

THE LEGAL LEGACY OF THE 'WAR ON TERROR'

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(Annual Tony Blackshield Lecture delivered at Macquarie Law School,
Macquarie University, 10 October 2013)

Australia enacted an extraordinary number of anti-terror laws in the name of the 'war on terror' in the years after September 11. This lecture asks whether Australia needed new anti-terror laws, and assesses the laws that were enacted. It also deals with recommendations made for reform, and the prospects that such changes might be realised. It reaches conclusions about Australia's new anti-terror laws, and, more broadly, what the enactment of these laws suggests about the Australian legal system, and the protection it offers for fundamental human rights.

I INTRODUCTION: ANTI-TERROR LAWS IN THE SHADOW OF SEPTEMBER 11

I have decided to talk today on a subject that has occupied much of my time over the past 12 years — the enactment of Australia's first national anti-terror laws. I became involved in this area because of Tony Blackshield. My undergraduate honours thesis for him on the *Communist Party Case*¹ was written as an exercise in legal history,² and I did not anticipate that similar issues of law and national security would arise again in Australia. When they did after the devastating attacks of 11 September, 2001 (September 11), I found myself quickly drawn in as nations responded in ways that raised a wide range of fundamental questions about public law and justice.

The American response to September 11, and in particular President George W Bush's statement that 'you're either with us or against us',³ reminded me of similar rhetoric in Australia in the late 1940s. It is one of many parallels between these two important eras.

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¹ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

² Significant parts of this thesis were published as George Williams, 'Reading the Judicial Mind: Appellate Argument in the *Communist Party Case*' (1993) 15 *Sydney Law Review* 1 and George Williams, 'The Suppression of Communism by Force of Law: Australia in the Early 1950s' (1996) 42 *Australian Journal of Politics and History* 220.

³ CNN, 'You are either with us or against us' (6 November 2001)
<<http://edition.cnn.com/2001/US/11/06/gen.attack.on.terror/>>.

Hence, the editorial in the *Sydney Morning Herald* on 7 November 1947 stated:

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.⁴

Sydney Morning Herald editorials seem to have lost a little punch in the years since.

The High Court's decision in the *Communist Party Case* stands as a beacon against the hysteria of the time. The decision to strike down federal legislation banning the Communist Party, in the face of overwhelming community support for the initiative, is the strongest indication yet seen in Australia of the High Court's role in vindicating the rule of law. The decision also reminds us of important principles that I felt ought not to be forgotten in the frenzy of lawmaking that was to follow after September 11. In particular, Sir Owen Dixon talked in the *Communist Party Case* of the dangers of concentrating too much power in any one arm of government and in the executive in particular. He said

History, and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.⁵

This insight has driven much of my work in the years since September 11. We must not, in the name of protecting our democratic freedoms from terrorism, undermine those same freedoms.

II AUSTRALIA NEEDED NATIONAL ANTI-TERROR LAWS

My undergraduate study of the late 1940s and early 1950s Australian battle against the communist 'menace' gives me a critical eye when it comes to extraordinary measures to protect national security. That time does not, however, suggest that there is no role for the law when it comes to protecting the community from internal and external threats. Indeed, I have always been of the view that Australia needed to enact anti-terror laws after September 11.

Australia has a short history of enacting laws specifically aimed at the prevention of terrorism. In fact, before September 11, only the Northern Territory had such a law,⁶ and in all other Australian jurisdictions politically motivated violence was instead dealt with under the traditional criminal law.

The absence of national anti-terror laws in Australia prior to September 11 was not

⁴ Phillip Deery (ed), *Labour in Conflict: The 1949 Coal Strike* (1978) 21.

⁵ Ibid.

⁶ *Criminal Code Act 1983* (NT) pt III div 2.

surprising. Apart from isolated incidents such as the 1978 bombing attack on the Commonwealth Heads of Government Regional Meeting at the Sydney Hilton Hotel, Australia had little direct experience of terrorism. However, the rarity of such attacks was not itself a justification for the lack of law. Anti-terror laws should ideally be in place as a precursor to a possible attack, rather than enacted in haste after the event. Indeed, the worst possible time for enacting anti-terror laws can be in the aftermath of a devastating terrorist attack. The fear and grief that such an event produces is hardly conducive to rational debate about the appropriate scope of such laws.

The attacks of September 11 provided the catalyst for Australia's first national anti-terror laws. It has been argued that such laws were not needed, primarily on the basis that terrorism can be dealt with by the existing criminal law. However, I do not see that position is sustainable. Laws were needed to deal with specific aspects of threat posed by terrorism. For example, the nation needed a statutory framework directed to preventing the financing of terrorist acts overseas so as to ensure that Australians do not enable such attacks.

More broadly, the criminal law in place in 2001 was not sufficient for the task of preventing terrorist attacks. It failed to adequately deal with matters such as terrorist organisations and was not sufficiently directed to the problem of prevention. It is not appropriate in the context of terrorism, as is often the case for other types of crime, to primarily apply the force of law once an act has been committed so as to bring the perpetrator to justice. Instead, given the potential for catastrophic damage and loss of life, intervention to prevent terrorism is justified at an earlier point in the chain of events that might lead to an attack. Such prevention can be seen as an act of political pragmatism given the pressing need for Australian governments to take action to protect the community from terrorism. It can also be seen as a measure designed to respect fundamental human rights, including the right to life and to live free of fear.

Anti-terror laws raise important questions as to how early the law should intervene to pin criminal responsibility on actions that may give rise to a terrorist attack. It is arguable that the laws as actually enacted give rise to lengthy jail sentences for preparatory acts too far removed from the actual commission of an act of terrorism. However, this is not a persuasive argument against the existence of anti-terror laws per se, but for their recalibration so as to ensure that they criminalise actions that can be more realistically described as preparation for committing a terrorist act. On the other hand, the argument for appropriate anti-terror laws is not a case for departing from well-accepted principles of criminal law aimed at ensuring outcomes such as the right to a fair trial. Anti-terror laws must be framed in light of such values.

An effective prevention strategy also required laws to confer powers on agencies such as the Australian Federal Police and Australian Security Intelligence Organisation (ASIO). These organisations required legal authorisation to collect information to head off an attack and the power to target not only individuals that might engage in terrorism but also groups or cells of potential terrorists. Again, the issue here is not so much one of justification, but of proportionality. Australia's law enforcement and intelligence agencies should have sufficient powers to dismantle and prevent threats to the community, but those powers should be

carefully tailored to the level of the threat. They should also be subject to strict and transparent safeguards enforced by independent agencies.

Apart from the inadequacy of its existing national laws, Australia was justified in enacting new anti-terror laws after September 11 in fulfilment of its obligations as a member of the international community. For example, Resolution 1373 of the United Nations Security Council, adopted on 28 September 2001, determined that States shall ‘take the necessary steps to prevent the commission of terrorist acts’ by ensuring that ‘terrorist acts are established as serious criminal offences in domestic laws and regulations’.⁷ This gave rise to a clear obligation on the part of Australia to enact laws directed at this problem. While Australia had laws in place that could have been used to *prosecute* individuals for acts of terrorism, it was unsustainable for Australia to argue that it already had sufficient laws in place directed at the *prevention* of terrorism.

Finally, Australia’s anti-terror laws can be seen as having an important moral dimension. In an era punctuated by terrorist attacks starting with New York and Washington and followed by Bali, Madrid, London, Mumbai, Jakarta and elsewhere, it was appropriate that Australia outlawed such forms of political violence. Enacting a specific crime of terrorism signalled that, as a society, Australia rejects the use of violence in the pursuit of a political, religious or ideological goal.

Governments and parliaments deserve credit for recognising that Australia required a body of law directed towards protecting the community from the threat of terrorism. These institutions were correct in their assessment that such laws ought to be directed particularly to the prevention of such acts. In hindsight, our legal system prior to 9/11 reflected complacency about the potential for political violence in Australia and the region.

III THE LAWS THAT AUSTRALIA GOT

The problem arising from Australia’s anti-terror laws is not that they exist, but the extraordinary and far reaching form in which they were enacted. Australia’s response to September 11 was similar to that of many other countries.⁸ It emphasised the need to deviate from the ordinary criminal law — with its emphasis on punishment of individuals after the fact — by preventing terrorist acts from occurring in the first place. The result was a bout of lawmaking that continues to challenge long-held assumptions as to the proper limits of the law, and criminal law in particular, and also accepted understandings of the respective roles of the executive, parliament and the judiciary.

One remarkable feature of Australia’s response to terrorism is the sheer volume of lawmaking. In the 12 years since September 11, Australia’s Federal Parliament, and so not

⁷ SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001), preamble and art 2(e).

⁸ See generally Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012); Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011).

including the laws of the States and Territories, has enacted 61 anti-terror laws.⁹ This can be divided into two periods. Across the 6 years of the Rudd, Gillard and Rudd governments, the Federal Parliament enacted 13 of these laws, an average of one new law every six months or so. By contrast, during the high point of the so-called ‘war on terror’, from 11 September 2001 to the fall of Prime Minister Howard’s Coalition government in 2007, the Federal Parliament enacted 48 anti-terror laws, an average of a new anti-terror statute every 6.7 weeks.¹⁰ The statistics are eye-catching and, indeed, Australia’s output of anti-terror laws greatly exceeds that of nations facing a higher threat level. In a comparative analysis of the anti-terror laws passed in a range of democratic nations, Kent Roach has described Australia’s response as being one of ‘hyper-legislation’ as a result of Australia getting ‘caught up in the 9/11 effect’.¹¹ He found:

Australia has exceeded the United Kingdom, the United States, and Canada in the sheer number of new antiterrorism laws that it has enacted since 9/11 ... this degree of legislative activism is striking compared even to the United Kingdom’s active agenda and much greater than the pace of legislation in the United States or Canada. Australia’s hyper-legislation strained the ability of the parliamentary opposition and civil society to keep up, let alone provide effective opposition to, the relentless legislative output.¹²

Australia’s national anti-terror laws are striking not just in their volume, but in their reach. As a result of these laws, powers and sanctions once thought to lie outside the rules of a liberal democracy except during wartime have now become part of the Australian legal system. Examples of these powers and sanctions are as follows:

- i. Australia’s new anti-terror laws define a ‘terrorist act’ as conduct engaged in or threats made for the purpose of advancing a ‘political, religious or ideological cause’.¹³ The conduct or threat must be designed to coerce a government, influence a government by intimidation, or intimidate a section of the public. The conduct or threat must also cause any of a number of harms, ranging from death and serious bodily harm to endangering a person’s life, seriously interfering with electronic systems, or creating a ‘serious risk to the health or safety of ... a section of the public’.¹⁴ The definition excludes advocacy, protest, dissent or industrial action so long as there is no intention to cause things such as serious physical harm, death or a serious risk to the health or safety of

⁹ This figures is based upon the 54 anti-terror statutes I identified had been enacted in the decade after September 11 in George Williams, ‘A Decade of Australian Anti-Terror Laws’ (2011) 35 *Melbourne University Law Review* 1136, 1144. Since that tally, the following further seven anti-terror laws have been enacted, with such statutes identified according to the methodology set out in that article: *Combating the Financing of People Smuggling and Other Measures Act 2011* (Cth); *Aviation Transport Security Amendment (Air Cargo) Act 2011* (Cth); *Nuclear Terrorism Legislation Amendment Act 2012* (Cth); *Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012* (Cth); *Aviation Transport Security Amendment (Screening) Act 2012* (Cth); *Customs Amendment (Military End-Use) Act 2012* (Cth); *Aviation Transport Security Amendment (Inbound Cargo Security Enhancement) Act 2013* (Cth).

¹⁰ George Williams, ‘A Decade of Australian Anti-Terror Laws’ (2011) 35 *Melbourne University Law Review* 1136, 1145.

¹¹ Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 309.

¹² *Ibid*, 310.

¹³ *Criminal Code Act 1995* (Cth) Sch 1 (‘*Criminal Code*’) s 100.1(1) (definition of ‘terrorist act’, para (b)).

¹⁴ *Ibid* s 100.1(2)(e).

the public. The definition is more carefully tailored than others in some nations,¹⁵ but still encompasses liberation movements, such as the struggle of Nelson Mandela against apartheid, the armed resistance in East Timor or those currently seeking to bring down the Syrian government.

- ii. The laws create a range of new offences, including that of committing a ‘terrorist act’.¹⁶ Other provisions create a wide range of offences for conduct preparatory to a terrorist act. These include: providing or receiving training connected with terrorist acts;¹⁷ possessing ‘things’ connected with terrorist acts;¹⁸ and collecting or making documents likely to facilitate terrorist acts.¹⁹ The penalties are severe. For example, a maximum penalty of life imprisonment is imposed where a person provides or collects funds and is reckless as to whether those funds will be used to facilitate or engage in a terrorist act,²⁰ or, more generally, where the person does ‘any act in preparation for, or planning, a terrorist act’.²¹ These offences can be combined with the ‘inchoate’ offences that apply to other Commonwealth crimes, such as that for attempt or conspiracy. These offences are also committed even if a terrorist act does not occur or the training/thing/document/act is not connected to a specific terrorist act.²² The offences thus render individuals liable to serious penalties even before there is what would ordinarily be regarded as the formation of criminal intent. It is this predictive approach, exemplified in the doubly pre-emptive offence of ‘conspiracy to do an act in preparation for a terrorist act’, which gives the offences such an extraordinary reach.
- iii. The new laws contain remodelled sedition offences whereby it an offence punishable by seven years’ imprisonment to urge the overthrow of the Constitution or government by force or violence, or to urge interference in parliamentary elections. It is also an offence to urge violence against a group or an individual on the basis of their race, religion or political opinion.²³
- iv. The laws enable warrantless searches whereby police officers may enter premises without a warrant in order to prevent a thing from being used in connection with a terrorism offence, or where there is a serious and imminent threat to a person’s life, health or safety.²⁴ While on the premises, police officers have the power to seize any

¹⁵ Ben Golder and George Williams, ‘What is “Terrorism”? Problems of Legal Definition’ (2004) 27 *University of New South Wales Law Journal* 270; Keiran Hardy and George Williams, ‘What is “Terrorism”? Assessing Domestic Legal Definitions’ (2011) 16 *UCLA Journal of International Law and Foreign Affairs* 77.

¹⁶ *Criminal Code* s 100.1(1) (definition of ‘terrorist act’).

¹⁷ *Ibid* s 101.2.

¹⁸ *Ibid* s 101.4.

¹⁹ *Ibid* s 101.5.

²⁰ *Ibid* ss 103.1(1) (general offence), 103.2(1) (where the funds are collected for or on behalf of a specific person).

²¹ *Ibid*, s 101.6.

²² See *ibid* ss 101.2(3), 101.4(3), 101.5(3), 101.6(2).

²³ *Ibid* ss 80.2A–80.2B. These offences were first introduced as ‘sedition’ offences by the *Anti-Terrorism Act (No 2) 2005* (Cth) sch 7 item 12. They were amended to their current form by the *National Security Legislation Amendment Act 2010* (Cth) pt 2

²⁴ *Crimes Act 1914* (Cth) s 3UEA.

other ‘thing’ if they suspect on reasonable grounds that doing so is necessary to protect someone’s health or safety, or because the circumstances are ‘serious or urgent’.²⁵

- v. The Australian laws provide a longer investigation period for terrorism offences (24 hours) compared to non-terrorism offences (12 hours).²⁶ In the case of a terrorism offence, the investigating authorities may also apply to a magistrate for up to seven days of ‘dead time’ if they need to suspend or delay questioning the suspect (for example, while making overseas inquiries in a different time zone).²⁷
- vi. The laws enable the proscription, or banning, of organisations by government decree. The Attorney-General can make a written declaration that an organisation is a ‘terrorist organisation’.²⁸ Once a declaration is made, a range of offences apply to individuals who are linked to that organisation, including: directing the activities of a terrorist organisation;²⁹ intentionally being a member of a terrorist organisation;³⁰ recruiting for a terrorist organisation;³¹ receiving funds from or giving funds to a terrorist organisation;³² providing ‘support’ to a terrorist organisation;³³ and associating with a terrorist organisation.³⁴
- vii. Included in the laws is a ‘preventative detention order’ regime in which individuals may be taken into custody, without charge or trial, and detained for a maximum period of 48 hours where this is reasonably necessary to prevent an ‘imminent’ terrorist act from occurring or to preserve evidence relating to a recent terrorist act.³⁵ An extended period of detention is then possible under State law up to a maximum of 14 days.³⁶
- viii. The laws also include a ‘control order’ regime, in which individuals not suspected of any criminal offence may be subject to a wide range of restrictions that can regulate almost every aspect of their life, ranging from where they work or live, to whom they can talk, where those restrictions are ‘reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.’³⁷ A person can even be subject to house arrest. All this can occur without a trial, and indeed control orders ignore the concept of guilt and innocence altogether.

²⁵ Ibid (Cth) s 3UEA(5).

²⁶ Compare ss 23DB–23DF (terrorism offences) with ss 23C–23DA (non-terrorism offences).

²⁷ Ibid s 23DB(11).

²⁸ In order to make such a declaration, the Attorney-General must be satisfied that the organisation ‘is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act’ or ‘advocates the doing of a terrorist act’: *Criminal Code* s 102.1(2)(a)–(b).

²⁹ Ibid s 102.2.

³⁰ Ibid s 102.3.

³¹ Ibid s 102.4.

³² Ibid s 102.6.

³³ Ibid s 102.7.

³⁴ Ibid s 102.8.

³⁵ Ibid s 105.4.

³⁶ See, eg, *Terrorism (Police Powers) Act 2002* (NSW) s 26K(2).

³⁷ *Criminal Code* s 104.4(1)(d).

- ix. The anti-terror laws provide extraordinary new powers to ASIO whereby the Director-General of ASIO can apply to the Attorney-General for questioning and detention warrants.³⁸ A person may be questioned in eight hour blocks up to a maximum of 24 hours where this would ‘substantially assist the collection of intelligence that is important in relation to a terrorism offence’.³⁹ In addition, a person may be detained for up to a week for questioning where there are reasonable grounds to believe that he or she will alert another person involved in a terrorism offence, not appear before ASIO for questioning, or destroy a record or thing that may be requested under the warrant. It is an offence punishable by five years’ imprisonment to refuse to answer ASIO’s questions, or to give false or misleading information. These warrants may be issued against non-suspects, including family members, journalists, children between the ages of 16 and 18⁴⁰ and innocent bystanders. It is an offence, while a warrant is in effect and for two years afterwards, to disclose ‘operational information’ (including ‘information that [ASIO] has or had’) that a person has as a direct or indirect result of the issue or execution of the warrant.
- x. The laws include new powers of electronic surveillance, not only for terrorist suspects, but also for those who the authorities believe are ‘likely to communicate’ with the person under investigation.⁴¹
- xi. They also grant additional powers to the Attorney General to close down a courtroom from public view where sensitive national security information is likely to be disclosed.⁴² That information may then be led against a defendant in summary or redacted form. Decisions as to whether the evidence will be admitted are decided in a closed hearing from which the defendant and even his or her legal representative may be excluded.⁴³ When deciding whether and in what form to admit the evidence, the judge or magistrate is directed to give ‘greatest weight’ to the interests of national security over other considerations.⁴⁴
- xii. The laws require that publications, films or computer games that ‘advocate’ the doing of a terrorist act must be classified as ‘Refused Classification’.⁴⁵ This includes where the publication, film or computer game ‘directly praises the doing of a terrorist act in circumstances where there is a risk that such a praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the *Criminal Code*) that the person might suffer) to engage in a terrorist act’.⁴⁶

³⁸ *Australian Security Intelligence Organisation Act 1979* (Cth), Part III Div III.

³⁹ *Ibid* ss 34D–34G, 34R–34S.

⁴⁰ See the ‘special rules for young people’ in *ibid* s 34ZE.

⁴¹ *Telecommunications (Interception and Access) Act 1979* (Cth) s 46(1)(d)(ii).

⁴² *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31.

⁴³ *Ibid* s 29(3).

⁴⁴ *Ibid* ss 31(7)(a), (8), 38L(7)(a), (8).

⁴⁵ *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s 9A.

⁴⁶ *Ibid* s 9A(b).

IV DISPROPORTIONATE LAWS

Australia needed new anti-terror laws, but the laws actually enacted reflect major problems of process and political judgment. To a significant degree, this was a result of many of the laws being enacted in haste⁴⁷ as a reaction to catastrophic attacks overseas, especially those on September 11 and in London in 2005, both of which provoked considerable anger, fear and grief in the community.

It is not surprising that at such times people look to their political leaders for a strong response, including action that may actually prove to be disproportionate to the threat due to its impact on democratic liberties. This dynamic is well known, and was well stated by Alexander Hamilton in *The Federalist* (No 8) in the late 18th century:

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual efforts and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.⁴⁸

This dynamic might be countered by strong human rights protection. However, Australia is now the only democratic nation in the world without a national human rights law such as a human rights act or Bill of Rights.

Legally-protected human rights standards can provide a yardstick against which to assess the making of new anti-terror laws. Even then, they may prove to be only of limited benefit in the face of what can be overwhelming political and community pressure, in the aftermath of a terrorist attack, for 'tough laws' that 'do whatever it takes' to stop a future terrorist attack. A more significant benefit of human rights protection may therefore be that it can provide a trigger and mechanism for post-enactment analysis. This is a means by which overbreadth in anti-terror laws in other democratic nations is now being reassessed, and on occasion remedied. Such a winding back may occur as a result of judicial decisions or through a fresh assessment by a government recognising the value and importance of protecting democratic freedoms.

Such a call was taken up in the lead-up to the 2010 United Kingdom general election. Counter-terrorism reform was identified as a priority by the Liberal Democrats and the Conservative Party and then formed part of the Coalition agreement between them.⁴⁹ In 2011, the new Coalition Government announced a comprehensive review of the UK's anti-terror

⁴⁷ See See Andrew Lynch, 'Legislating with Urgency — The Enactment of the *Anti-Terrorism Act (No 1) 2005*' (2006) 30 *Melbourne University Law Review* 747; Andrew Lynch, 'Legislating Anti-Terrorism: Observations on Form and Process' in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 151; Greg Carne, 'Hasten Slowly: Urgency, Discretion and Review — A Counter-Terrorism Legislative Agenda and Legacy' (2008) 13(2) *Deakin Law Review* 49.

⁴⁸ James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers* (Penguin, 1987), 112-113.

⁴⁹ UK Government, *The Coalition: Our Programme for Government* (2010) pp 11, 24.

and security powers. Home Secretary Theresa May declared the government was ‘committed to reversing the substantial erosion of civil liberties’ produced by the UK’s terrorism laws:

I want a counter-terrorism regime that is proportionate, focused and transparent. We must ensure that in protecting public safety, the powers which we need to deal with terrorism are in keeping with Britain’s traditions of freedom and fairness.⁵⁰

The results of this review were published in 2011. It was found that some of the UK’s counter-terrorism measures were ‘neither proportionate nor necessary’.⁵¹ As a result, the government announced a suite of proposals designed to ‘liberalise’ its counter-terrorism laws to ‘correct the imbalance ... between the State’s security powers and civil liberties’ and make those powers more targeted.⁵² A key component of this reform was the abolition of control orders.⁵³ Australia has gone through no like process of political recalculation and review, despite the fact that our control order regime, which remains in place, is based upon the now-repealed UK regime.⁵⁴

The result in Australia is a body of anti-terror laws that in key respects undermines democratic freedoms to a greater extent than the laws of other comparable nations, including nations facing a more severe terrorist threat. For example, it would be unthinkable, if not constitutionally impossible, in nations such as the United States and Canada to restrict freedom of speech in the manner achieved by Australia’s 2005 sedition laws. It would also not be possible to confer a power upon a secret intelligence agency, like that conferred on ASIO, that could be used to detain and question non-suspect citizens.

A central challenge in enacting anti-terror laws is how best to ensure the security of the nation while also respecting the liberty of its people. In democratic nations, the answer is usually grounded in legal protections for human rights. In Australia, the answer is provided almost completely by the extent to which political leaders are willing to exercise good judgment and self-restraint in the enactment of new laws. This is not a check or balance that has proved effective in Australia when it comes to the enactment of anti-terror laws.

V WHAT NOW?

For many people, the debate over anti-terror laws is a thing of the past. Indeed, I often encounter surprise from people when I mention that the laws passed in the wake of September 11 remain on the statute book. Many people, including experienced lawyers, assume that the laws were the subject of sunset or other clauses and so have departed the statute books now that the immediate emergency is over. This indeed was the experience of the like laws enacted during World War I and World War II, but, unlike those conflicts, the

⁵⁰ “Rapid Review of Counter-terrorism Powers”, *Press Release*, 13 July 2010.

⁵¹ UK Government, *Review of Counter-terrorism and Security Powers: Review Findings and Recommendations*, 5.

⁵² *Ibid.*, 3.

⁵³ *Ibid.*, 5.

⁵⁴ See generally Lisa Burton and George Williams, ‘What Future for Australia’s Control Order Regime?’ (2013) 24 *Public Law Review* 182.

‘war on terror’, like the war on drugs, is a misnamed conflict without a conceivable end. As a result, with rare exceptions where sunset clauses may yet expire sometime in the future, Australia’s new anti-terror laws will operate in perpetuity unless action is taken.

The problem is not necessarily one of the misuse of anti-terror laws. Indeed, some laws, such as ASIO’s detention power have never been, and may never be, used. In such cases, the problem lies in how such extraordinary powers are becoming seen as normal, and so applied elsewhere. An example is the extension of the control order regime from our national anti-terror legislation to so-called anti-bikie laws.⁵⁵ In South Australia, former Premier Mike Rann justified this by saying: “We’re allowing similar legislation to that applying to terrorists, because [bikie groups] are terrorists within our community.”⁵⁶ Laws of this kind are now spreading throughout the country, and are also encouraging the revival of offences for guilt by association and consorting. The danger is that the exceptional powers granted to combat terrorism will increasingly be used by State governments to prosecute the law and order debate. They are becoming part of the State legislators’ toolbox for demonstrating to the community how they are tough on crime.

While there has been very little political backing for revising Australia’s anti-terror laws, there is no shortage of analysis and official reports on the subject.⁵⁷ Earlier in 2013, two long-awaited, independent reports commissioned by the Commonwealth were released that deal with major parts of the laws, and recommend very significant change.

One report was convened by the Council of Australian Governments (COAG) to review a long list of powers and offences.⁵⁸ The committee was led by Anthony Whealy QC, a retired judge from the NSW Court of Appeal, and included senior state and federal police officers.⁵⁹ The other report was prepared by a leading member of the New South Wales bar, Bret Walker SC.⁶⁰ He was appointed in 2011 as the first independent monitor of Australia’s anti-terror laws, and as such is charged generally with reviewing the operation, effectiveness and implications of these laws.⁶¹

Walker had significant advantages in preparing his report. The COAG Review was rushed for time, whereas Walker’s conclusions are the culmination of more than a year and a half of discussion and analysis. The Federal Parliament has also given Walker special powers.⁶² He can question agencies such as the Australian Federal Police and ASIO, and has access to classified information such as their case files.

⁵⁵ For example, *Serious and Organised Crime (Control) Act 2008* (SA).

⁵⁶ ABC Radio National, ‘South Australia’s Plans to Obliterate Outlaw Bikie Gangs’, *The Law Report*, 6 May 2008 (Mike Rann) <<http://www.abc.net.au/radionational/programs/lawreport/south-australias-plans-to-obliterate-outlaw-bikie/3254212>>.

⁵⁷ See e.g. Security Legislation Review Committee, Parliament of Australia, *Report of the Security Legislation Review Committee* (2006).

⁵⁸ Council of Australian Governments, *Review of Counter-terrorism Legislation* (2013).

⁵⁹ The membership of the review committee can be found here: <<http://www.coagctreview.gov.au/committee/Pages/default.aspx>>

⁶⁰ Walker B, *Independent National Security Legislation Monitor Declassified Annual Report* (2013).

⁶¹ *Independent National Security Legislation Monitor Act 2010* (Cth).

⁶² *Independent National Security Legislation Monitor Act 2010* (Cth).

The reports recognise the real danger posed to the community by terrorism. Walker identifies ‘investigation and particularly surveillance’ as ‘by far the most effective powers’ to meet this threat.⁶³ The problem is that the Federal Parliament has granted the police and ASIO powers that go considerably beyond this.

Both the COAG and Walker reports come to the same conclusion: in many respects, Australia’s anti-terror laws are unnecessary, go too far and lack appropriate safeguards. It is clear from these reports that many of these laws need urgent repair or even repeal.

The reports have a lot in common. Both undertake a careful, forensic analysis of some of Australia’s most contentious laws, and find aspects of them wanting. For example, the reports recommend the abolition of preventative detention orders, by which a person can be held without charge for up to 14 days.

The COAG Review also examines offences directed at terrorism. It finds that many apply far too widely, such as one that permits a person to be jailed for up to 15 years for ‘possessing a thing’ connected with a terrorist act. It finds that offences such as this should be tightened, and in other cases it recommends repeal, such as for the broad-ranging offence of associating with a terrorist organisation.

Walker finds that the control order regime is ‘not effective, not appropriate and not necessary’.⁶⁴ He recommends that it be abolished, or at least rewritten to apply only to people convicted of a terrorism offence who remain a danger to the community. By contrast, the COAG Review recommends that the control orders be retained, but only with a range of significant new safeguards.

The controversial law that grants ASIO an extraordinary power to question and detain in secret for up to a week Australian citizens not suspected of any crime also receives attention. Walker recommends that ASIO retain the power to gather intelligence by questioning people about their knowledge and links to terrorism. However, he finds that the agency should lose its power to detain.

Walker’s report and the COAG Review strip away any pretence that Australia has the right laws in place to protect the community from terrorism. The reports reveal that many of these laws are ineffective or unnecessary. Some are also dangerous in how they undermine important democratic values, such as freedom of speech, the right to a fair trial and the presumption of innocence.

It is clear that the Federal Parliament has much work to do to fix Australia’s anti-terror laws. The manner in which the COAG and Walker reports were released was not a promising start. They were released to the public at 5pm on federal budget day in May 2013. This also happened to be the last possible day allowed for releasing the Walker report, which the government had received in late 2012. Releasing the reports in this way meant that they and their recommendations were buried under the analysis and media attention bestowed on the

⁶³ Walker B, *Independent National Security Legislation Monitor Declassified Annual Report* (2013), 4.

⁶⁴ *Ibid* 4.

budget. Leaving the release to the last minute also meant there was no chance that they could be acted on prior to the 2013 federal election.

It might have been thought that the election period would at least provide an opportunity for the major parties to indicate how they would respond to these reports in the next term of Parliament. However, rather than do so, both did everything they could to avoid providing a concrete answer. When pressed to do so by the Law Council of Australia, the Labor Party stated that ‘a re-elected federal Labor Government will carefully consider the reports before reaching a final position on the substance of the recommendations’,⁶⁵ while the Coalition said that it would ‘carefully consider’ the recommendations in Walker’s report, but otherwise had ‘no plans to make material alterations to the anti-terrorism legislation introduced under the former coalition Government following the September 11, 2001 attacks’.⁶⁶ Such responses hardly amount to clarion calls for reform, or even a preparedness to acknowledge the major deficiencies in Australia’s anti-terror laws identified by the Commonwealth’s own independent inquiries.

VI CONCLUSION

Australia was right to enact new anti-terror laws in the wake of the September 11 attacks. Such laws were needed to ensure that the legal system offered protection to the community by preventing terrorist attacks from occurring. Passing new anti-terror laws also enabled Australia to live up to its international obligations and signalled that as a nation Australia rejects such forms of political violence.

In the years since September 11, the Federal Parliament has enacted 61 anti-terror laws. This has given rise to a large and remarkable new body of legislation providing for powers and sanctions that were unthinkable prior to the 2001 attacks. Indeed, the rhetoric of a ‘war on terror’ reflects the nature and severity of the laws enacted in response to the threat. While these laws were often cast as a transient response to an exceptional set of events, it is now clear that the greater body of this law will remain on the Australian statute books for the foreseeable future.

This poses a long-term challenge for the Australian legal system and Australian democracy. While new anti-terror laws were needed, the laws actually enacted diverge in too many respects from the laws that Australia should have achieved. The result is a body of enactments that is creating new understandings of the normal limits of the law in Australia. This is broadening the extent to which it is considered acceptable for Australian law to sanction extraordinary powers or outcomes, such as detention without charge or the silencing of speech.

Australia’s new anti-terror laws expose structural problems with Australia’s system of law. That system is dependent upon an effective parliamentary process and a culture of respect among political leaders when it comes to democratic values, rule of law principles and human

⁶⁵ Law Council of Australia, *Key Legal Issues: 2013 Federal Election Responses* (2013) 16.

⁶⁶ *Ibid.*

rights. Anti-terror laws reveal how many of the bedrock principles of Australian democracy are actually only assumptions and conventions within the political system rather than hard legal rules that demand compliance. The laws reveal the capacity of politicians and parliaments to contravene these values and, in doing so, to create new and problematic precedents for the making of other laws. The result in Australia is the legal legacy of the ‘war on terror’.

POSTSCRIPT: TONY BLACKSHIELD AS A TEACHER AND AUTHOR

GEORGE WILLIAMS

It is an honour to return to Macquarie Law School to give a lecture in Tony Blackshield's name, and also to follow in the giant footsteps of Michael Kirby, who delivered such an eloquent inaugural lecture last year.¹

I was a student of Tony's in 1989, some 24 years ago, in my third year at Macquarie University. He taught me Australian Government I and II, which were then the names of the compulsory constitutional law subjects. Tony's teaching remains firmly entrenched in my memory. Put simply, he was brilliant in the way that he combined an encyclopaedic knowledge of the Constitution with a rich repertoire of anecdotes and stories about the High Court.

He was also a hard task master. Each week we would receive a bundle of new material. It was clear that Tony was determined to include as much as he could, and so tens of pages were presented with the text flush to the margin and in a tiny font. It was an intimidating, if highly rewarding, course.

Tony was renowned for his feedback. I still have some of my assignments from his courses, and my essays show that Tony was not shy in making use of his red pen. As I flick through the pages I can see my feeble efforts at constitutional analysis covered by swathes of Tony's careful responses. Indeed, I wondered at the time why students were subject to a word limit, when the marker was not.

One comment of Tony's that pleased me at the time was his response to a paragraph I had written on the *Engineers Case*.² Tony wrote: 'Very thoughtful and balanced – Coperesque!' On rereading my paragraph, I think that Tony was more than a little kind to me, and far less so to Michael Coper.

I must admit though that I remember less about the content of the thick bundles of reading he assigned to us each week, than his stories. I still use these in my own teaching. I can recall Tony talking about how Justice Lionel Murphy kept a copy of the Constitution by his bedside as a cure for insomnia, and how Justice Edward McTiernan broke his hip, while chasing a cricket in his hotel room, and had no choice but to resign when Sir Garfield Barwick refused to install a wheelchair ramp at the Court.

Tony was an exceptional teacher because he combined intellectual rigour with the life and colour of the law and the people who inhabited it. He imbued what could be a dry subject with its necessary, human side. Indeed, the greatest impact his teaching had on me was not in conveying the basic rules of our Constitution, but in helping me to understand for the first

¹ Michael Kirby, 'A R Blackshield and Realism in Australian Constitutional Law' (2012) 11 *Macquarie Law Journal* 8.

² *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

time how legal rules can be dependent on the vagaries of circumstance and personality. More broadly, Tony awakened in me a sense of the connections, actual and potential, between the Constitution and social justice.

I have been very fortunate that my relationship and association with Tony deepened after he taught me in 1989. He supervised my legal honours project two years later and, consistent with his own approach to word limits, permitted me to hand in a monstrous 40 000 word thesis. Its subject was the significance of the High Court's 1951 decision in the *Communist Party Case*.³ In particular, I was determined to unpick the extent to which the decision was a consequence of the people and personalities involved, and how the case had shaped, and had been shaped by, the politics of the time.

Tony's support of me did not cease when I finished my undergraduate studies. He wrote the reference that enabled me to spend a year at the High Court as an associate to Justice Michael McHugh. I was fortunate to arrive in 1992, and so had the opportunity to work on decisions such as *Mabo*⁴ and the free speech cases.⁵ Tony also wrote a reference that turned me away from a full time career at the bar, in that it enabled me to win a junior position as an academic at the Australian National University.

My first act as an academic was to approach Tony with a view to translating his reams of course materials into a text on Australian constitutional law. He displayed an enormous, and generous, degree of trust in agreeing to undertake the project with me, a 25-year-old newly minted constitutional lawyer. That book, *Australian Constitutional Law and Theory*,⁶ has now been published in five editions by Federation Press and has sold over 55 000 copies. The sixth edition will appear in just a few months, sadly, for the first time, without Tony as co-author, as he has now finally taken the step into retirement. Working on this book has been the greatest joy of my academic career and the result has been the publication of which I am most proud.

The book once again displays Tony's relaxed attitude to word length. It extends to nearly 1500 pages and has been nicknamed 'the brick' by law students, no doubt with affection. Despite its size, words are squeezed onto every page, thereby keeping faith with its origins. The book also bears all the hallmarks of Tony's great intellect, which is one reason why it has been one of the most successful Australian legal books of recent decades, and why it been prescribed as the text in a majority of Australian law schools.

Working with Tony on this book has certainly expanded my intellectual horizons. It has formed the bedrock of my knowledge of the field, and through him I have come to know much more than I had expected, or I suspect wanted, about subjects such as the year books of mediaeval England or the proper use of the ellipsis.

³ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁵ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁶ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 5th ed, 2010).

There is much more that I could say about Tony and his teaching, ranging from the time he fell asleep mid-class through to the lengthy digressions and good humour involved in our weekly sessions on the *Oxford Companion to the High Court of Australia*.⁷ I will say though that some things are beyond even him. He has taught me many things, but never to sing about the High Court and its cases.

⁷ Michael Coper, Tony Blackshield and George Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2007).