

AUSTRALIAN VALUES AND THE WAR AGAINST TERRORISM

GEORGE WILLIAMS*

I INTRODUCTION

Terrorism is a threat to our national and personal security. It is also a challenge for our legal system. After the terrorist attack that destroyed the World Trade Center on 11 September 2001 and the terrorist attack in Bali on 12 October 2002, national laws are needed to better protect the Australian people. Such laws can bolster community confidence and fulfill Australia's international obligations. Before September 2001, only the Northern Territory had laws dealing specifically with terrorism.¹

The Federal Government's legal response to September 11 was introduced into Parliament in March 2002 as two packages of legislation. The first was the Security Legislation Amendment (Terrorism) Bill 2002 (Cth) ('Terrorism Bill'), which was enacted after being substantially amended to meet a number of concerns. It creates several new offences, including life imprisonment for engaging in or planning a terrorist act.² Further penalties apply for providing or receiving terrorist training³ and for involvement with terrorist organisations.⁴ The new law means that from 5 July 2002 onwards terrorists and their supporters can be arrested, tried, convicted and jailed.

The second package of anti-terrorism legislation presented to Parliament contained only one Bill, the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth) ('ASIO Bill'). That Bill motivated a 27 hour debate in Parliament over the final sitting days of 2002, but was not passed and remains deadlocked.

In my address I examine this legislation and the issues that Parliament will face when it next considers the ASIO Bill. In doing so, I take a step back to look

* Anthony Mason Professor and Director, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales; Barrister, New South Wales Bar. This is the edited text of the National Press Club Telstra Australia Day Address delivered on 29 January 2003. I thank Tracey Stevens for her research assistance.

1 *Criminal Code Act* (NT), Pt III Div 2. The provisions were modelled on the *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK).

2 *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s 101.1(1).

3 *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s 101.2(1), (2).

4 *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s 102.

at the wider context. An assessment of the ASIO Bill must not be divorced from our history and shared values. This context is an important source of guidance at a time of community fear and national grief after the Bali attack. Without it, it is difficult to know where to draw the line in our response to the terrorist threat, including what we can justify in the name of a war against terrorism. We may regret our answers to such questions if, in focusing upon President Bush's 'fight for freedom' in Iraq, we compromise our personal freedoms at home.

II OUR HISTORY AND THE CRUSADE AGAINST COMMUNISM

Australia has overcome similar dangers in the past to those facing us today. Strong national measures were needed to protect national security during World War II. However, even then it was recognised that such measures must not undermine Australia's identity as a free and democratic society. Prime Minister Robert Menzies, in introducing the National Security Bill 1939 (Cth) on 7 September 1939, stated:

Whatever may be the extent of the power that may be taken to govern, to direct and to control by regulation, there must be as little interference with individual rights as is consistent with concerted national effort ... the greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and to lose its own liberty in the process.⁵

The most direct historical parallel with events in Australia since September 11 is found in the period of the late 1940s and early 1950s when we grappled with the external and internal threats posed to our security by the spectre of communism. Community fear was fed by political and media hysteria. The 1946 federal election policy statement made by the Country Party asserted that it 'regards the Australian communist in the same category as a venomous snake – to be killed before it kills'.⁶ Similarly, the editorial in the *Sydney Morning Herald* on 7 November 1947 stated, in words that resemble President Bush's rhetoric of 'you're either with us or against us'.⁷

Communism is cold, harsh and ruthless, and it is building slowly and inexorably to the day when our democratic Government will be superseded by a Godless, tyrannical Communistic dictatorship in Australia ... Any Australian born in this country who embraces Communism is a traitor. There is no half way. There has to be a choice between good and evil, and people must be either loyal or disloyal.⁸

When Menzies became Prime Minister for the second time in 1949, one of his first actions was to introduce the Communist Party Dissolution Bill 1950 (Cth) ('Anti-Communism Bill'). In doing so he failed to heed his own words from a decade earlier. The Anti-Communism Bill banned the Australian Communist

5 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 September 1939, 164 (Robert Menzies).

6 Brian McKinlay, *A Documentary History of the Australian Labor Movement 1850–1975* (1979) 691.

7 See, eg, *You are Either With Us or Against Us* (2001) CNN.com <<http://www.cnn.com/2001/US/11/06/gen.attack.on.terror/>> at 24 April 2003.

8 Phillip Deery (ed), *Labour in Conflict: The 1949 Coal Strike* (1978) 21.

Party and fellow organisations. It also enabled the proscription (or banning) of anyone declared by the Governor-General to be a communist (a term that was loosely defined).⁹ In the second reading speech on 27 April 1950, Menzies listed 53 leading Australians as ‘communists’.¹⁰ Unfortunately, he later had to admit that five of those persons were not actually communists.¹¹ A similar mistake was made by the *Sydney Morning Herald* the day after Menzies’ speech when it published as a ‘named’ communist the photograph of Mr J W R Hughes, the Deputy Commissioner of Taxation, instead of Mr J R Hughes, an officer of the Federated Clerks’ Union¹² (the newspaper corrected its mistake the next day).¹³

The Anti-Communism Bill was introduced to Parliament on the day the first Australian forces landed in Korea, and the Labor-controlled Senate passed the Bill despite severe misgivings. Members of the Labor Party were directed to do so by its Federal Executive in what became known as the ‘chicken resolution’. However the High Court held on 9 March 1951 that the legislation was invalid due to its inconsistency with basic rule of law principles.¹⁴ In giving the Governor-General an unreviewable power to ban people and organisations, the law denied the role of the High Court.

Defeat in the High Court led Menzies to put the issue to a referendum on 22 September 1951, where it narrowly failed¹⁵ despite opinion polls suggesting that 80 per cent of electors favoured banning the Australian Communist Party.¹⁶ Menzies was bitter after his defeat, but went on to achieve victory in election after election.

In the half-century since its enactment, the Anti-Communism Bill has been regarded as one of the most draconian and unfortunate pieces of legislation ever to be introduced into the Federal Parliament. It threatened to herald an era of McCarthyism in Australia and to undermine accepted and revered Australian values such as the presumption of innocence, freedom of belief and speech, and the rule of law.

Looking back on these events in the midst of our debate over anti-terrorism legislation, Prime Minister John Howard stated on 22 May 2002 that he believed

9 A ‘communist’ was defined as ‘a person who supports or advocates the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin’: Communist Party Dissolution Bill 1950 (Cth) s 3.

10 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1996–7 (Robert Menzies).

11 Wilton John Brown, *The Communist Movement and Australia: An Historical Outline* (1986) 192.

12 Editorial, *The Sydney Morning Herald* (Sydney), 28 April 1950, 1. This photograph appeared only in some editions.

13 Editorial, *The Sydney Morning Herald* (Sydney), 29 April 1950, 1.

14 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. See George Williams, ‘Reading the Judicial Mind: Appellate Argument in the Communist Party Case’ (1993) 15 *Sydney Law Review* 3; George Winterton, ‘The Significance of the Communist Party Case’ (1992) 18 *Melbourne University Law Review* 630.

15 The referendum failed to gain the support of a majority of electors by close a margin: 2 317 927 ‘yes’ votes to 2 370 009 ‘no’ votes. See generally Michael Kirby, ‘H V Evatt, The Anti-Communist Referendum and Liberty in Australia’ (1990) 7 *Australian Bar Review* 93; Leicester Webb, *Communism and Democracy in Australia* (1954); George Williams, ‘The Suppression of Communism by Force of Law: Australia in the Early 1950s’ (1996) 42 *Australian Journal of Politics and History* 220.

16 Leslie Crisp, *Ben Chifley: A Political Biography* (1977) 390.

‘the Australian people made the right decision in rejecting the [referendum] proposal’ to ban the Communist Party.¹⁷ He said that he had held this view for ‘quite a lot of years too’.¹⁸

As we focus upon our own present security crisis after September 11 and the Bali attack, it is easy to forget our history and its lessons. But the parallels are too striking to be denied. The ideological enemy today is not communism, but terrorism. Terrorism, like the communist threat before it, does not pose a conventional threat to our security, but one that is hard to pin down and equally difficult to meet. This is accompanied today not by conflict in Korea and Vietnam, but in Afghanistan and Iraq. In these circumstances it would be a national tragedy if we did not learn from Menzies’ mistakes, as acknowledged by our own Prime Minister. With the benefit of hindsight, we can do better.

III AUSTRALIAN VALUES AND THE WAR AGAINST TERRORISM

New laws dealing with these issues must strike a balance between national security on the one hand, and important public values and fundamental democratic rights on the other. We must not pass laws that undermine the very democratic freedoms we are seeking to protect from terrorism. It is a matter of balance and proportionality, as well as a test of political leadership. If we fail to achieve this balance we risk losing part of what makes this a great country to live in.

This does not mean that our response should be timid or that new laws cannot be justified. It does, however, mean that the case for departing from accepted civil rights and key elements of our democracy must be fully justified and carefully scrutinised. National security is not a goal to be attained at any cost, but should be pursued to the extent that it protects our democratic freedoms and way of life. Maximum security at the cost of living in an authoritarian state is not something that Australians would, or should, accept.

Unfortunately, the Federal Government’s efforts at drafting anti-terrorist legislation not only repeat mistakes made by Menzies in 1950, but also threaten to add to them. If passed in their original unamended form, last year’s anti-terrorism Bills could have done more to undermine the long term health of our democratic system than any threat currently posed by terrorism.

The first Terrorism Bill in its original form sought to criminalise actions performed ‘with the intention of advancing a political, religious or ideological cause’ that caused harm or damage.¹⁹ This could have subjected Australians – including farmers, unionists, students, environmentalists and even internet protestors who were engaged in minor unlawful civil protest – to life

17 John Howard (Press Conference, Beijing, 22 May 2002), <<http://www.pm.gov.au/news/interviews/2002/interview1663.htm>> at 24 April 2003.

18 Ibid.

19 Security Legislation Amendment (Terrorism) Bill 2002 (Cth) s 100.1(1).

imprisonment.²⁰ In provisions seemingly modelled on the Menzies anti-communism legislation, the Terrorism Bill also empowered the Federal Attorney-General to ban organisations, accompanied by a penalty of 25 years' imprisonment for their members and supporters.²¹

The Terrorism Bill failed to pass in its original form and was substantially amended after a highly critical, unanimous report by the Senate Legal and Constitutional Committee.²² The Bill, as enacted, contains a much stricter definition of terrorism,²³ and does not grant the Attorney-General a unilateral power of proscription.²⁴ That power now lies substantially with the courts.

The ASIO Bill, by contrast, has yet to be enacted and arguably poses a greater threat to our basic values. In its original form, the Bill allowed adults and even children who are not terrorist suspects to be detained and strip searched,²⁵ and to be held by ASIO for rolling two day periods that could be extended indefinitely.²⁶ The detainees could be denied access to people outside of ASIO, and could be denied the opportunity to inform family members, their employer, or even a lawyer of their detention.²⁷

The Bill embodies the idea that indefinite detention incommunicado of citizens by ASIO can be justified in Australia. This is consistent with the Government's acquiescence in the indefinite detention of David Hicks and Mamdouh Habib by the United States military at Camp X-Ray at Guantanamo Bay. The ASIO Bill goes further, however, than the detention of the terrorist suspects at Guantanamo Bay. If it is enacted, Australians could be held under the ASIO Bill, not because it is suspected that they have engaged in terrorism or are likely to do so, but because they may 'substantially assist the collection of intelligence that is important in relation to a terrorism offence'.²⁸

It is easy to imagine how such a regime could be applied to journalists. Like anyone else held under the law, a journalist could be detained without access to legal advice and denied their right to silence or to protect their sources. A failure to answer a question put by ASIO would be punishable by a five year jail term.²⁹

20 Security Legislation Amendment (Terrorism) Bill 2002 (Cth) s 101.1.

21 Security Legislation Amendment (Terrorism) Bill 2002 (Cth) s 102.4.

22 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002* [No 2] (2002), <http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/report/report.pdf> at 15 May 2003.

23 *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s 100.1(1).

24 *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s 102.1(3).

25 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 1] (Cth) s 34M. The section specified that a strip search could not be conducted on children under the age of 10 years.

26 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 1] (Cth) s 34F(1), (4).

27 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 1] (Cth) s 34F(8).

28 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 1] (Cth) s 34C(3).

29 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 1] (Cth) s 34G(3).

I have described the original ASIO Bill as being ‘rotten at the core’ because it would confer unprecedented new powers upon a secret intelligence organisation.³⁰ These powers could be used in 10, 20 or even 50 years’ time against the Australian people by an unscrupulous government. In its original form, the ASIO Bill would not be out of place in former dictatorships such as General Pinochet’s Chile.

There are many examples in the past of governments around the world seeking new powers in the pursuit of increased national security, only for those powers to be used against their own citizens or the political opponents of government. They remind us that our own democratic processes and values should not be taken for granted and instead must be reaffirmed and respected.

The Parliamentary Joint Committee on ASIO, Australian Secret Intelligence Service (‘ASIS’) and Defence Signals Directorate (‘DSD’) unanimously found that the ASIO Bill ‘would undermine key legal rights and erode the civil liberties that make Australia a leading democracy’.³¹ In a second inquiry by the Senate Legal and Constitutional Committee, a joint report by Labor and Government members rejected the Government’s desire for a detention power and instead proposed a different model based upon a power to question.³² Separate minority reports by the Democrats and the Greens expressed outright opposition to the ASIO Bill.³³

In response, the Government has agreed to some changes to the ASIO Bill. Its amendments limit detention to seven days (although a person may be subject to more than one period of such detention),³⁴ provide that the regime does not apply to children under 14 years of age³⁵ and state that detainees are guaranteed access to a lawyer after the first two days of their detention.³⁶ The Government also accepted a three year sunset clause.³⁷

Despite these concessions, the Bill remains fundamentally flawed in three respects. First, it still contains a regime for detention without trial for innocent

30 George Williams, ‘Why the ASIO Bill is Rotten to the Core’, *The Age* (Melbourne), 27 August 2002, 15.

31 Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) vii, <www.aph.gov.au/house/committee/pjcaad/terrorbill2002/terrorindex.htm#content> at 24 April 2003. See also Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) 6–7, <www.aph.gov.au/senate/committee/legcon_ctte/asio/report/report.pdf> at 24 April 2003.

32 Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002) 86, <www.aph.gov.au/senate/committee/legcon_ctte/asio_2/report/report.pdf> at 24 April 2003.

33 Ibid 153, 161 respectively.

34 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth) s 34F(4)(aa).

35 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth) s 34NA(1).

36 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth) s 34C(3C).

37 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth) s 4.

Australian citizens. Second, this regime would still apply to children as young as 14 (albeit, only where the child is a suspect). Third, detainees are not guaranteed access to a lawyer during the full period of detention.

Surprisingly, even the amended ASIO Bill gives innocent Australians (who may or may not have useful information) fewer rights and protections than terrorist suspects (who can only be detained and questioned under the criminal law for a maximum of 12 hours³⁸). In this respect, the ASIO Bill goes further than legislation in the United Kingdom,³⁹ Canada,⁴⁰ (and the United States⁴¹). Only Australia has sought to legislate to authorise the *detention in secret* of *non-suspects*. In the United Kingdom, the police may detain suspected terrorists for 48 hours extendable for a further 5 days,⁴² and in Canada police may detain suspected terrorists for 24 hours extendable for a further 48 hours.⁴³ The United States legislation provides for the detention of ‘inadmissible aliens’ and any person who is engaged in any activity ‘that endangers the national security of the United States’ (detention is for renewable six month periods).⁴⁴ While the Council of Europe’s *Guidelines on Human Rights and the Fight Against Terrorism*⁴⁵ recognise that detention of up to seven days may be justifiable, this only applies to suspects after their arrest. There is no suggestion that the detention of non-suspects for the purpose of assisting with intelligence gathering can be justified.

IV A WAY FORWARD FOR THE ASIO BILL?

Parliamentary division on these issues has led to a stalemate. The Democrats and Greens oppose the Bill, and while the Labor Opposition accepts the need for appropriate legislation to strengthen ASIO’s powers, there appears to be a deep divide between the Government and the Opposition on matters of principle. The Opposition has agreed only to a questioning power with a maximum of 20 hours’ detention (12 hour limit on questioning, with a possible extension of eight hours where there is an imminent terrorist attack).⁴⁶ The Labor model excludes children⁴⁷ and provides for full access to legal advice.⁴⁸ It is unclear whether the ASIO Bill will be enacted in some form or whether it will become a trigger for a double dissolution election.

38 *Crimes Act 1914* (Cth) ss 23C and 23D.

39 *Terrorism Act 2000* (UK).

40 *Anti-Terrorism Act*, SC 2001, c 41.

41 *USA Patriot Act 2001*, Pub L No 107–56, 115 Stat 272 (2001).

42 *Terrorism Act 2000* (UK) s 41.

43 *Anti-Terrorism Act*, SC 2001, c 41 s 4, inserting ss 83.3(6) and (7) into *Criminal Code*, RS 1985, c C-46.

44 *USA Patriot Act 2001*, Pub L No 107-56, § 41, 115 Stat 272 (2001).

45 Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism* (2002).

46 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10430–1 (Simon Crean, Leader of the Opposition).

47 *Ibid* 10430.

48 *Ibid*.

If there is a way out, it must start from the premise that Parliament should not legislate for the detention in secret of Australian citizens who are not suspected of any crime. Anything else is inconsistent with basic democratic and judicial principles. Australians are unlikely to accept the detention of citizens except as part of a fair and independent judicial process resulting from allegations of criminal conduct. There are grave dangers in allowing a government to bypass the courts, especially where a covert government organisation with minimal public accountability is involved. It would not be acceptable to the community for a State police force to detain people in secret for several days, nor should it be for ASIO.

Subject to this premise, what can be justified? There is a strong case for Australian citizens being compelled to answer questions and provide information they have on terrorist activity. This should override their right to silence. But an approach that focused upon the *questioning* and not the *detention* of people with useful information would be more ideologically acceptable. This is more consistent with other models now operating at the federal level, for example, in royal commissions or even in the collection of evidence about corporate crime. Once the questioning of a person has ended, they must be free to go.

The Federal Government accepted significant amendments in enacting its first Terrorism Bill. It did so in line with the recommendations of a unanimous Senate Committee report.⁴⁹ This led Prime Minister John Howard to say at his National Press Club Address on 11 September 2002 that ‘through the great parliamentary processes that this country has I believe that we have got the balance right’.⁵⁰ The Government again needs to get the balance right with the ASIO Bill, but as yet is far from doing so. The way forward is for it to accept the bipartisan findings of the Senate Legal and Constitutional Committee by removing the core detention element of the ASIO Bill and replacing it with a questioning power. The Bill should also provide access to legal advice during questioning, and should not apply to children.

V CONCLUSION

The Government’s response to September 11 has produced some of the most important and controversial legislation ever introduced into the Federal Parliament. Unfortunately, insufficient regard has been given to basic civil liberties and the rule of law. Menzies got it wrong with his anti-communist legislation. So has the Government today with its ASIO Bill.

It is unfortunate that Australia is contemplating a new law that exceeds even the stringent measures enacted in the United States. One reason for this is that

49 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 (No 2)* (2002), <http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/report/report.pdf> at 15 May 2003.

50 John Howard (Speech delivered at the National Press Club, Canberra, 11 September 2002), <<http://www.pm.gov.au/news/speeches/2002/speech1848.htm>> at 24 April 2003.

Australia, unlike the United States, the United Kingdom and every other western nation, lacks a Bill of Rights. We also lack the mechanisms, judicial or otherwise, for determining when civil rights have been unduly undermined by national security laws.

The consequence is that in Australia the question 'how far should we go in enacting new anti-terrorism laws' is purely political. The power to override the freedoms we take for granted is dependent upon the goodwill and good sense of our politicians. This leaves us uniquely vulnerable to bad laws made in haste at times of community fear and national grief. The danger is that at such times the contours of debate will match the populist pressures of political life. This danger is no longer regarded as acceptable in other like nations, and it should not be regarded as acceptable here. Our rights and values are of the utmost importance, and we should do more to protect them. If we do not, in fighting the war against terrorism, we may do long-term damage to the principles and values upon which our democracy depends.

POSTSCRIPT

15 months after it was introduced, the ASIO Bill was passed by both Houses of Parliament on 26 June 2003. The breakthrough came when Attorney-General Daryl Williams announced a shift on each of the main sticking points. First, the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) ('Act') only applies to people aged 16 years and over. Second, detainees will immediately have access to a lawyer of their choice. ASIO may request that access be denied to a particular lawyer, but only where the lawyer poses a security risk. Finally, 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.

Under the Act, a person can only be held and questioned 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. These additional protections in the hands of independent people blunt some of the worst excesses of the original Bill.

As passed, the ASIO Bill can be justified only as a temporary response to the threat to our security posed by terrorism and is akin to the one-off laws passed in Australia during World Wars I and II. Under a sunset clause, the legislation will lapse after three years. It should not then be re-enacted unless there remains a high security threat. In this form, the Bill does not create a long-term precedent for law enforcement and intelligence gathering in Australia.