

Law as a Preventative Weapon Against Terrorism

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Sir John Latham, a former Commonwealth Attorney-General, liked to quote Oliver Cromwell's statement on security matters that 'being comes before well-being'.¹ It is a good observation to keep in mind. The necessary premise of any constitutional order and system of government is that people are alive. Serious threats to national security must be addressed.

The Commonwealth has legislated in recent times to protect against the threat of global terrorism. I consider that the threat of terrorism is one of the most serious threats we face. The government's counter-terrorism policy has the key elements of prevention, preparedness, response and recovery. Our legislation largely focuses on the first two elements, prevention and preparedness. Relevant measures include control orders, preventative detention orders and enhanced questioning and detention powers.

Preventative measures generally

Before turning to the specifics of Australia's response to terrorism, I would like to emphasise that preventative measures are not, as some critics have suggested, new to Australian law. The most obvious example of an age-old and recognised preventative measure is the denial of bail. Similarly, the executive may take preventative steps with respect to asylum seekers, the mentally ill and people with infectious diseases. (Even Sir Gerard Brennan and Sir William Deane, while justices of the High Court, acknowledged as much.)² In the first and second world wars, regulations allowing internment of enemy aliens were upheld by the High Court as constitutionally valid.³ In recent times, State parliaments have legislated for preventative measures in respect of child sex offenders: from those cases, we now know which kinds of measures are constitutionally permissible⁴ and which are not.⁵

The Commonwealth's anti-terrorism legislation was enacted with accepted principles in mind. A recent constitutional challenge as to the validity of parts of the legislation was unsuccessful.⁶

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There is no point in having a Constitution and its various protections if nobody is around to live under it. In this decade alone, Australians and Australian property have been, either directly or indirectly, the subject of planned, aborted or actual attacks in every year. The Director-General of ASIO, Paul O'Sullivan, said recently:

Australia continues to face a challenging and dynamic security environment. We continue to be a terrorist target and the threats of attack are likely to be with us for many years. An attack in Australia remains feasible and could well occur.¹²

There has been much misunderstanding about the counter-terrorism laws and the effect they will have on ordinary people. That is why the government, together with law enforcement agencies, is engaging with the community and explaining the operation of the laws, their intended targets, and people's rights and obligations under the laws. These initiatives help to strengthen public trust, confidence and cooperation, and prevent feelings of marginalisation or resentment.

International and domestic terrorism have reconfigured the dangers and security priorities for much of the world, and Australia is no exception. The government is continually monitoring the threat to assess whether any further legislation or other action is required. These new challenges require us to be responsive. I believe that a strongly preventative approach, underscored by robust but fair laws, is the best way forward for Australia and her interests.

Notes

- 1 See, for example, Parliament of Australia, *Parliamentary Debates*, House of Representatives, 19 June 1923, 117 (John Latham, Attorney-General); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 141.
- 2 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 28 (Brennan, Deane and Dawson JJ).
- 3 *Lloyd v Wallach* (1915) 20 CLR 299; *Ex p Walsb* [1941] ALR 359. McHugh J made mention of these cases in his Honour's reasons for judgment in *Al-Kateb v Godwin* (2004) 219 CLR 562, 588-9.
- 4 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.
- 5 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
- 6 *Thomas v Mowbray* [2007] HCA 33.
- 7 *Criminal Code* (Cth) Divs 104-5.
- 8 *Australian Security Intelligence Organisation 1979* (Cth) Pt II, Div 3.
- 9 *Criminal Code* (Cth) Divs 101-2.
- 10 *Thomas v Mowbray* [2007] HCA 33, [17].
- 11 AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 171. See also William Gummow, *Change and Continuity: Statute, Equity and Federalism* (1999) 72; and Murray Gleeson, 'Courts and the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (2003) 181.
- 12 Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 23 May 2007, 129 (Paul O'Sullivan).