

Good Instincts or Poor Judgment? Australia's counter-terrorism response after 9-11

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Introduction

Following the highly destructive attacks in Washington and New York on September 11 2001 (9-11), the Australian government declared a new paradigm for considering the threat of terrorism and the rule of law. In the name of countering evolving strategic threats and changing terrorist tactics, the Liberal-National coalition, led by Prime Minister John Howard, enacted a wide variety of counter-terrorism legislation. Partly drawing on examples from overseas experiences, legislative proposals set about developing a comprehensive web of criminal and national security laws with a core focus on pre-emptive surveillance and offensive engagement.

Given a post 9-11 world, it is clear that governments have a duty to sponsor the development of law that will protect their citizens from terrorism. The threat of conviction and punishment in dealing with globalised terrorism can no longer be considered an effectual deterrent. As such, the security sector must be able to properly equip itself to provide accurate and timely intelligence and, where necessary, develop a capacity to intervene at an early enough stage to prevent a 'new level of threat'. Further, new laws were required, at the very least to bring security policy into compliance with aspects of Security Council Resolution 1373 (2001) to punish terrorist acts and stymie terrorist financing. More recently, Paul O'Sullivan, the director-general of the Australian Security Intelligence Organisation (ASIO), warned policymakers that there were still small and loose networks of extremists in Australia preparing for acts of violence (O'Sullivan, 2007).

The Howard Government correctly argued that there is an urgent need to ensure that intelligence and law enforcement agencies have readily available the legislative measures required to keep one step ahead of terrorists. Yet despite any determination to create more mobile, intelligence-driven operational response and adapt law to deal with terrorism, there is also an urgent need to proceed carefully and ensure that legislation is not unbalanced or unfair. This paper sets out to analyse trends in lawmaking and address the limitations and shortcomings in key provisions of counter-terrorism related law in Australia. In particular, the paper will consider the nature of expanded special powers afforded to Australia's main domestic spy agency - ASIO - and its implications for democratic practice and national security. For the first time in its history, ASIO could detain people without charge, trial or conviction and conduct compulsory questioning for information gathering. The extension of Australian Federal Police (AFP) powers and the introduction of 'preventative detention' in a terrorist situation will also be covered.

Under Australia's National Counter-Terrorist Plan (2003), the government cited that it would rely on an intelligence-led arsenal to prevent terrorist crimes with a particular focus on prevention. In the overhaul of security operations, ASIO has been drawn into the arena of domestic policing. Previously, the agency had no powers to detain and interrogate members of the community (Head, 2002). It will be argued that that Howard government's proposals to strengthen Australia's counter-terrorism laws in relation to extended incommunicado detention have failed to maintain an appropriate balance between rights and security. Further, the enhancement of national security arrangements

were exposed to a deficient, piecemeal process of law-making, accelerated by the government's control of the Senate in 2005. A lack of public consultation and parliamentary debate served to camouflage a high level of political opportunism that threatens to alienate core sections of the Muslim community and reinforce anti-Muslim sentiment, thereby making society less safe.

Outline of Key Provisions

ASIO is a member of a group of six intelligence organisations, each with distinct responsibilities to protect national security. Formed by Prime Minister Ben Chifley in 1949, it was primarily created as a covert intelligence gathering agency. One of the main functions of ASIO is to collect information, correlate and evaluate intelligence and supply assessments concerning activities or situations that might endanger Australia's national interests at home or abroad. The sheer volume of ASIO's budget skyrocketed after the shock of 9-11 increasing to \$340.6 million in 2006-07, compared with \$62.9 million prior to the terror attacks (Ramsey, 2006). A significant shift in ASIO's resources was accompanied by a newborn organising principle that claimed old standards for combat and intelligence against terrorism required a thorough re-evaluation and urgent upgrading.

Alert to heightened domestic pressures to act in a resolute manner after 9-11, the Howard government promised to conduct an extensive review of Australia's security apparatus in dealing with terrorism. Attorney General Phillip Ruddock (2007) interpreted counter-terrorism policy as an 'unfinished canvas'. Former Attorney General Daryl Williams observed that although there was no known 'specific threat' of terrorism, Australia faced a potential new range of terrorist threats and the presence of groups/individuals that were allegedly linked to past terrorist attacks (Williams, D, 2001a). Williams (2001b) later added that "...we're dealing with potentially quite extraordinary situations where there may be a great number of lives at risk, there may be a very serious risk of major property damage. What we need to do is to be able to get maximum information, maximum intelligence, in order to prevent any terrorist acts being committed. Now, if we don't suspect a person of being engaged in planning for a terrorist act, there is no capacity for the police to arrest them. They may be unwilling to participate in questioning. We need to have a power to coerce people to answer questions, or to provide information".

The first package of exceptional anti-terrorism legislation, comprising five Bills, that included the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, was introduced into federal parliament on March 2002. The Parliamentary Joint Committee on ASIO ASIS and DSD unanimously described the initial Terrorism Bill as 'the most controversial piece of legislation ever reviewed by the Committee' (Commonwealth of Australia, 2002). Some legal sectors responded by cautioning that the impact of the sweeping litany of proposed legitimate changes would imperil rule of law by establishing "...part of the apparatus of a police state" (Williams, 2001: 15). In particular, significant changes to ASIO (and later police) powers represented a radical departure from traditionally non-derogable criminal law positions

like the presumption of innocence, the right not to be detained without charge and the right to remain silent.

The Terrorism Bill failed to pass in its original form (Forbes 2002). A revised version of the Bill - the *ASIO Bill (no.2)* - was eventually passed fifteen months later on June 2003. Despite a number of lingering parliamentary reservations, at times awkwardly intertwined with opposition unease not to be seen as 'soft' on terrorism, the new legislation included broad-ranging terrorism offences and would enable ASIO to detain and question people in order to engage in an 'appropriate form of interrogation' for intelligence gathering on terrorist activities. Since the completion of this Bill, the federal government has passed more than 41 other terrorism-related laws (Williams and Lynch, 2006). The complex task of reworking legislative and procedural boundaries to combat terrorism quickly moved into uncharted territory as Howard declared his intention to expand secrecy provisions to limit operational accountability, recalibrate the relationship between different branches of government and further boost police and security powers of investigation, interrogation and detention.

In its final form, the *ASIO Bill (no.2) 2003* caused considerable consternation, partly because it provided the domestic intelligence agency with vast, unparalleled powers of arrest and detention. Previously, under ordinary criminal law, a person could be interviewed by the state or federal police only when they were suspected of committing a crime and had to be charged or released within 12 hours. Police prisoners had the right to legal council, who could be present during questioning, as well as the right to remain silent. Under the new legislative regime, ASIO could now request a warrant to secretly detain and question any individual, aged 16 years and over who was alleged to have useful information related to 'terrorism offences'. It was sufficient that the 'issuing authority' (a federal magistrate or judge) had "reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence", even if no act of terrorism had occurred.

Once apprehended, the detainee can be subject to strip and body searches, be interrogated for up to 24 hours (in a maximum of three eight-hour blocks) before a 'prescribed authority' (a person who has previously been a judge of the High Court, Federal Court, Family Court, Supreme or District Court of a State or Territory). Questioning and detention may be spread over a one week period (168 hours). Individuals will face a five-year jail term if they refuse to co-operate or answer questions, as well as the prospect of having to prove to ASIO that they do not possess certain information or material. The onus of proof is on the defendant to prove their innocence. A person can be held and questioned again if the issuing of a repeated warrant is justified by the arrival of fresh information, including any additional information that might have been obtained during questioning under the previous warrant.

In the wake of the Bali bombings that killed 202 people, including 88 Australians, in October 2003, the government moved to introduce another range of legal reforms designed to strengthen its counter-terrorism powers. On 27 November new provisions to the *ASIO Legislation Amendment Bill 2003* were introduced into Parliament. The

measures were passed eight days later on 5 December 2003. The measures enhanced ASIO's capacity to exercise its existing questioning and detention powers in two major aspects. Firstly, they extended the maximum period of questioning of a person from 24 to 48 hours, if the detainee required the use of an interpreter at any time because of lack of fluency in the English language. Secondly, secrecy provisions were tightened in order to narrow the general community's ability to monitor ASIO activities. The provisions inserted general requirements and general offences which criminalised all primary and secondary disclosures of information about an ASIO warrant, about the questioning or detention of a person under the warrant or about any other 'operational information' connected to the warrant. The expression operational information was defined to mean information that ASIO has or had; a source of information that ASIO has or had; or an operational capability, method or plan of ASIO.

The Madrid bombings of commuter trains in March 2004 again provided an impetus for a litany of legislative changes with the introduction of the *Anti-Terrorism Bill 2004 (No.2)* and *(No.3)*. And after an internal review of terrorism laws as a result of the London bombings in July 2005, the Prime Minister again announced more changes to terrorism measures to deal with 'home-grown' hostility. Howard insisted that he wanted the new provisions in place before Christmas that year. The key features of the *Anti-Terrorism Bill (No.2) 2005* would include incitement offences that would expand the grounds for the outlawing of terrorist organisations to include organisations that 'advocate' terrorism as well as the extension of criteria to provide that anyone could be convicted of terrorism offences without evidence of a specific plot or target. In attempts to adapt to the cultural phenomenon of home-grown suicide bombers, the legislation sought a contentious form of detention without trial in the shape of preventative detention (Chong and Kadous, 2005).

The AFP argued that tackling the clandestine nature of modern terrorism activity demanded a greater range of agile, adaptable tools for police agencies. It claimed that the high standards of proof required to secure a criminal conviction created a highly restrictive policing barrier when attempting to prevent a terrorist threat from occurring or preserving evidence relating to a terrorist act that had recently taken place (McCulloch and Carlton, 2005: 400). ASIO's outgoing director-general Dennis Richardson added weight to this line of thinking by stating to a parliamentary committee that "...effective laws must be in place before terrorists strike, as it is virtually impossible to play legislative catch-up after an actual attack or after an identified threat has emerged" (cited in Kerr and Banham, 2005). Although underlying evidence might be thin, preventive detention orders were viewed as a statutory outlet to provide a far more helpful route to enable the removal of people who might be dangerous to themselves or others from the public domain. Such a form of detention once more challenged the traditional purpose of legal intervention – orders were primarily connected with suspicions or expectations about what an individual might do or be going, rather than their past conduct.

The *Anti-Terrorism Bill (No. 2) 2005 Bill* was passed on 7 December, 2005. Preventive detention would allow the AFP to target suspects who had not committed a crime or had had any criminal involvement and take them into custody and detain them for a short

period. Due to constitutional constraints, secret detention was permissible for only 48 hours at federal level. State and territory legislation, however, enabled a preventative detention order, issued simply on the basis of reasonable suspicion, to be extended for a period up to 14 days. The unprecedented system would have no investigatory purpose. Once detained, neither the police nor ASIO could question a person while they were being held. Secrecy remained a notable hallmark of the preventive detention regime. When interned, restrictions would be placed on contact with other persons. A detainee could only ring their immediate family or advise an employer that were safe but would not be able to be contacted for the time being. No further information was allowed to be given. If a person subject to the order, their lawyer and any others who are involved disclose that an individual had been detained or interrogated, the result would be a criminal offence with a penalty of up to five years imprisonment.

In March 2006, the Howard government introduced the *ASIO Legislation Amendment Bill 2006*. The bill extended existing sunset clauses and review mechanisms by 10 years, extending an atmosphere of 'extraordinary circumstances' in a volatile post 9-11 situation until at least 2016.

Flawed Laws

Australia has had relatively little direct experience with politically and/or ideologically motivated violence compared to other Western democracies (see Hocking 2004). The Howard government's political considerations in gathering itself for a legislative response to the events of 9-11 and its management of an apprehensive public has had enormous implications for Australian society and the rule of law. ASIO and the police have been given vast new powers that have brought about a radical change in intelligence and law enforcement. The war against terrorism set the scene for the deployment of specialist laws to shift ASIO from an undercover spying agency into a type of preventative police force, combining surveillance and other secret operation with raids, detention and interrogation. The AFP has been provided with considerably expanded arbitrary power for the purpose of confronting an often invisible enemy.

While not an exclusive tool in counter-terrorism strategy, intelligence collection and carefully targeted preemptive control is vital. However, it remains imperative that the exercise of state power is guided with both a proper sense of value for democratic traditions and does not become counter-productive. Key elements of the Howard government's counter-terrorism legislation to strengthen ASIO and police powers constituted, in many instances, an unclarified response that overstepped important political and legal boundaries. As Wright-Neville (2005) highlighted, newly adopted anti-terrorism laws occurred in 'several waves', essentially as an automatic retort to high-profile terrorist attacks overseas, with quick movements in law-making failing to ensure that the creation of new intelligence and policing measures did not outstrip the nature and level of the threat.

A starting point in comparison between Australia and other nations such the United States and the United Kingdom is how the construction of counter-terrorism regimes has

been conducted against a backdrop aiming to entrench increased state powers without many complementary safeguards, including a Bill of Rights, and outside the ambit of ordinary criminal law. This shifting foundation in legal standards and the undercutting of due process was underlined in the rewriting of laws to dent the capacity of lawyers to assist clients (Mahon and Palmer, 2003). Many of the government's prescribed detention protections to advance official checks and balances were inadequate. In practice, it would be difficult to enforce certain safeguards due to rigid constraints on access to lawyers and the limited right to legal council. ASIO could veto a detainee's choice of legal representative where the lawyer is deemed to be a 'security risk'. When a lawyer was present, they are unable to interrupt or object to the questioning or actively advise their client, other than requesting clarification of an ambiguous question. Lawyers can be ejected for 'unduly disrupting' the questioning. In some circumstances, it is possible for questioning to proceed in the absence of the lawyer.

Within such a legislative terrain, the right to legal representation is strictly constrained. Sydney lawyer Adam Houda observed that protections against abuses to power and other risky interrogation activities had not been infused into the legislative blueprint. "The role of the lawyer is minimal, bordering on non-existent, merely a token gesture" (cited in Morris and Riley, 2003). Well-known Senior Council Julian Burnside expressed concerns, despite factors such as inbuilt reporting requirements by ASIO, that limiting the capacity of lawyers to provide deliberate and thorough legal advice might be used to browbeat detainees and extract false confessions or admissions. "I don't think the safeguards are adequate because if you exclude or qualify the use of lawyers, then the potential for the misuse of power is increased. We've seen in other circumstances that the law enforcement authorities can make mistakes, and they can get a mistaken idea of what's going on and pursue theories that turn out to be ill-founded" (Burnside, 2005).

Others argued that even if an exception to contemporary legal principles was somewhat more ideologically palatable because one assumed Australians continued to face threats simply due to 'who we are' – notably an open, pluralistic, law-abiding society - the broader purpose of the government approach to security also contravened international obligations that were closely aligned with the fortification of those very same democratic principles and values. Critics pointed out that the Bill was inconsistent with article 9 and 14 of the International Covenant on Civil and Political Rights (Giroux, 2002). The law breached several of Australia's human rights obligations, in particular, the use of "...detention for public security reasons must still comply with the right to liberty in article 9; it must not be arbitrary, it must be based on grounds and procedures established by law (that is, sufficiently circumscribed by law and specifically authorised), information on the reasons must be given, and court control of the detention must be available".

Without the existence of a constitutional safety-net and dismissing the relevance of international law, the Howard government expressed a preparedness to expose its own citizens to a detention process that no other liberal democratic country considered within tolerable limits or that no comparable intelligence services had deemed necessary to deal effectively with terrorism. As previously mentioned, detainees do not need to be

suspected of any offence. Noted by Hocking (2003: 365), legislative developments effectively placed "...intelligence on the same plane as evidence". The secret detention of citizens by ASIO would apply not only to terrorists or would-be terrorists but also to non-suspects. Individuals alleged of possessing certain information or material would have to prove otherwise, reversing the long-standing tradition of a burden of proof.

In short, Australian law aims to create a security model of targeting its citizens with diminutive or no evidence. ASIO can detain individuals in secret who are not accused of any crime but may have inadvertently come into contact with a person with knowledge about terrorist activities. The ability to detain citizens for questioning who are not suspected criminals is a highly controversial notion. Boulten questioned whether ASIO was a suitable body to be given police powers. "My concern is that the questioning regime is being used by ASIO to gather information to add to its broader base of intelligence. The powers are not strictly used to obtain information that might be relevant to a specific, identifiable terrorism offence. They are not being used for their stated and intended purpose. The ASIO questioning is in reality a de facto police interrogation. These powers are as wide as they are and more powerful than police questioning powers because they are designed for use in support of national security issues—i.e. to ward off the threat of imminent terrorist attacks. They should not be used for ordinary police work" (Boulten, 2005: 7). Burnside added that, due to the highly elastic nature of extended laws, "...in principle, anyone who watches Al Jazeera television might fall within the reach of these provisions" (Burnside 2005: 7).

It is worth highlighting that the increased emphasis on national security in both the US and UK has been aimed at terrorists (Michaelsen, 2003: 283). Alternatively, a wide range of analysts have argued that 9/11 was actually a failure in intelligence rather than a failure in law (see Fessenden, 2005). Discourse in Australia has been relatively muted regarding a workable criterion to measure the intelligent community's effectiveness. There is a strong need for sustained investigation into matters such as the nature of bureaucratic organisations and whether past security failures have stemmed from matters such as weak spots in the setting of intelligence priorities and the analysis of information rather than information gathering per se. Academic debate in the United States, for instance, has raised the question of whether many of the problems facing its national security establishment had been due to an inability to adapt to the rise of terrorist networks and the spread of international terrorism after the collapse of the Soviet sphere (Zegart, 2005). At the same time, launching new programs in Australia and increasing the volume of information collection through coercive and pre-emptive terms may simply redirect the work and resources of an intelligence body such as ASIO in a manner that does little to address deficiencies in intelligence analysis and allow room for improvements in organisational culture and structure in order to meet a diverse range of threats to the national interest.

A central challenge facing Australia – and all democratic nations - is the extent to which the strengthening of the coercive powers of the state is a rational, justified response to terrorism that protects often fragile democratic principles, upholds national security imperatives and mitigates the spread of jihadist movements. While the 'war on terrorism'

does pose a challenge to traditional criminal law principles and some constraints on liberty may be necessary, it may be that "...there is no legislative 'fix' or panacea against terrorism" (Berwick, 1996). As Zedner (2005: 515) has also contended that, "...measures introduced against putative terrorists in conditions of emergency have an uncanny way of being perpetuated beyond that emergency and extended to offences of lesser gravity". The adoption of open-ended legislative reorganisations in relation to security developments, which Howard himself has described as 'unusual', is in danger of producing a public image of 'toughness' at the expense of justice, may be ineffectual and has neglected to provide a compelling, comprehensive assessment to help improve to the future performance of the security sector.

Defective Law-Making

Criticisms of the Howard government's counter-terrorism proposals to harden intelligence and police powers have not been limited solely to the nature of problems within the specific content of particular Bills but also in associated limitations in law-making procedures from a democratic perspective. In broad terms, the ongoing fear of terrorism served to destabilize the process of deliberative law-making. In 2003, for example, the Senate Legal and Constitutional Committee were given just six weeks to assess 120 pages of complex counter-terrorism legislation (Browne, 2005). A similar pattern was repeated in 2006. When bipartisan Senate Committee identified room for improvements and isolated explicit shortcomings with proposed counter-terrorism legislation, the government responded by disregarding the substance of the Committee's recommendations (Williams and Lynch, 2006).

The results of the 2004 Australian election, in particular, were the catalyst for the wholesale abandonment of parliamentary convention. Howard's electoral victory had given the government a majority in the Senate for the first time in more than 20 years. Howard stated that the Senate one-seat majority outcome was good for his government, but it would not abuse the privilege and use its power modestly (Walters, 2005). The government's sincerity in ensuring robust community consultation and proper parliamentary appraisal, however, was brought into question when it moved quickly to ensure fewer opportunities for scrutiny on its statements and papers. The government worked actively to reduce the scope for the parliament and civil society to gain information on the merits of legislative changes by blocking amendments and allowing only tokenistic input and a highly truncated review. Taking advantage of its Senate control, the government enforced guillotine motions and shut down parliamentary debate. The now dominant government essentially signaled its intention to insulate draft legislation from democratic pressures by implying that pressing national security concerns justified its handling of the Senate as a simple rubber stamp.

Of great concern was a prevailing attitude that appeared to assume that fighting terrorism and adhering to the central mechanisms of democracy and the rule of law were incompatible goals. Ruddock described the events of 9-11 as a wake-up call. "Well, before September 11, we were at war; it's just that we didn't know it" (cited in Nguyen, 2006). By placing Australian society in a continuous state of emergency, a war-like

mindset gave insufficient regard to thoughtful consideration to representative democratic practice. The government's parliamentary activity during its fourth term of office suggested a strong distaste for accountability mechanisms. A combination of scaremongering and deliberate public disinvestment was exposed by Howard's steadfast unwillingness to release the *Anti-Terrorism Bill (No.2)* for interactive, transparent consideration prior to its introduction to parliament.

After initially agreeing to consider options for harmonizing state and territory legislative provisions after the London bombings, some premiers and territory leaders expressed unease over an unwillingness to incorporate a wider level of analysis to determine whether the costs and consequences of new laws might outweigh the benefits (Banham, 2005). A more consultative and open approach to security protection was viewed as helping to improve public understanding of the purpose and functions of the intelligence community as well as testing the logic of the government's thinking. Many non-government experts had distanced themselves from supplementary legislation arguing that no cogent case or detailed information had been made available to support an additional extension of ASIO and police powers, apart from a universal call-to-arms (Fraser, 2005). While supporting the need for laws to prevent a terrorist act before it occurred rather than simply punishing individuals after an attack, White (2005) observed that existing laws appeared robust. Any act of planning a particular or specific terrorist attack or the preparation for the perpetration of violence was already a criminal offence. "Our police already have the power to interdict a terrorist plan if they discover it...If the police have evidence that someone is planning or preparing an attack, they can be arrested, charged and held until the case is brought to trial".

In October 2005, a 107-page copy of a 'draft-in-confidence' version of the *Anti-Terrorism Bill (No.2)* was posted on the internet by Australian Capital Territory Chief Minister Jon Stanhope. Stanhope refused to remove the confidential document, despite complainants from the Prime Minister's office. Stanhope stated he had released the draft to ensure that a highly centralized and controlled political process was 'reasonably adaptive' and sensitive to both the requirements of democracy and national security. He declared that "law of this significance made in this haste can't be good law" (cited in Nicholson, 2005). Stanhope (2005) later added that law-makers were "...putting too much of a focus on what Muslims should do to reassure us of their intentions, and not nearly enough emphasis on honestly acknowledging our own role in creating the conditions that lead, inexorably, to disaffection. To say this is not to be an apologist for terror or to appease those who resort to terror. It is simply to acknowledge cause and effect".

Stanhope's rationale for a thorough process of informed study and measured public debate to build trust in intelligence and policing, complied with his demand for a greater effort to engage more directly with moderate Muslim opinion and more closely monitor the possible causes of Muslim estrangement, proved to be unsuccessful. Compounding a general sense of confusion was Howard's announcement on November 2 that the government would immediately recall the Senate to introduce an 'urgent amendment' to stop a 'specific' planned terrorist act. Citing operational matters, Howard stated he would

not provide any detailed advice on the character, timing or nature of the threat to the community. As a result, the Senate Legal and Constitutional Legislation Committee had only one day to consider the merits of the highly complex legislation and conduct public hearings. Defence Minister Senator Robert Hill acknowledged that a limited, belated inquiry was “obviously not as good as a long inquiry” but claimed that time was “of the essence in this matter” (cited in Dodson, 2005: 11). Legal expert Andrew Lynch (2005) expressed unease at the reasoning that surrounded the hurriedly presented Bill. He categorized several oversights and inconsistencies in the Bill including disparities between Howard’s early statements on fixing ‘operational offences’ and the actual draft law presented by the Attorney-General that was eventually passed.

Australia has long been prone to collective panic (Burke, 2001). As Michelle Grattan (2005) observed, with a string of high-profile politicians and sections of the media working to inflate national security threats, “...there is a big link between people’s fears and their willingness to accept drastic measures in the name of security”. According to polls taken in late 2005, a large number of Australians have expressed a measure of support for tougher anti-terrorism approaches and offensive security methods (Secombe and Dodson, 2005). Such a popular display indicating a willingness to sacrifice personal privacy for more safety, however, coincides with the fact that seven out of ten people also expressed fears that they anticipated a major terrorist incident in Australia within two years (Lynch, 2005). The dynamics of the government’s counter-terrorism strategy has served to convince large sections of the population that sacrificing civil liberties and political protections was essential in order to ‘win’ the war against terrorism.

Genuine community concerns after 9-11 have become increasingly interlocked with evidence of executive bullying, a pattern of behavior that has politicized intelligence issues and the rise of pervasive media standpoints inclined to indulge in xenophobic, panic-stricken drama (Poynting 2002, Barker, 2003). Seemingly uninterested in posing fundamental questions or casting a more critical eye over an array of unprecedented laws, the Howard government bluntly warned that forms of dissent aimed at the government’s anti-terrorism legislative program was ‘un-Australian’ (Mackay, 2005). In addition, Former Defence Minister Peter Reith had advised of foreign threats such as Indonesia that could serve as a ‘launching pad’ for terrorism against Australia (Farr, 2001: 8). Others pointed to apparently more immediate, internal dangers and counseled that “Australian Muslims will have to decide whether they are Australians first” (Akerman, 2001: 109). Such a magnification of an onslaught of threats from every direction sat uncomfortably in the backdrop of a national terrorism alert level that has remained unchanged at ‘medium’ since 2001, indicating a business-as-usual setting whereby a terrorist attack ‘might’ occur (Walters, 2005).

Proposals such as the right to detain without charge or trial have not been necessarily underpinned by accurate political assessments regarding any fault-lines in Australia’s ability to anticipate and counter threats. Paranoid or even overly-pessimistic security scenarios and the projection of misplaced fear has had a tendency to sideline a risk management based adjustment that is linked with a critical appraisal of threat perceptions and the adequacy of current levels of protection. As Daniel Flitton (2007) observed,

Australia's dilemma is of a 'different character and scale' than the risks and challenges confronting countries such as the UK and US. The expansion of counter-terrorism regimes in Australia has displayed troubling signs of knee-jerk reform and an opportunistic exploitation of the real fears of the Australian public in order to expand executive power and electoral advantage.

Pivotal, a vital ingredient to address the problem of terrorism is to diminish its appeal to potential terrorist leaders and operatives. The danger is that the creation of short-cuts in the administration of justice and oversimplified understandings of the root causes of terrorism will actually hinder national security efforts by creating an environment that acts to cultivate support or sympathy for terrorist movements. A heavy-handed and imprecise counter-terrorism policy, in many instances, has been interpreted as an attack on Islamic faith. The operation of excessive laws has contributed to a greater sense of alarm and polarization amongst social groups (Kelton, 2006). Far from preventing or detecting terrorism, special emergency powers may trigger unintended, and highly self-defeating, consequences that include the isolation of moderate forces. Strategic analyst Aldo Borgu advised that more study was needed into the causes of violent radicalization in Australia. "I don't think we're at a point where terrorism defines our daily life. Most of the terrorist groups such as al-Qaeda or JI (Jemaah Islamiah) don't have the capability to mount a sustained campaign the way the IRA did...(These new counter-terrorism laws)...maybe counter-productive and send some people over the edge" (cited in Kelly, 2005: 20).

In order to do their job, security agencies such as ASIO must rely on cooperation at a grassroot level to assist with intelligence operations to monitor and target terrorist ideologues (Davies and Banham, 2005). In May 2007, Australian intelligence sources revealed that negative attitudes held by Muslims towards the security sector was hampering its efforts to attract recruits. Evidence of increasing levels of disaffection and distrust was further identified as generating a climate that had resulted in reluctance from individuals, in particular from the Muslim and Arab communities, to offer potentially sensitive information of possible terrorist planning to authorities (Kerbaj, 2007). Sydney Iman Sheik Khalil Shami blamed the Howard government's constant bombardment of alarmist national security rhetoric for contributing to the stigmatization of Muslims as terrorists. He noted that security agencies "...need to be seen that they are not this scary monster that lives in the darkness and just snatches people. The more they engage in the community, the more the community is going to feel relaxed" (cited in Kerbaj, 2007). Indeed, the anti-terror laws in case of Gold Coast doctor Mohamed Haneef exposed a series of shortfalls in a legislative framework that appeared highly open to abuse and misuse by authorities (Neighbour, 2007).

In this respect, laws such as secret detention present a slippery slope. One possible upshot of contemporary security measures could be the pursuit of innocent sections of Australia's relatively small Muslim community in 'fishing expeditions'. "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" (cited in Schubert, 2002: 18). Bilal Cleland, Secretary of the Islamic Council of Victoria warned that the various Muslim

groups "...are concerned that the definition of terrorism will take on a religious, bigoted tone, and it could mean that the Muslim community here will become unjustified targets of interference and hostility from the state authorities" (Cleland, 2002). A principal objective of enhanced security powers in tackling terrorist networks will "...allow the government to detain people who are not and have never been - so far as anyone knows - involved in terrorist planning or training, on the grounds that police or ASIO believe that they might become terrorists in the future. But how could they tell that? How far would they cast this new net? And why can't adequate powers to fight terrorism be provided more simply and safely by the normal processes of criminal justice?" (White, 2005). At the very least, the stifling of independent and public discussion and a fractured process of law-making served to undermine efforts to support responsible government and to promote understanding of, and confidence in, the need for specialist terrorism laws.

Conclusion

In Australia, as elsewhere, governments are grappling with the challenge of protecting their communities against terrorist violence and the proper reorganization of democratic standards and the traditional norms associated with rule of law and criminal justice. 9-11 changed the orthodoxy of Australia's security thinking through introducing measures moving beyond traditional concentration on punishment and justice after the crime. The anticipatory application of coercive measures, pre-emptive programs and extensive penalties ultimately altered the mandate and quality of ASIO and of the police in significant ways.

Australia's counter-terrorism arrangements set about to consolidate a new approach to address a new type of terrorism. However, the Howard government's reconsideration of the character and operations of the security sector has fallen short of conforming to democratic values and the careful consideration of the real and persistent threat of terrorism. In considering the Australian government's desire to change the dynamic of law and order politics to incorporate the detention of non-suspects, critics have wondered "...if the United Kingdom could survive the terrorism of the IRA without changing the fundamental nature of its legal system, the question must be asked what is there about al-Qaeda that now requires some of the fundamental values of...(Australian)...democracy to be overturned?" (cited in Dick, 2006: 11). Problematically, Muslim communities have felt increasingly targeted with the introduction of sweeping provisions that are open to manipulation and that may be applied or interpreted in a discriminatory way.

In a speech reflecting on the tragic 9-11 attacks, former chief justice Sir Gerard Brennan (2007) cautioned that "...we must never allow fear - that most malleable of political emotions - to transfer the protection of individual liberty from the judicial to the executive branch of government. Nor should our laws isolate and alienate peaceful citizens, robbing us of that solidarity and communal courage that has preserved us in past perils". The Howard government has failed such a test. It has failed to reconcile democratic freedoms and security; a balance that can only be achieved successfully with an accountable notion of national security together with integrated political measures based on democratic values and a realistic assessment of the risk of terrorist attack in

Australia. In a climate of fear, the government's pattern of highly reactive legislative responses unduly compromised democratic standards and failed to keep a sense of reality and equilibrium in complex issues of national interest.

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