



Australian Government
Attorney-General's Department

Secretary

THE LEGISLATIVE RESPONSE – FINDING THE RIGHT BALANCE
National Security for a Diverse Community Forum

INTRODUCTION

In his opening address this morning, the Attorney-General referred to the National Action Plan to Build Social Cohesion, Harmony and Security.

SOCIAL COHESION

The Prime Minister has singled out these qualities – social cohesion and community harmony – as two of the major factors that have contributed to the maintenance of a stable democracy in this country since 1 January 1901.

In his Australia Day address in 2001 celebrating the centenary of Federation, Mr Howard said:

In the arts, in scientific endeavour, on sporting fields and on battle-fields, in the building of all the infrastructure of a modern nation, in the respect offered to us by other nations and in the creation of a stable and harmonious society from people drawn from the four corners of the earth – Australia's achievements are impressive and a source of pride for us all.¹

Of course, our idea of how to attain social cohesion has changed over time.

There was a period when cohesion was thought to be best achieved by maintaining an artificial, Anglo-Saxon outpost half a world away from Britain.

While it lasted, the White Australia policy restricted Asian immigration, despite the fact that some Chinese immigrants had lived and worked here since the gold rush days in the mid-nineteenth century.

I was a student at Flemington State School in Victoria in the early 1950s when the first wave of immigrants arrived from war torn Europe after the Second World War. They came from Italy, Greece, Germany, Latvia and many other countries. But they were all called *new Australians* irrespective of where they had come from.

Half a century later, the 2001 census showed that 43% of the Australian population was either born in another country or had a parent born overseas.²

In the last 50 years, those immigrants – and their second and even third generation descendants – have contributed to social and cultural traditions which have greatly enriched our way of life and increased our understanding and tolerance of other cultures and religions.

Those traditions have become an integral part of what constitutes modern Australia. Taken together, they evidence our capacity as a nation to accept a diversity of opinions, religious beliefs and lifestyles.

The Prime Minister acknowledged the importance of this capacity in his 2001 address when he said that one of the great institutional pillars of Australian democracy was our *strong, effective and robust political and parliamentary system where the opportunity exists for open debate and endless diversity of views.*³

Apart from our general acceptance of diversity, freedom of political discussion has been recognized by the High Court of Australia as an implied right under the Australian Constitution⁴.

Freedom of religion has always been constitutionally guaranteed. The Constitution provides that:

¹ John Howard, MP, Australia Day address, National Press Club, 25 January 2001

² See www.diversityaustralia.gov.au at 25 July 2007

³ John Howard, MP, Australia Day address, National Press Club, 25 January 2001

⁴ See Sawyer's The Australian Constitution, Third Edition, Gut Aitken and Robert Orr QC, page 138

*The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*⁵

And, in addition to other human rights, discrimination on the basis of race is illegal under the Racial Discrimination Act 1975.

Today, Australia's immigration policy brings in people from an increasingly broad range of countries and seeks to assimilate them into our population whatever their national or ethnic origins.

In doing so, the Government's aim is to build on our past success as a culturally diverse, tolerant and open society that is united by a shared future and a commitment to our nation and our democratic values and institutions.

I have outlined this brief overview of the makeup and history of the Australian population because I think it provides some useful background to the consideration of our new anti-terrorism laws since September 11.

REACTION TO SEPTEMBER 11

A few days after the terrorist attacks in New York and Washington in September 2001, I was asked to chair a whole of government review of Australia's counter-terrorism arrangements.

It was patently clear to everyone on that interdepartmental committee that our current arrangements were grossly inadequate. We recognised they were conceptually grounded in the past.

Put simply, we had to propose a new approach to 21 st century terrorism.

We handed our report to the National Security Committee of Cabinet by the end of October.

Essentially, we made four groups of recommendations. They were:

⁵ The Australian Constitution, section 116

- one, to increase resources to existing counter-terrorism agencies
- two, to consolidate some administrative functions to achieve a more cohesive outcome
- three, to make a wide range of security improvements (including in particular additional security at airports and the border), and
- four, to introduce new laws to deal with this new type of terrorist threat.

NEW TERRORISM

It might be useful to define what I mean by *new terrorism*.

To me, its key features are that it has only a vague purpose, not a clear political objective; it deliberately attacks innocent citizens and non-military targets at random; and, as at least some of its perpetrators are willing to die for their cause, the prospect of punishment for a crime will have limited or no deterrent effect.

These characteristics can be contrasted sharply with other terrorist activity inflicted by groups such as the Irish Republican Army which were directed at a clearly identifiable political goal.

PURPOSE OF THE CRIMINAL LAW

Surprisingly, it is not easy to define *crime* despite the importance of the criminal law in our society.

One simple definition offered by legal academic Peter Gillies is that: *Crime is ... conduct which is recognised by the law (as made by the courts and legislatures) as being criminal*⁶.

Other commentators define criminal acts by reference to their consequences, which leads on to a consideration of the purposes of criminal sanctions.

⁶ Peter Gillies, *Criminal Law*, Fourth Edition, page 5

Those purposes include retribution, general and specific deterrence, rehabilitation, preservation of morality and incapacitation or prevention of harm to others.

The Parliament has made terrorist acts and related conduct a criminal offence based squarely on those principles but in particular on deterrence and incapacitation.

This basis for these offences has been accepted by the judges who have heard terrorism trials in Australia over the last few years.

In the *Thomas* case, Justice Cummins noted: *In the matter of terrorism offences the principle of general deterrence is of pre-eminent importance.*

And in the *Jack Roche* case, Justice McKechnie quoted this observation from Lord Bingham: *In passing sentence for the most serious terrorism offences the object of the Court will be to punish, deter and incapacitate; rehabilitation is likely to play a minor (if any) part.*

NEW LAWS

One proposition often put forward by critics of Australia's recent anti-terrorism laws is that the laws which existed in Australia on 10 September 2001 were adequate to respond to terrorism as it has manifested itself in the 21st century.

The unambiguous answer from the Government and from the Parliament is that they were not.

Australia had some counter-terrorism legislation before 2001, but it was very limited and directed to specific behaviour. That legislation had its origins mainly in international treaties dealing with particular types of threats like plane hijacking and hostage taking.

This is understandable.

Australia was a very safe country, protected by geography and social cohesion from the disputes that lead to conflict, insurgency and terrorism in other, less fortunate, parts of the world. We did not need sophisticated anti-terrorism offences then.

We could rely – if necessary – on traditional State offences such as murder and causing grievous bodily harm.

But those offences are primarily directed at punishing an offender after the event. They are based on the assumption that, in most cases, the threat of conviction and punishment is an effective deterrent.

They suffer from what is, in my view, an almost fatal flaw when related to terrorism. They largely depend on the completion of an act – such as murder – before the offence is committed.

The judges who have heard some recent terrorism cases understand this new legislation is directed to making certain conduct a criminal offence before a terrorist attack occurs.

In *R v Thomas*, Justice Cummins said: ... *such offences need to be prevented before they occur; not simply punished after the event.*

And in the *Lohdi* case, Justice Whealy expressed this similar view: *The very purpose of the legislation is to interrupt the preparatory stages leading to the engagement in a terrorist act so as to frustrate its ultimate commission.*

MORE LEGISLATION

The first batch of new counter-terrorism laws – following on from the October 2001 review – was passed by Parliament in June 2002.

Those laws make it a crime, among other things, to commit a terrorist act, to prepare to commit a terrorist act, to be a member of a listed terrorist organisation, to train with a terrorist organisation or to fund a terrorist organisation.

A *terrorist act* is defined as an action or threat which is made with the intention of advancing a political, religious or ideological cause with the intent of coercing or intimidating a government or the public and with consequences including loss of life or serious damage to property.

However, a terrorist act does not include advocacy, protest, dissent or industrial action.

The aim of the legislation is to create clear and specific offences relating to modern terrorism and to give intelligence and law enforcement agencies the capacity to intervene earlier than they could under the conventional criminal law.

The focus on preparatory conduct is intentional and essential. Conventional offences (including murder and other serious harm offences, conspiracy and attempt) could still be relevant in some circumstances. But any analysis of the charges in recent or current terrorism cases will show that much of the conduct alleged against the accused would not have constituted a criminal offence under our pre-2001 laws.

The steady stream of new terrorism laws since 2001 culminated in the passage of two significant Anti-Terrorism Acts in December 2005.

They were the 24th and 25th Acts passed by Parliament to better protect Australians from terrorism since the dreadful events in September nearly six years ago.

Taken together, those 25 Acts represent the evolution of a whole new area of criminal law and law enforcement procedure.

Two specific aspects of that legislation may be of interest to you. One is the process for proscribing a terrorist organization.

The second is the basis on which you might commit an offence if you fund a terrorist organization.

PROSCRIBING A TERRORIST ORGANISATION

The process for proscribing a terrorist organisation is set out in the *Criminal Code 1995*.

The Attorney-General has to be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in preparing, planning, assisting in or advocating a terrorist act. It is not necessary for the terrorist act to actually take place.

In coming to that view, the Attorney considers a statement of reasons prepared by the Australian Security Intelligence Organisation in consultation with the Department of Foreign Affairs and Trade.

He also seeks advice from the Australian Government Solicitor's Chief General Counsel as to whether the statement of reasons is sufficient to meet the criteria for listing set out in the Code.

If the Attorney is satisfied, he offers a briefing on the proposed listing to the Leader of the Opposition and consults with the States and Territories before making the necessary regulations.

Once the regulations are made, the Attorney makes the statement of reasons available to the public through a press release and on the national security website.

The regulations are reviewed by the Parliamentary Joint Committee on Intelligence and Security and its report is tabled in Parliament.

Finally, because the regulations are delegated legislation, they can be set aside by a vote of the Parliament.

I should make two further points for the sake of completeness.

A court could find an organisation is a terrorist organisation even if it has not been proscribed under the Code.

For example, I don't think anyone would doubt that Al Qaida is a terrorist organisation, even if it had not been proscribed. However, the Government's approach has been to proscribe organisations which meet the requirements of the Code so everyone knows that is their legal status.

The other point is that some international terrorist organisations have not been proscribed in Australia because they don't have sufficient connection to this country to meet the Criminal Code criteria.

FUNDING A TERRORIST ORGANISATION

The next issue is funding a terrorist organisation.

Under the *Criminal Code*, a person may be guilty of an offence with a maximum penalty of 25 years if they intentionally receive funds from, make funds available to, or collect funds for or on behalf of an organisation they know to be a terrorist organisation.

The important element is the person's knowledge that the organisation is a terrorist organisation.

If a person does not know that it is a terrorist organisation but is reckless about that fact, then the person may be guilty of an offence with a maximum penalty of 15 years imprisonment.

I should say that reckless does not just mean careless or inadvertence. To be guilty the person must be aware of a substantial risk that the organisation is a terrorist organisation and the person knows it is unjustifiable to take that risk.

DO THESE LAWS GO TOO FAR?

The passage of these new anti-terrorism laws has not been free from criticism.

Some commentators see them as eroding established civil liberties and legal protections.

They argue that they give intelligence and law enforcement agencies unacceptably intrusive and unjustified additional powers.

However, as far as I can tell, many of the critics do not offer any constructive options or counter-proposals. Most of the time they simply argue, either directly or by implication, for the retention of the pre-2001 status quo.

The Australian Government does not accept these criticisms. It sees the new laws differently.

It sees them as balancing civil liberties with its most basic responsibility to keep the whole community safe and secure.

It recognizes that the relationship between individual rights and community safety has altered since September 11 but believes that it has achieved the right balance in the changed security environment.

In doing so, the Attorney-General, Philip Ruddock, has pointed out that these laws are consistent with the Universal Declaration of Human Rights which states in Article 3 that *Every person has the right to life, liberty and security of the person.*

The Government's approach has been that individual rights have to sit comfortably with this overriding human right to which everyone in our community is entitled.

This point was made very clearly by the Hon John von Doussa QC, the President of the Human Rights and Equal Opportunity Commission, in a speech he delivered at James Cook University on 12 September 2006 in which he said:

It is self-evident that terrorism is a gross violation of fundamental human rights. Only the mad or the bad would suggest otherwise. The threat of terrorism is patently legitimate. The Government has both a right and a duty to take action to protect its citizens.

OTHER ARGUMENTS

In addition to this argument, I would make four further points in response to these criticisms.

The first is that there is nothing unusual about evolving or adapting the criminal law – like any other area of law – to meet changing circumstances. That happens all the time.

Apart from counter-terrorism, some other notable areas of development of Australian criminal law over the last few years include legislation outlawing cybercrime, people trafficking, money laundering and child sex tourism.

The second observation is that changes were plainly necessary. Our existing laws had been drafted to meet different threats. They had become inadequate for the task.

Journalist Paul Kelly put it this way: *One sign of a mature democracy is its ability to change its security laws in response to an unprecedented threat to its society. What else would a mature nation do? Denial is not an option*⁷.

The third observation is that many other countries have also changed their laws to deal more effectively with the threat of modern terrorism.

LAWS OF AUSTRALIA

The fourth – and I think the most important – observation is that the changes to our counter-terrorism laws were the subject of intense public debate and parliamentary scrutiny.

Anyone who has carefully followed the development of these new laws will know that there have been a number of parliamentary inquiries into the major pieces of counter-terrorism legislation over the past five years.

The draft laws as originally put forward were amended by the Government in the light of the parliamentary committee reports.

They were also amended as a result of internal party consideration and negotiation with the Opposition parties.

In other words, the legislation was negotiated through a complex process that meant there was a considerable level of support for the final form of the new laws.

I should also add that much of the legislation is underpinned by a referral of constitutional power from the States and some of it is reinforced by complementary Acts of the Parliaments of the States and Territories.

In short, I think these new laws are a very clear example of democracy in action.

They have involved all Australian governments and parliaments in an extraordinary display of national cooperation.

⁷ *The Weekend Australian*, 2 September 2006, page 18

NO STEREOTYPING

One issue that has come up from time to time is whether the laws are directed at any particular group in the community.

Let me say categorically that is not the case. The laws are directed at preventing or dealing with terrorist acts, irrespective of the origins or associations of the alleged terrorist.

The Director-General of the Australian Security Intelligence Organisation confirmed this approach in an interview reported in *The Australian* newspaper on 9 July 2007.

The report states that Mr O'Sullivan made clear that ASIO's investigations are evidence driven rather than dictated by stereotyping.

Mr O'Sullivan is quoted as saying: *For us, the question is do we see behaviour that impinges on those particular threats? We don't target people because they're Muslims or because they're doctors, or because they live in Brisbane, or whatever.*

This policy accords with commonsense and with my understanding of the approach taken in other countries.

Any other approach would be an inexcusable waste of time and resources, not to mention an unjustified intrusion into the lives of innocent citizens.

It also recognises that Muslims are just as likely to be killed or injured in a random terrorist attack as any other community group.

UNDERLYING CAUSES

It is worth reflecting briefly on what we think are the issues underpinning this lethal extremism.

What is it that links disparate, disaffected groups across the world and inspires them to work with or emulate the terrorist acts of Al Qaida and its affiliates?

I repeat emphatically that none of the Australian Government's policies are an attack on Islam. None of them are an attack on our Muslim citizens or neighbours.

Australia's policies are a response to extremism which has hidden behind a perversion of what the Prime Minister has rightly described as one of the great religions of the world.

One analysis of the contributing causes – which I appreciate is open to debate – is that, within the diversity of Islam, current radical strands share four broad features:

- First is a desire to return to an earlier, pure Islam, purged of outside influences
- Second is the aim to create Islamic states, and ultimately a pan-Islamic caliphate, ruled by strict Islamic law
- Third is a willingness to use violence, and
- Fourth is a virulent anti-Westernism in reaction to grievances ranging from unfair treatment and Muslim economic dispossession to what is seen as the contaminating influence of Western culture.

I don't know if these are accurate assessments.

But I acknowledge that one thing is very clear – neither Muslim religious law nor the great majority of Muslims support violence.

I recently read a publication entitled *Islamic Law and its Reception by the Courts in the West* which was published by the Hague Conference on Private International Law (which is affiliated with the United Nations) following a congress it held in Osnabruck in October 1998.

In that book, I noted in particular two quotes from the Qur'an.

The first is: *Allah commands justice, the doing of good and giving to kith and kin, and He forbids all indecent acts and evil and rebellion.*⁸

The second is: *Take not life which Allah hath made sacred, except by way of justice and law.*⁹

OTHER VIEWS

When I have travelled overseas with the Attorney-General, we have asked our counterparts for their analysis of the causes and solutions to terrorism in their country.

The United States is absorbed in its battle with Al Qaida and its affiliates.

For other countries, one common theme seemed to me come out of their answers.

Terrorism was seen to originate in some local cause or grievance which was then built up into a more generalized and less specific concept of disadvantage or unfair treatment.

That in turn could then be utilized by powerful or influential figures to radicalize followers to the stage where they would consider committing a terrorist act.

For example, in our region we are particularly concerned about Jemaah Islamyiah, but French authorities are focused on North African based terrorist networks from Algeria and Morocco.

The Spanish are also worried about terrorism emanating from Northern Africa, as well as their internal Basque separatist movement and the Eta threat.

The Dutch are concerned that their long term guest worker program has left a significant element of their population disaffected and unassimilated into their broader community and therefore susceptible to radical teaching.

Britain has suffered at the hands of terrorists with connections to Pakistan.

⁸ *Islamic Law and its Reception by the Courts in the West*, edited by Christian v. Bar, Carl Heymanns Verlag KG, 1999, page 11, S.16 (90)

⁹ *Ibid* page 11, S.6 (151)

ISOLATION

Lord Nazir Ahmed, the first Muslim member of the British House of Lords, had an interesting perspective on the causes of modern terrorism.

After the 7 July bombings in 2005, the British Government appointed seven working groups to come up with ways the community could work together to prevent extremism. Each working group concentrated on a different strand of the overall problem of home-grown terrorism.

The working groups' findings are published in a report entitled *Preventing Extremism Together*. The report's recommendations include recommendations about engaging young Muslims in the British community; instilling a more faithful reflection of Islam in the education system; setting up a new advisory body of mosques and imams; and developing a toolkit articulating a new vision for British Islam.

Lord Ahmed was one of the convenors of the panel of working parties.

He strongly supported the principal recommendation that there needs to be much greater inclusion of the Muslim community and mainstream engagement in British life.

A major concern was that second generation Muslims did not have any connection to their parents' country of origin nor did they feel that they had become part of the British community.

In this isolated situation, unemployment, personal problems and perceptions of disadvantage or other grievance can result in a level of disaffection that has the potential to be fanned into terrorism by a radical imam or charismatic leader.

Lord Ahmed emphasised the need to train imams in England, in preference to bringing possibly radicalised imams from overseas.

He also advocated conducting, or at least translating, Muslim religious services in the English language. This would make the mosques more accessible to Muslims from a range of ethnic and

language backgrounds and broaden their teaching by addressing more than one narrow ethnic group.

I noticed some of the ideas put forward by Lord Ahmed in our discussion were included in a speech on security the new British Prime Minister, Gordon Brown, made in Parliament on 25 July 2007.

Mr Brown said, according to a report I have read, that measures to combat radicalisation should include training in citizenship and community cohesion for faith leaders, sponsorship for English speaking imams, the creation of interfaith bodies and a BBC Arabic channel.

CONCLUSION

So, in conclusion, I recognize that the modern terrorist threat poses real dilemmas for liberal democracies and the separate groups within them.

Governments face the difficult task of balancing diverse views and expectations about civil liberties with the need to ensure the security of the community as a whole.

But governments can't sit on the fence or be paralyzed into inaction. They have to make decisions.

In this case, the Government believes our new anti-terrorism laws provide a carefully balanced legal basis to deal with an unprecedented terrorist threat.

But it readily accepts that new offences and criminal penalties are only part of a comprehensive response to this complex problem.

The laws must be accompanied by other measures – taken in partnership with the community – which are directed to removing the root causes of modern terrorism and not just its terrible consequences.

Robert Cornall AO

2 August 2007