



Australian Government
Attorney-General's Department

Secretary

SHAPING LEGISLATION TO MEET FUTURE SECURITY CHALLENGES

SECURITY IN GOVERNMENT CONFERENCE 2007

INTRODUCTION

Good morning.

It is a great pleasure for me to welcome you to this Security in Government Conference for 2007.

The theme of this conference is the future of security.

The brochure you all received says that, since the tragedy of 11 September, we have reviewed and improved every aspect of our national security arrangements.

A significant part of that improvement has been achieved through new anti-terrorism legislation.

However, the nature of the terrorism threat continues to change.

And, as the conference brochure also notes, new threats continue to emerge, in addition to the radical extremism we have been focussing on most directly for the last few years.

Those new threats include pandemics, bioterrorism, proliferation of weapons of mass destruction, cyber-crime, increasingly severe natural disasters and fears for the environment.

In addition, after six years investigation and experience, we now have a deeper analysis and a more thorough understanding of the root causes of 21st century terrorism.

As a result, we recognise modern terrorism requires a broader and more diverse response than the immediate reaction to the attack on the World Trade Centre, which was essentially to find and punish the perpetrators.

We also recognise that protecting the community involves a comprehensive approach that encompasses protection from all of the possible harms we might suffer, including natural disasters.

All of this means that meeting future security challenges is a continuous and unending task. It means security policy and legislation require constant monitoring and adjustment as circumstances change.

Therefore, although the new Government has not yet had the chance to put its stamp on Australia's national security policy, we can reflect at this conference on where we are now and consider some of the issues the Rudd Government will face as it takes office.

LEGISLATION TO DATE

You are no doubt at least broadly aware of the major pieces of anti-terrorism legislation that have been passed by the Australian Parliament since June 2002. I won't go into the detail of that legislation again.

I think it is sufficient to just make four points about it.

The first is that much of it was passed through Parliament with support from the major political parties.

Secondly, much of it was passed in accordance with the terms of the State reference of terrorism power, which means in effect that it was supported by the State Governments as well.

Thirdly, the legislation was enacted over several years. It was developed, adapted and extended on the basis of experience.

Fourthly, the Rudd Government will no doubt give consideration to the structure and effectiveness of the existing legislation as it takes over responsibility for national security and puts its policies for protecting Australia and Australians into place during the coming term.

It is not appropriate for me to speculate about the Government's intentions, so today I want to comment on what I see as some trends in thinking about modern terrorism over the last few years which may be relevant to the development of future policy and legislation.

MOVING FROM INITIAL RESPONSE TO ROOT CAUSES

As I have said, the day one United States response to the terrorist attacks in New York and Washington was to ascertain who did it and bring them to justice, one way or another.

The Central Intelligence Agency and other US intelligence and defence agencies quickly determined that Al Qaida and Osama Bin Laden were behind those attacks and set about pursuing them and the Taliban, their protectors in Afghanistan.

The *United States National Strategy for Homeland Security* published in July 2002 declared that the strategic objectives of homeland security in order of priority were:

- to prevent terrorist attacks within the United States
- to reduce America's vulnerability to terrorism, and
- to minimise the damage and recover from attacks that do occur¹.

The purpose of the Strategy was *to mobilise and organise our Nation to secure the US homeland from terrorist attacks*².

¹ Published by the Office of Homeland Security, page vii

² Ibid, page 1

While the strategy was drawn in broad terms, the rhetoric was all about war.

That rhetoric was repeated by President George W Bush on 14 December 2003 when, following the capture of Saddam Hussein, he said:

*The war on terror is a different kind of war, waged capture by capture, cell by cell and victory by victory..... the United States of America will not relent until this war is won*³.

In the April 2004 publication, *Patterns of Global Terrorism*, put out by the US Department of State, the Coordinator for Counterterrorism, Ambassador Cofer Black expressed the first strategy for dealing with the terrorist threat in these terms:

*We will defeat terrorist organisations of global reach by attacking their sanctuaries; leadership; command, control and communications; material support; and finances*⁴.

This response has been well catalogued by Bob Woodward in the *Bush at War* trilogy, Ron Susskind in *The One Percent Doctrine*, Dick Clark in *Against All Enemies* and former CIA Director, George Tenet, in his memoirs, *At the Center of the Storm*.

I draw a couple of conclusions from my reading of some of those contemporary records of that extraordinary time.

One is that the United States clearly saw itself as at war against a known enemy, at least initially, which could be dealt with by an enhanced military solution.

I say *enhanced* because I gather this was the first time the CIA had had such a major operational role in a Defence force mission.

My second conclusion is that, over time, there came the realisation that, while Al Qaida and Bin Laden were quite rightly the focus of the United States' immediate attention, the problem of radical extremism was much more deep seated, wide spread and intangible than they had first imagined.

I think it is a fair assessment that other disaffected groups such as Jemaah Islamiah were encouraged, sponsored or possibly just inspired by the actions of Al Qaida, which ignited their own radicalism into terrorist acts.

In other words, as time passed, there came the recognition that this is a contest involving both people and ideas and that those ideas are not linked to an obvious group or national or political cause.

There was the realisation that this is not a contest against an identifiable enemy in any conventional sense.

We now know it is much more complicated because the terrorist threat is based in an extreme ideology which is not related to a defined, even if intractable, political issue and is not confined geographically to one country or region.

COMPARATIVE TERRORISM IN THE UNITED KINGDOM

³ Quoted in *Patterns of Global Terrorism 2003*, United States Department of State, April 2004, page iii

⁴ *Ibid*, page iii

This nebulosity makes the issues provoking the new terrorism more difficult to resolve than the last great cause of terrorism in the 20th century, that is, the Northern Ireland problem.

Fortunately that conflict looks like it has finally succumbed to a negotiated political solution.

However, it is worth remembering that that political violence also had devastating consequences.

In the years between 1969 and 1998, it resulted in 3,289 deaths in Northern Ireland and 41,837 injuries (that is, almost 3 percent of the population). There were 35,669 shooting incidents, 15,246 bomb explosions (many of them in Belfast or Londonderry) and 18,258 persons charged with terrorism offences.

These statistics are taken from an article by Bernadette C Hayes and Ian McAllister entitled *Sowing Dragon's Teeth: Public Support for Violence and Paramilitarism in Northern Ireland*⁵.

To give some comparative context for those numbers, the authors have made these calculations:

*If we extrapolate these figures to Britain, some 111,000 people would have died, with 1.4 million people injured. This represents just under half of all British deaths (265,000) during the Second World War. Further extrapolating the deaths to the United States, some 526,000 would have died, more than died during the Second World War (405,000) and nine times the American war dead in Vietnam*⁶.

DIFFERENCES

The British High Commissioner, the Right Honourable Helen Liddell, drew several clear distinctions between the Northern Ireland terrorism and terrorism since September 11 in her speech at the Security in Government Breakfast last week.

The High Commissioner noted four major differences.

They are:

- first, the British authorities knew where most of the Irish Republican Army came from, but the tentacles of Islamist extremism spread across the Middle East, Africa and Asia
- second, with the IRA, the more intricate the plot – the greater the danger, but with Islamist extremism the primitive can be as deadly as the intricate
- third, for the IRA the threat of terror was the key weapon, which explained the coded tip-offs. In contrast, the goal of Islamist terrorism is mass murder, and
- fourth, with the IRA, there was always the hope that pragmatism would prevail over fanaticism. But with Islamist terrorism, the ideology is extreme; it will never accept the legitimacy of other views⁷.

⁵ Hayes and McAllister, *Political Studies*: 2001 Vol 49, page 903

⁶ *Ibid*, page 902

⁷ *Learning Lessons the Hard Way*, delivered in Canberra, 27 November 2007, page 4

BROADER THINKING

Of course, observations about the importance of a broad strategy to combat terrorism do not detract from the need to have secure borders, intelligence-directed disruptions of planned attacks, competent police investigations and anti-terrorism laws that fit the offence.

They don't detract from the need to cooperate with our international partners in intelligence, law enforcement and border protection.

They don't replace the need to work with intelligence, law enforcement and border protection agencies in our region to improve their counter-terrorism efforts.

They don't remove the need for us to help our near neighbours draft effective anti-terrorism legislation, as we did in Cambodia.

They don't reduce the importance of establishing institutions such as the Jakarta Centre for Law Enforcement Cooperation (known as J-C-LEC).

JCLEC was set up by the Australian and Indonesian governments to improve operational expertise in law enforcement agencies in our region.

The centre has already trained more than 2,000 participants in courses covering investigations management, security risk management, disaster victim identification, post bomb blast programs and Islamic law and politics.

They simply mean that an effective response to modern terrorism cannot be limited to those measures.

ONE STEP FURTHER BACK

If we take one step further back, we can see that a primary objective of our strategy should be to prevent people getting to the point where they would consider committing a terrorist act.

The recognition of the depth, reach and amorphous nature of 21st century terrorism has led to the introduction of broader policies to address the underlying or ideological causes of radical extremism and not just its visible manifestation.

I don't intend to go through all of these policies but it is useful to comment on a few of them to indicate the sorts of strategies I have in mind.

COUNTER-RADICALISATION

The first is to identify the way in which people are recruited to terrorism and stop that process before it begins or at least interrupt it before it is completed.

There seems to be general consensus that there are three clear stages involved: isolation from the community, which makes a person susceptible to radicalisation based on exaggerated or concocted grievances which can in turn lead to them becoming sufficiently extreme in their beliefs that they can be induced to commit a terrorist act.

This analysis leads on to a range of countering plans.

They include plans as diverse as keeping young people at school; involving disaffected groups in community activities; requiring imams to conduct religious services in English; supporting the training of local imams to replace possibly radical imams from other countries; and encouraging Islamic community groups to help the civil authorities address these problems.

One tangible international contribution Australia is making in the field of education is its current project building 2,000 junior secondary schools in Indonesia by 2010.

The schools will create more than 330,000 places for 13 to 15 years olds, targeting children from poor and remote areas. This initiative will give these children a better education and better prospects in life that they could otherwise expect.

When you think about these examples, they give you some idea of the dimensions of the challenge ahead, if we are to succeed in stamping out the root causes of modern terrorism.

PUBLIC DIPLOMACY AND STRATEGIC COMMUNICATION

Another illustration of the broadening approach to counter-terrorism can be seen in the *US National Strategy for Public Diplomacy and Strategic Communication* which was published recently by the Strategic Communication and Public Diplomacy Coordinating Committee.

US approaches to public diplomacy have undergone significant review and change over the past two years.

In the wake of the September 11 terrorist attacks, more than 30 reports were written on the subject. Many of them were highly critical.

Following her appointment in September 2005, President Bush tasked the Under Secretary for Public Diplomacy, Karen Hughes, to address the identified problems.

The first step in this process is the development of the United States' first ever national strategy for public diplomacy, which was released in June this year.

The National Strategy highlights the importance the US places on public diplomacy as a key tool in countering terrorism.

There is a strong emphasis on its role in addressing negative views and misunderstandings about the United States in the Islamic world.

To this end, the strategy document itself and commentary on public diplomacy by the Administration places significant weight on the need to focus on what has been termed the *diplomacy of deeds*.

This term covers communicating value messages by better promoting what Americans are doing to help improve the lives of others around the world, particularly in areas such as health, education and economic opportunity.

The strategy calls for the expansion of education and exchange programs with an emphasis on reaching youth, women and influential people in selected countries.

Teaching the English language, using technology and developing public-private partnerships are all seen as critical tasks.

The strategy also identifies the need to modernise the US' methods of communication with the rest of the world.

This aim is to be achieved by increasing the visibility of language trained American spokespeople on foreign TV and radio and through the use of the internet, web chat rooms, blogs, online videos and podcasts.

Put simply, this seems to me to be the start of a major push by the US to have its values, policies and objectives better understood by the rest of the world.

INTELLIGENCE, POLICE AND SUCCESSFUL PROSECUTIONS

I want to digress for a couple of minutes to comment on one practical issue that needs careful attention and that is the way in which our anti-terrorism laws are being interpreted and applied by the courts.

As cases are prosecuted under our new legislation, we can assess whether the laws are achieving their object or falling short of Parliament's intended outcome.

It is important to understand that the response to modern terrorism has resulted in an interaction of intelligence and police work that did not exist before.

This interaction necessitates a considerable adjustment by the agencies involved in rethinking their purpose, procedures and culture.

The traditional role of intelligence agencies is to develop intelligence to protect the nation's interests by disrupting politically motivated violence or potential terrorist acts, to assist other agencies in the performance of their duties and to inform Government decisions.

Under its governing legislation, the Australian Security Intelligence Organisation's first function is *to obtain, correlate and evaluate intelligence relevant to security*⁸.

Security includes protection from espionage, sabotage and politically motivated violence⁹.

Intelligence agencies have not had to think about intelligence as evidence or act in accordance with rules that would allow intelligence to be put before a court of law in a criminal trial.

Conversely, the Australian Federal Police's mission is *to fight crime together and win*.

Police are trained to think in terms of potential offences and to gather evidence for a possible criminal prosecution. Intelligence that does not amount to admissible evidence is of limited use to law enforcement agencies.

⁸ ASIO Act 1979, section 17

⁹ ASIO Act 1979, section 4

Now, these two previously disparate cultures are required to adapt their thinking, policies, protocols and work practices to accommodate the demands of each other's discipline, at least to some extent.

We can see this change very clearly in the United States.

After September 11, the mission of the Federal Bureau of Investigation was redefined, so that preventing terrorism comes before fighting crime.

The FBI's mission is now *to protect and defend the United States against terrorism and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners.*

The FBI's first priority is *to protect the United States from terrorist attack.*

Here in Australia, ASIO is now a frontline participant in the implementation of some of our anti-terrorism laws.

Adjusting to these new requirements hasn't been easy.

The recent decision in the case of *R v Ul-Haque* illustrates the problem.

In that case, Justice Adams of the New South Wales Supreme Court ruled a record of interview was inadmissible. His decision was based on his assessment of the combined impact ASIO and Australian Federal Police questioning had had on the accused's state of mind before he was formally interrogated.

A similar issue arose in the *Jack Thomas Case*. The Victorian Court of Appeal overturned an earlier decision by Justice Philip Cummins which had allowed the AFP's record of interview with Mr Thomas in Afghanistan into evidence.

The Court of Appeal decision indicates the procedure that will need to be followed by Australian police officers conducting interviews in other countries if the records of those interviews are to be admissible evidence in Australian courts.

However, while Mr Thomas' conviction was set aside, leave was granted to re-prosecute him on the basis of similar admissions he made in a subsequent television interview. That prosecution is expected to be heard in February 2008.

Those two cases illustrate issues which relate to the implementation of the anti-terrorism legislation by ASIO and the AFP.

An issue of statutory interpretation arose in two other cases involving consideration of the legislative requirement that bail should only be granted in exceptional circumstances in terrorism prosecutions.

In the case of Dr Mohammed Haneef, Magistrate Payne granted bail on the basis that an accumulation of factors constituted *exceptional circumstances*.

Those factors included that Dr Haneef was a doctor; he had no criminal history; he could return to work; he had a good employment history; and his passport had been seized.

Also in July this year, Justice Bongiorno came to a similar view in the Victorian Supreme Court case referred to as the Tamil Tigers prosecution. The judge found that a combination of factors in aggregate met the test of exceptional circumstances.

In that instance, those factors included the prospective delay before the trial would be held; previous good character and personal circumstances; and that nothing had been done by the accused to hinder or obstruct the investigation.

These cases indicate the need to closely monitor court decisions under the new laws. Those decisions will inevitably shape the way the laws are being implemented. However, if modification of practice proves to be impractical, then it may be necessary to consider changes to the legislation to ensure that the laws are working as Parliament intended.

CHANGING APPROACHES

Another indication of the evolution of thinking about the real scope of security policy can be seen in the revised *US National Strategy for Homeland Security* published by the Homeland Security Council in October 2007.

In his introduction, President Bush says:

More than 6 years after the attacks of September 11, 2001, we remain at war with adversaries who are committed to destroying our people, our freedom, and our way of life. In the midst of this conflict, our Nation also has endured one of the worst natural disasters in our history, Hurricane Katrina. As we face the dual challenges of preventing terrorist attacks in the Homeland and strengthening our Nation's preparedness for both natural and man-made disasters, our most solemn duty is to protect the American people.

The first chapter of this 2007 Strategy is titled *Today's Realities in Homeland Security*.

It records the evolution of thinking about the breadth of the responsibilities encompassed in the term *homeland security*.

It says that, after September 11, the US *developed a homeland security strategy based on a concerted national effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism and minimise the damage and recover from attacks that do occur*¹⁰.

Now the thinking has moved to this position:

*The human suffering and staggering physical destruction caused by Katrina were a reminder that threats come not only from terrorism, but also from nature. Indeed, certain non-terrorist events that reach catastrophic levels can have significant implications for homeland security....This Strategy therefore recognises that effective preparation for catastrophic natural disasters and man-made disasters, while not homeland security per se, can nevertheless increase the security of the Homeland*¹¹.

¹⁰ *National Strategy for Homeland Security, October 2007, page 3*

¹¹ *Ibid, page 3*

RECOGNITION OF ESSENTIAL LINK TO ALL HAZARDS

As Chairman of the Australian Emergency Management Committee, I welcome the recognition that emergency services are an essential part of the response to a terrorist attack, as with any other disaster.

Australia's emergency services prepare and train on the basis that they must be in position to respond to all hazards. To them, it largely makes no difference what causes a disaster. Their task is to help the injured, minimise the damage and assist in recovery.

The importance of this function in the day-to-day lives of Australians can be seen in the response to Cyclone Larry and, more commonly, floods and bush fires.

Events like this take place every year.

Our emergency services respond to them with quiet efficiency and a minimum of fuss which reflects extremely well on their professionalism and the dedication of the volunteers who assist them.

There is no doubt in my mind that this evolution of thinking to, in effect, attribute equal significance to counter-terrorism and emergency response is justified and timely.

It has been recognised in Australia by the inclusion of emergency response elements in counter-terrorism exercises over the last couple of years.

I look forward to the further development of the linkages between counter-terrorism and emergency services roles over the next few years.

TECHNOLOGY

I want to make a couple of comments about technology.

The rapid development of technology is presenting governments with great challenges in many areas, including fighting terrorism.

One example which is particularly relevant to my portfolio is the challenge of maintaining our capacity to intercept telecommunications passing between increasingly sophisticated and relatively cheap communication devices which provide telephone, internet and other merged services.

It is a common observation that terrorists are technically savvy and very adaptable.

They are credited with effective use of the internet and using each development in technology to their advantage.

We will need to maintain constant vigilance in future to ensure that our counter-terrorism approaches are not becoming outdated by the speed of developments in technology.

TRUST

My final point is about trust.

I think it is self-evident that the public needs to have trust in the fairness of our anti-terrorism laws and the integrity of the agencies which implement them.

Public trust is also an essential precondition to the effective operation of all of those areas of counter-terrorism policy that require community participation or cooperation.

The importance of trust was highlighted by Mr Jonathan Evans, the Director of MI5, in a speech he made in Manchester on 5 November 2007.

Mr Evans said: *Public trust is becoming an increasingly important issue for many organisations, both private and public. My Service is no exception, and we need to ensure that our work is sufficiently understood. Although our operations must remain secret for them to be successful, we have a responsibility to keep the public informed about the threats they face and what we are doing to counter them*¹².

This point was reinforced by the British High Commissioner in her speech last week. Mrs Liddell said:

Our police have a crucial role to play in earning the trust of the public. Successful prosecutions give police and intelligence services a moral licence to pursue terrorists and to impose necessary burdens on the public to enable them to do so.

These comments support the proposition that one of the major responsibilities of Government and all of the agencies involved in implementing our anti-terrorism policies is to earn and maintain public trust.

Agencies such as the Inspector-General of Intelligence and Security, the Australian Commissioner for Law Enforcement Integrity and the Commonwealth Ombudsman will, through the discharge of their supervisory duties, play an important part in achieving that goal.

CONCLUSION

So in conclusion, we reach the inevitable question, what comes next?

That question will be answered by our new Government as it puts its policies into place over the next few months.

However, I anticipate that the issues I have touched on today will have some impact on the development and implementation of those policies in future.

ROBERT CORNALL AO

5 December 2007

¹² *Intelligence, counter-terrorism and trust*, Address to the Society of Editors, Radisson Edwardian Hotel, Manchester, 5 November, 2007