AUSTRALIA'S LEGAL RESPONSE TO TERRORISM: NEITHER NOVEL NOR EXTRAORDINARY?

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Abstract

Using comparative material, the presentation will explore the extent to which recent terrorism laws constitute a derogation from fundamental values and principles of the criminal law. Wider powers of investigation, coupled with reverse onus clauses, strict liability and inchoate offences, seriously threaten to undermine our human rights. Rather than being novel or extraordinary, these new laws seem to conform to the legal template that has been driving the War on Drugs over the past two decades in Australia and elsewhere. The displacement of human rights within this new model of criminal law based on surveillance and risk management of suspect populations will be critically evaluated.

Part of my agenda is to subvert the predominant rhetoric that we live in extraordinary times that demand, it follows, extraordinary laws (typically laws that abridge fundamental human rights and massive expansions of State power). I propose to expend little time on ASIO, which I feel demands too much attention, and to which others here today will talk about. National security powers are only a small part of the post-9/11 legal picture. There are significant State laws generated in the aftermath of NY and Bali that deserve similar critical scrutiny and public debate – I hope to nudge that along a little today.

I feel that there is almost a new *genus* of law: post 9/11 law. Although 9/11 has become a significant force in justifying these laws, the truth is that there is an element of opportunism (by some law enforcement and state agencies) behind these claims of necessity for new powers and offences.

While the ASIO Bill was attracting all the media attention, the Leaders' Summit on Terrorism and Transnational Crime in April 2002 mooted some significant reforms to criminal law: including an agreement to introduce model laws and mutual recognition of powers relating to cross-border investigations within 12 months. The Summit referred this issue to the Standing Committee of Attorneys-General and Australasian Police Ministers Council which established a Joint Working Group on National Investigative Powers. The Working Group was comprised of police and government lawyers from all jurisdictions, but no academics or wider human rights bodies. The

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Joint Working Group issued a Discussion Paper, *Cross Border Investigative Powers For Law Enforcement* (2003). The aim of the model legislation outlined in the Discussion Paper was two-fold: (a) to promote national consistency of laws related to selected covert investigative powers; and (b) to establish a framework for mutual recognition of those powers during cross border investigations. In my submission to the Discussion Paper I voiced concerns about the scope of these reforms, particularly the Working Group's failure to consider whether existing powers were adequate (the refusal to adopt an 'evidence based' approach to reform), as well as a failure to consider adequately human rights issues (such as the significant privacy rights threatened by covert operations).

I remain sceptical about the legislative schemes of impunity under controlled operations – that law enforcement agents and their informers can apply for prospective immunity for crimes that may need to be committed during such operations (though there is no immunity for death, GBH or rape). Already it is clear from reports in the US, that law enforcement officials have posed as Arabs sympathetic to bin Laden for the purpose identifying possible terrorist financiers. Closer to home, disruption activities in relation to people smuggling may have involved informers engaging in sabotage (though this remains a matter which the AFP in the interests of operational security has refused to answer questions about). Following recent reform to the Crimes Act last year, it is now clear that such activities can now be immunised under the controlled operations regime.

What disturbed me most about what has happened in the last 12 months in relation to covert law enforcement is the subversion of law reform processes: in relation to the cross border investigation DP only three weeks were made available for public consultation, though this was later extended. In the end only 19 submissions were received. The trend is worse at State level where reforms are proceeding without public consultation on the direction for reform.

It's not all doom and gloom however. On the less negative front, 9/11 can be viewed as a positive catalyst for promoting uniformity or harmonisation in the criminal law. As the criminal lawyers amongst you would know, achieving consistency in approach in Australia has been very difficult as States and Territories jealously guard their competencies and "law and order" constituencies. This is notwithstanding more than a decade of SCAG (Standing Committee of Attorneys General) work through the MCCOC (Model Criminal Code Officers' Committee). Prior to 9/11 the reports were rarely implemented (Feds aside) uniformly. However, 9/11 has seen some remarkable changes. In the field of cybercrime, you can see a real contrast in approach pre and post 9/11. The Leaders' Summit highlighted this type of crime as one that posed particular threats to national infrastructure especially through cyberterrorism. Since prioritising cybercrime, there has been significant progress in implementing the MCCOC report throughout Australia, with most jurisdictions in substantial compliance now. Interesting attacks on computer systems has been brought within the definition of terrorism act under the Federal offence too.[1]Another effect has been the quiescence of the States in referring powers to the Commonwealth to enact its package of terrorism offences. This is further evidence of national cooperation in

[1] See Bronitt, S. & Gani, M., "Shifting Boundaries of Cybercrime: From Computer Hacking to Cyberterrorism" (2003) 27 *Criminal Law Journal* 303.

criminal justice matters – and an antidote to the traditional jealous protection of " law and order" agendas by the States and territories.

My title provocatively suggests that our responses to terrorism are neither novel nor extraordinary. To the few among you with an interest in legal history (or historical novels and/or films about Ned Kelly), the 19th century moral panic and legislative overreaction to bushranging is instructive. At this time, there emerged widespread concern about 'outlaws', usually escaped convicts, who travelled between colonies to evade detection. Their criminal acts, mainly highway robbery, have been distinguished from ordinary crimes due to their political dimension. The attacks did differ from ordinary property crimes: they were directed to colonial infrastructure – highways, banks, post-offices and the police and magistracy (the ruling elite). Indeed, the incipient fear of rebellion played a role in the passage of the local Bushranging Act in NSW in 1830.[2] It must be said that the risk of rebellion was often exaggerated by the politicians and press (some might say today that little has changed).

What is interesting is how the State responded in the 19th century: the Bushranging Act in NSW empowered the arrest on suspicion of persons who could not establish their identity, and required suspected persons to prove that they were not engaged in illegal activities. The Act was clearly inconsistent with English law, though the Supreme Court held that it was not repugnant due to the special circumstances facing the colony.[3] These views resonate with the views of our present Attorney General – that these are exceptional times warranting exceptional measures.

Indeed, the NSW *Terrorism (Police Powers) Act 2002* resonates strongly with these colonial terrorism laws. The NSW Act contains a raft of "special powers" to prevent terrorism. The Act copies the Federal definition of terrorism. These "special powers" can be invoked by senior police with Ministerial concurrence. What are these special powers for? The authorisations granted under the Act are for preventing terrorist attacks and gathering evidence of past attacks. The powers are designed to locate persons, vehicles and areas that are implicated in future or past terrorist acts. The powers allow police to obtain the disclosure of identity of persons (including persons who are in an area that is the target of an authorisation). The powers are not limited to individual persons or suspects – they could be used to target communities such as mosques and educational institutions! There are also powers of search without warrant, and to seize and detain property. The authorisation cannot be challenged by *any* court, nor can any procedural irregularity (including a lack of actual authority) be raised to impugn its validity – so it seems that police searches under a non-compliant authorisation cannot be challenged under s138 Evidence Act as evidence obtained unlawfully or improperly.

It has been made an offence for a person to fail to cooperate with or obstruct a police officer. The duration of authorisations varies: (i) to *prevent* attacks it is 5 days or to 24 hours (ii) to investigate past attacks, it is 24 hours. Not all of these terrorism measures will comply with international human rights standards.

[2] See 'The Bushranging Act 1830' (NSW) (11 Geo 4 No 10).
[3] Considered in *R v Smith and McCormick* [1830] NSWSC 46 (21 June 1830).

Criminalising suspects who refuse to explain their whereabouts etc is a good example of offences that abridge the right to silence. This was seen in a recent European case, *Heaney v Ireland*[4] where the accused were convicted for failing to provide an account of their movements under Irish terrorist laws. The Court was robust in its denunciation that terrorism cannot justify "a provision which extinguishes the very essence of the applicant's rights to silence and against self incrimination guaranteed by Article 6 of the ECHR". Of course, there has been very little discussion of these State reforms while Federal terror laws and ASIO continue to grab all the headlines, and draw the majority of scholarly attention.[5]

The Victorian terrorism reforms post 9/11 prompt similar concerns. The *Terrorism (Community Protection) Act 2003* (Vic) has created a new category of covert search warrants. These authorisations are granted by the Supreme Court. Interestingly they are not warrants that target suspected terrorists but rather are directed to "premises" where it is believed that a terrorist act has been or may be committed. The power is not limited (like ordinary warrants) to gathering evidence. Rather, the warrants are granted where it is believed that the entry and search will substantially assist in preventing or responding to the terrorist acts: section 6. While seemingly unusual powers, they are actually consistent with recent reforms to listening devices legislation which permit the targeting of 'places' rather than 'persons' suspected of involvement in drug dealing.

The general point to make here is that rather than being exceptional, these reforms look quite normal in the broad sweep of criminal justice reform over the past decade. Karl Alderson at the Public Law Weekend this year made this precise point – that the expansion of Federal power has been proceeding apace since the 1970s. The driving force for the expansion is drug law enforcement and measures to combat organised crime. While some may be reassured that these changes are the natural direction for criminal justice reform, I still view these developments as problematic. The war on drugs has distorted the criminal justice system considerably over the past two decades. Exceptional measures introduced in the 1980s and 1990s to deal with serious drug offences have been normalised over time. The drug war has provided the template for the war on terrorism: expansion of powers to engage in telecommunications interception, controlled operations, and deployment of informers to conduct covert interviews or engage in disruption activities. To achieve these reforms the legislation has used broad definitions, resulting in overbroad and ill-defined investigative powers. In the Federal arena, "terrorism" has been simply added to the list of serious offences that now can be subjected to controlled operations. The cross border scheme, if enacted next year, as I suspect it will be, is a significant step closer to producing a national scheme of covert criminal investigation: this will mean that a surveillance warrant or controlled operation in one jurisdiction will be automatically recognised in another.[6]

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[4] (2000) 33 EHRR 246.
[5] See Carne G., "Terror and the Ambit Claim: Security Legislation Amendment (Terrorism) Act 2002 (Cth) (2003) 14 Public Law Review 13 and Hocking J., *Terror Laws* (Sydney: UNSW Press, 2004).
[6] Following public consultation, the model laws have recently been published: Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigative Powers, *Cross Border Investigative Powers for Law Enforcement – Report* (2003).

An interesting trend in Australia has been the revival of ‘status’ crimes in this area – *viz.* criminalising a person's status as a member of a group, rather than punishing them for what that person has done or intends to do. Section 102.3 of the *Criminal Code 1995* (Cth) makes it an offence if a person is intentionally a member of a proscribed organisation. There is a defence of withdrawal after you know it is a terrorist organisation, but the legal burden is on you to establish that you took reasonable steps to cease that membership. Thus, if a previously lawful organisation is proscribed the person has to move quickly (before the prosecution does). Also, how does repudiation of membership occur and what if this might place a person or their family in jeopardy? Liberal criminal justice scholars have tended to heap scorn on status crimes on the ground that they violate the rule of law: that the law punishes criminal acts not types.[7]. Having said that, these types of offence have a venerable pedigree in criminal law: consorting law (with criminals and sex workers), and vagrancy. Also, going back earlier, the outlawry provided a process (not dependent on conviction) whereby an enemy of the State could forfeit their property – the effect of attainder was devastating to the outlaw and their families (if it was accompanied by corruption of blood). Stepping back from these new terrorism offences, there definitely seems to be a revival of status-based approaches to criminality– what is offensive in my view is the unacceptably wide unguided discretion conferred on public officials (in this case the Minister) in determining the groups to be proscribed (organisation is directly or indirectly involved in planning, assisting and fostering terrorist attacks). There is also a wide discretion in whether membership of the group is established on the facts. This is because of the breadth of the definition of “member” under the Criminal Code, which is controversially defined as including “informal” member. So lack of formal membership may be no bar to a prosecution. The very process of proscription will drive organisation undercover because the task of establishing informal membership status necessarily looks to the character and associations of the person: guilt by association rather than guilt for what they have actually done or planned to do.

The common law refused to recognise an indictment based on mere possession of a ‘thing’ and initially at least had great difficulty with recognising inchoate forms of liability. Of course, the modern criminal law has no such inhibition and for that we have to thank drug law (eg the growing boundaries of conspiracy have much to do with the contexts in which the doctrine was developed – ie to combat drugs and organised crime). Again these laws fit within the modern trend of 20th century criminal law.

Our laws to combat financing terrorism have a similar pedigree in drug law. The *Suppression of the Financing of Terrorism Act 2002* is modelled on the proceeds of crime legislative format. Most of our modern confiscation legislation stems from the United Nations *Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances* (1988): significantly, Article 5 requires the confiscation of proceeds of crime, and also that domestic bank secrecy provisions should not unduly hinder the progress and operation of international criminal investigations. Interestingly, as Arie Freiberg and Richard Fox have pointed out, the civil regime for confiscation is actually very expensive to operate and poses serious threats to civil

[7] Allen, F., *The Habits of Legality: Criminal Justice and the Rule of Law*, (1996: New York, Oxford Uni Press), p 30.

liberties.[8] His thesis is most interesting for its suggestion that the Australian Tax Office (ATO) has been more successful in removing the profit motive from crime, and incapacitating criminals financially, than criminal confiscation legislation The ATO seems like an unlikely 'player' here – but it treats "crime" as just another business activity, and moves quickly to do assessments of criminals, estimating undeclared profits of years of organised crime, and then moving to seize assets. We know this works – Al Capone was caught not by the Feds but by the IRS. The question is morally whether the community can view terrorism as a business in the same way.

So what about the comparative experience? Our terrorism offences enacted at the federal level in 2002 were modelled directly on the UK *Terrorism Act 2000* definitions. The UK, anti terrorist powers enacted in the 1970s and 1980s have been extensively studied. We should recall the "administrative" internment of large numbers of young (predominantly Catholic) men in the early 1970s in Northern Ireland, who were held on preventive grounds, never convicted of any crime, and who were subject to forms of interrogation subsequently held to be torture by the European Court of Human Rights. Perhaps we think this could never happen here in Australia. I think we are naïve if we assume that forms of preventive detention and questioning cannot take on a coercive quality in Australia, even if subject to judicial supervision and regulated by law. There is no doubt that concerns about terrorism in Northern Ireland have driven law reform in some undesirable directions on mainland UK. Paddy Hillyard, writing in 1993, noted how some of the emergency powers enacted in the UK (initially with sunset clauses) were gradually normalised.[9] Detention for questioning under *Prevention of Terrorism Act* was eventually made a permanent Act applicable throughout the UK, not just Northern Ireland. Perhaps the most widely known effect of terrorism were the modifications to the right to silence and legislation that allowed adverse inferences to be drawn from refusal to answer questions. These "innovations" were first tested out on the Northern Irish in the late 1980s, before being introduced to the mainland. Thankfully, thus far, Australia has resisted the temptation to use terrorism to drive a wider review of these civil rights (thus far we seem to have quarantined these deviations to intelligence-gathering procedures by ASIO). However, I believe it is only a matter of time before these changes spread into the normal criminal justice system.

There is little that is truly novel behind these recent reforms in Australia and elsewhere. That said, there is much to be worried about. The expansion of state power continues apace in Australia. More surveillance of suspect populations and places can be expected (a matter of concern in a criminal justice system that already authorises more than equivalent jurisdictions). We may also anticipate greater use of legislative immunities to excuse and protect law enforcement officials engaged in covert activity – these new intrusive powers are, of course, unreviewable before the courts.

The volume of new legislation itself is hard to track. Part of my research agenda in 2004 will be to track the changes to law justified (sometimes disingenuously) by reference to 9/11. The challenge for public policy, in my view, is to keep the issue of

[8] Freiberg, A. and Fox, R. "Evaluating the Effectiveness of Australia's Confiscation Laws" (2000) 33 (3) *The Australian And New Zealand Journal of Criminology* 239.
[9] Hillyard, P. *Suspect Community: people's experiences of the prevention of terrorism acts in Britain*, (1993: London, Pluto Press), p 263.

human rights driving the "terrorism law" agenda: it should not be viewed as a simple utilitarian exercise of weighing the competing values of crime control and due process.[10] In this regard it is instructive to compare the Australian approach with the recent Canadian reforms to their Criminal Code: what impressed me was how the Code approached the investigative hearing before the judicial officer. The law is concerned with obtaining information to prevent terrorism. They made it an offence not to answer the question put by the Attorney General, but then prevented the material gathered from being used in any criminal proceeding against the person, thereby protecting the right to remain silent – this approach is called "derivative use immunity". But then the preamble of the Act making these amendments says nothing about weighing competing interest. The preamble states:

> *Whereas the Parliament, recognising that terrorism is a matter of national concern that affects the security of the nation, is committed to taking comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote values reflected in, and rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms.*

This might be viewed simply as an aspirational statement – I am sure Charter challenges loom, but at least legislatures in Australia should be striving for both suppression of terrorism and protection of human rights. Clearly, a Bill of Rights would help focus the legislature and policy makes minds by articulating the importance of the rights under threat.

My final plea, as expressed at the Public Law Weekend, is that we need to shift the debate from Commonwealth law and ASIO to the State and Territory arena. Little, if anything, has been written on the significant range of laws and initiatives at State and Territory level to empower local police to investigate and prosecute terrorists. My prediction is that the NSW and Victorian powers will undoubtedly lead to increased surveillance and covert operations in Muslim communities. This investigation will not always be focused on terrorism, not least because it is notoriously difficult to construct cases around these nebulous crimes. So critical attention must be directed beyond the merits of specific terrorist offences and powers (which may be a dead letter, like treason and sedition) toward a wider category "political crime" generally. It is important to focus not only on serious terrorist crimes being prosecuted in our Supreme Courts, but on the policing of minor "political" offences and the less visible abuses of state power that occur on our streets.

[10] See Bronitt, S. "Constitutional Rhetoric versus Criminal Justice Realities: Unbalanced Responses To Terrorism" [2003] 14(2) Public Law Review 76.