
[Print this page](#)

Overseas terrorism laws can't simply be transplanted

How will the planned counter-terrorism laws work? Ben Saul investigates

16sep05

WHEN faced with terrorism, it is tempting for a community to legislate threats out of existence.

The London July bombings exposed the vulnerability of liberal democracies to terrorism, and motivated our own political leaders to reconsider Australia's security.

A striking feature of the legislative proposals announced by John Howard is the extent to which they borrow ideas from other countries, particularly Britain.

While there is nothing wrong with learning from others, there is a danger in selectively transplanting laws from legal systems which are very different to our own. Despite inheriting British common law, Australia's legal system has diverged from Britain's.

Since the British Human Rights Act of 1998, human rights principles now permeate British law in ways unknown in Australia.

British courts can independently supervise the impact of terrorism laws on the rights and freedoms of people in Britain -- whether citizens or foreigners. In 2004, the House of Lords found that the indefinite detention of suspected terrorists was discriminatory because it targeted only foreigners.

Human rights law doesn't prevent effective responses to terrorism, since it allows rights to be limited or suspended if necessary to protect other social values -- including security.

British courts accept the Government's view that terrorism is a threat that justifies temporarily suspending some human rights. At the same time, human rights laws ensure that governments are accountable for restrictions placed on rights.

It provides a principled framework for evaluating terror laws, ensuring they are strictly necessary and proportionate to the threat. Without similar protections in Australia, parliament should proceed carefully before agreeing to further terrorism laws.

Some proposals are reasonable, such as strengthening terror financing laws and offences against aviation, and better screening of citizenship applications. In contrast, it seems hard to justify intrusive control orders, preventive detention, extended time limits on ASIO warrants, stop-and-search powers, and higher penalties for giving false information to ASIO.

The Australian definition of terrorism is broad compared with the definition in the European Union, and attempts to broaden it further cannot be supported, particularly since it triggers exceptional police and security powers of investigation and detention. Australia has already given ASIO wide powers to question and detain for up to seven days those who

are not even terror suspects.

It is difficult to see how the proposed power of preventive detention is necessary, unless the intention is to randomly detain whole groups of people, such as Muslims, in the absence of reasonable suspicion or evidence of terrorism.

The proposals for federal preventive detention for 48 hours in a "terrorism situation", and preventive detention for up to 14 days in the states and territories, are seriously flawed.

The Government claims that they are based on British laws, but that claim misrepresents the British position. Police in Britain can detain terrorist suspects for up to 14 days in exceptional cases, but they have no power of preventative detention in a more general "terrorist situation". If the proposed control orders are based on the British law adopted this year, that is also a cause for concern. The British law only allows courts to review a control order if it is "obviously flawed", signalling that the courts are expected to defer to the Government on security matters.

The PM says that the proposals reflect world's best practice. If the Government is really committed to pursuing that concept, then it has every reason to adopt a national bill of rights -- as in Britain. An Australian Human Rights Act would ensure there is judicial scrutiny of counter-terrorism laws, ensure that rights and security do not tip dangerously out of balance.

Ben Saul is director of the Bill of Rights project at the Gilbert + Tobin Centre for Public Law, UNSW.