

Fear is a Bad Legislator

by Christopher Michaelsen*

U.S. President Franklin D. Roosevelt once declared that the only thing we have to fear is fear itself. Terrorism creates fear, individually and collectively. Terrorists gain power if they inspire fear in the minds of their audience, either because an atmosphere of terror enhances their rational political leverage or because it satisfies the irrational dictates of the fanatical ideological or religious doctrine they espouse – or both.

The atrocities of 9/11 and Bali understandably inspired fear in the minds of many Australians and so the desire to escape from an atmosphere of fear into a climate of greater security is a natural reaction. Besides, as terrorism often violates the most basic of human rights, the right to life, there is a duty for the state to respond. But in the relentless pursuit for absolute security also lies great danger. Terrorists will never defeat a strong democracy. An ill conceived and fear driven response, however, may damage the integrity and value of the state and have severe consequences for the way of life one is actually trying to defend.

It cannot be denied that it was (and is) sensible and necessary to reassess existing laws in the light of the 9/11 and Bali attacks. But it is questionable whether the fight against international terrorism is to be won through the introduction of a wide range of repressive domestic laws. Moreover, constant changes of the law not only create a degree of uncertainty in the legal system but also maintain an atmosphere of fear in the society itself. Nonetheless, the Howard government chose domestic legislation to play a decisive role in the fight against terrorism, which paradoxically is an international phenomenon.

In June 2003, Australia's domestic intelligence agency, ASIO, has been given unprecedented powers that allow it to detain people for up to seven days and interrogate them for up to 24 hours within that seven-day period. Persons detained do not need to be suspected of any offence and can be taken into custody without charges being laid or even the possibility that they might be laid at a later stage. Appeal to an Australian court of law is not available. What is more, detainees are required to answer all questions and provide any material or face up to five years imprisonment. In effect, these provisions abandon three fundamental principles of the rule of law: they remove the right to silence, habeas corpus and reverse the onus of proof.

Anti-terror laws were further bolstered in December 2003. Legislative changes doubled the maximum time a person can be questioned under a warrant where an interpreter is needed, from 24 to 48 hours. Despite strong criticism from a number of organizations including the Australian Broadcasting Cooperation and the Australian Press Council, legislative amendments also tightened secrecy provisions preventing people from

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discussing information obtained during their interrogation for two years after the warrant has expired.

Then, in early March 2004, Federal Parliament gave the Attorney-General powers to ban terrorist organizations even if they were not listed on the United Nations' terror lists. Organizations regarded as 'terrorist' can now be outlawed without the Parliament's approval. As a consequence, organizations like the Communist Party, Nelson Mandela's ANC, Free Papua Movement or any other group considered 'terrorist' or 'not conducive to the public good' for reasons of national security may be banned by the government of the day.

The latest swag of terror legislation was introduced into Parliament in late March and is currently examined by the Senate's Constitutional and Legal Committee. In response to proposals from a summit of police commissioners, federal and state police involved in terror investigations will be able to apply to a court for approval to detain suspects for an extra 20 hours beyond the current four-hour limit. In addition, changes to the Foreign Incursion and Recruitment Act make it an offence to train with organizations associated with terrorist groups. While these two measures are certainly sensible, other proposed amendments are deeply worrisome.

The proposed laws would also allow people to be prosecuted for being members of organizations that are not on the official list of banned terrorist organizations but in fact prove to be a terrorist organization. Furthermore, the new provisions would ban people from making money from selling books or memoirs about their training with terrorist organizations. While effectively curtailing the freedom of speech, a fundamental principle in any liberal democracy, provisions like these are also counterproductive. History provides numerous examples for defectors of terrorist groups publishing books or memoirs and thus providing rare insights into the respective group's organizational structures and motivations.

Never before in history has Australia witnessed a comparative overhaul of national security legislation and the introduction of laws that significantly curtail civil liberties and fundamental freedoms. A reasonable question that therefore has to be asked is: Are these drastic legislative measures proportional to the threat Australia is facing from international terrorism? While a terrorist attack cannot be ruled out completely, the threat of an attack occurring on Australian soil is relatively low.

While joining the 'coalition of the willing' may have slightly increased Australia's profile as a terrorism target, one should not overestimate the extent to which this country's role in Iraq has been acknowledged by the rest of the world. As confirmed by ASIO, a series of other countries are more at risk of attack. These include the U.S., the UK, Israel and several other countries, especially in Europe. Intelligence analysts believe that terror attacks are far more likely to occur against Australian interests overseas than in Australia itself. The amateur bomb scare at the Australian High Commission in Kuala Lumpur is a case in point.

Indeed, on the domestic front there is little evidence to suggest that Australia is host to any group capable of launching a mass-casualty attack similar to the 9/11 or Bali massacres. Terrorism experts agree that it is generally much harder to conduct terrorist operations within Australia than in countries like Spain, Britain, France or Germany. This is because these countries have - in contrast to Australia - porous borders and large Muslim communities with sympathizers likely providing shelter for potential terrorists.

A realistic assessment of the terrorist threat to Australia and the Howard government's legislative response hence leads to the conclusion that the introduction of drastic domestic counter-terrorism laws is an overreaction inspired by a climate of fear. Canberra's anti-terrorism legislation is, for the most part, ill-conceived. What is more concerning, however, is that the laws are likely to persist beyond the present threat of terrorism and will have profound impacts on the Australian legal system.

Chances that temporary repressive counter-terrorism measures will be repealed in the future are slim. In fact, experiences with anti-terrorism legislation in other countries in the past suggest otherwise. To this day, temporary measures introduced in the late 1970s in Northern Ireland to fight the IRA and in Germany to combat the Baader-Meinhof terrorist group remain in force unchanged. Australia is unlikely to be an exception to this rule. What is more, emergency laws are about to be extended progressively to other areas of investigation. A new draft bill, for instance, would give police extraordinary powers to tap phones and install listening bugs in drug investigations without first applying for a warrant. This is but one illustration of what Australian Council of Civil Liberties President Terry O'Gorman calls a 'function creep' in Australian law - the extension of special anti-terrorism powers into much broader areas of investigation.

Speaking to the Australian Law Council one month after the 9/11 attacks, High Court Justice Michael Kirby rightly warned that 'every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause. Always it is wise to keep our sense of proportion and to remember our civic traditions as the High Court Justices did in the Communist Party Case of 1951'. In this case the High Court declared the Menzies' government Communist Party Dissolution Act invalid. Such restraint and absence of fear at the height of the Cold War and in the golden age of Soviet espionage should have served as an example for a qualified legal response to terrorism today.

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