or may not protect individual citizens but which certainly protect the state itself. They presuppose that democracy is infinitely divisible, that by suspending aspects of the rule of law for whole classes of people we do not equally remove them from society as a whole. History shows us that we ignore at our peril the adage that, "When the rights of any are sacrificed, the rights of none are safe".²⁵

²³ See Heinrich's paraphrasing of A.V. Dicey's 3 senses of the rule of law in Heinrich, R. 'The least dangerous profession? Lawyers and the rule of law in the Commonwealth today' Closing Address to the Thirteenth Commonwealth Law Conference. Melbourne. 17 April 2002

²⁴ Heinrich, R. 'The least dangerous profession? Lawyers and the rule of law in the Commonwealth today' Closing Address to the Thirteenth Commonwealth Law Conference. Melbourne. 17 April 2002

²⁵ ACLU Board of Directors (1939) in Romero, 'In defense of liberty at a time of national emergency' *Human Rights* vol.29 no.1 2003