

Australia's Antiterrorism Laws Lack Adequate Oversight Mechanisms

Christopher Michaelsen
Strategic and Defence Studies Centre
Australian National University

On 3 November 2005, Philip Ruddock introduced into Federal Parliament the Anti-Terrorism Bill (No. 2) 2005. But has the Attorney-General and the Government demonstrated that the new laws are warranted by the exigencies of the situation? Are the new legislative measures likely to be effective? What difference will they actually make to the terrorist threat? How far are the laws based on fair estimates of actual consequences rather than on the comforts of purely symbolic action? Are they compatible with Australia's legally binding obligations under international law? Does the current terrorist threat require sacrificing the exact same principles and values we are fighting for in the first place? And does the Bill contain sufficient checks and balances?

While some would argue that the new laws are necessary and strike the right 'balance' between national security imperatives and concerns for civil liberties, others are likely to regard them as the latest example of a misguided counterterrorism policy that will eventually transform Australia into a 'police state'. Disagreement on important issues of public policy is a key feature of liberal democracy, of course. But when democrats disagree on substance, they ought at least to agree on strengthening the process of adversarial review. As Harvard scholar Michael Ignatieff pointed out, comprehensive review of antiterrorism legislation is particularly important in order 'to keep democracy safe both from our enemies and from our own zeal'.¹

Since September 2001, the Howard government has enacted no fewer than 28 new (federal) 'antiterrorism' laws dealing with a broad range of contentious issues.² What all the laws have in common, however, is that they largely lack effective judicial and parliamentary review mechanisms. Key pieces of antiterrorism legislation such as the *ASIO Amendment Act 2003* (which allows for seven-day detention without charge of *non-*

¹ Michael Ignatieff, 2004, *The Lesser Evil: Political Ethics in an Age of Terror*, Edinburgh, Edinburgh University Press, p. viii.

² See 'Legislation', <http://www.nationalsecurity.gov.au>.

suspects) do not provide for any meaningful judicial review at all.³ Other laws, including the Anti-Terrorism Bill (No. 2) 2005, allow for judicial review in very limited circumstances.⁴ But even in cases where judicial review is possible, Australian courts cannot examine the compatibility of antiterrorism laws with any human rights instrument, for example. The reason for this lack of human rights protection is simple. Australia neither has a constitutional bill of rights (like the United States or Germany), nor does it have any special act of parliament protecting the citizens' basic rights and freedoms (like the United Kingdom and New Zealand). Although Australia has been a party to the UN International Covenant on Civil and Political Rights since 1980, it has failed so far to give domestic effect to its international obligations (again in contrast to the United Kingdom).⁵

In the absence of any domestic human rights instrument and in light of limited judicial review, it is clear that effective parliamentary review of the antiterrorism laws is all the more important. Indeed, it was the Senate committee process that successfully toned down many of the worst parts of the antiterrorism legislation introduced by the Howard government in 2002-2004. However, with both Houses of Parliament now under Coalition control, the process of reviewing legislation *before* it is enacted is unlikely to continue to provide effective and adequate safeguards.

As far as parliamentary review of *existing* antiterrorism legislation is concerned, the possibilities for meaningful oversight are very limited as well. In general, Australia's antiterrorism legislation does not empower any parliamentary committee or independent body to oversee or review the operation, effectiveness and implications of the respective laws *per se*. The exception to this rule is the current inquiry into part of the ASIO Act 1979 by the Parliamentary Joint Committee on ASIO, ASIS and DSD.⁶ Due to a 3-year

³ See e.g. Christopher Michaelsen, 2003, 'International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11', *Sydney Law Review* 25 (3): 282-85.

⁴ Examining the 'Stanhope draft' of the Anti-Terrorism Bill 2005, Joo-Cheong Tham has argued convincingly that the Bill fails to provide effective judicial oversight in relation to control and preventive detention; Joo-Cheong Tham, 'The Failure to Provide Effective Judicial Oversight', Margot Kingston's Webdiary, http://margokingston.typepad.com/harry_version_2/2005/10/the_failure_to_.html#more.

⁵ This has rightly led to commentators calling for an Australian Bill of Rights. See e.g. George Williams, 2004, *The Case for an Australian Bill of Rights: Freedom in the War on Terror*, Sydney, UNSW Press.

⁶ Parliamentary Joint Committee on ASIO, ASIS and DSD, Review of Division 3 Part III of the ASIO Act 1979, http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/index.htm.

sunset clause introduced by the *ASIO Amendment Act 2003*, Division 3 of the Act expires in June 2006.⁷ An overwhelming majority of the 97 submissions received by the Committee argue strongly against re-enacting the legislation in its current form. The Attorney-General's Department and ASIO, however, have indicated that they would like to see the Act's sunset clause removed and the legislation 'set in stone'.⁸

The latest antiterrorism legislation, the *Anti-Terrorism Bill (No. 2) 2005*, also does not provide for any adequate oversight mechanisms. The Bill simply states that the provisions allowing for the issuing of control and preventative detention orders are subject to a 10-year sunset clause.⁹ The Bill also contains a section providing that the Council of Australian Governments (COAG) will, after 5 years, review the operation of certain State laws with a corresponding report to be laid before each House of Parliament. It is unclear, however, what legal implications, if any, this report will have. Indeed, it seems that the COAG report will not affect the operation of the 10-year sunset clause.

The lack of effective and adequate parliamentary review of antiterrorism legislation in Australia stands in stark contrast to the practice in other Western liberal democracies, both with common law and civil law traditions. Since Australia's antiterrorism legislation is largely modelled on the British legislation, however, this comment will focus briefly on the review mechanisms in operation in the United Kingdom only.

In Britain, the three major terrorism laws – the *Terrorism Act 2000*, the *Anti-Terrorism, Crime and Security Act 2001* (Part 4)¹⁰, and the *Prevention of Terrorism Act 2005* – are reviewed annually by an independent reviewer, Lord Carlile of Berriew QC. In addition, the *Anti-Terrorism, Crime and Security Act 2001* was also reviewed by an independent committee of seven Privy Councillors, headed by Lord Newton of Braintree. In December 2003, the Newton Committee submitted a report to the Home Secretary, who

⁷ The Committee is required to report by 20 January 2006.

⁸ Quoted in Joseph Kerr and Cynthia Banham, 'Set ASIO terrorist powers in stone, says outgoing head', *Sydney Morning Herald*, 20 May 2005.

⁹ Schedule 4, Part 1, Division 104, Subdivision H, s 104.32, Schedule 4, Part 1, Division 105, Subdivision F, s. 105.53, Schedule 5, Division 3A, Subdivision D, s. 3UK

¹⁰ The British government repealed Part 4 of the *Anti-Terrorism Crime and Security Act 2001* after the House of Lords, in December 2004, declared it incompatible with the Human Rights Act 1998 (and Britain's obligation under the European Convention of Human Rights). The Part 4 powers were replaced with a system of control orders under the *Prevention of Terrorism Act 2005*.

was then required to lay it before Parliament. The Committee had wide-ranging powers and was even empowered to specify provisions of the Act, which would be repealed if the Report was not debated by each House of Parliament within six months.¹¹

The *Prevention of Terrorism Act 2005* also provides for extensive parliamentary review. According to section 14, the Home Secretary must prepare a report about his exercise of the control order powers ‘as soon as reasonably practicable after the end of every relevant 3 month period’. He must then lay a copy of that report before Parliament. The Secretary is also required to appoint an independent reviewer (currently Lord Carlile) who oversees the operation of the Act and who produces an annual report. Furthermore, the Act specifically provides that the independent reviewer comments on the implications for the operation of the Act of any proposal made by the Home Secretary. Consequently, when the Blair government decided to introduce further amendments in the aftermath of the London bombings of July 2005, Lord Carlile, on 12 October, provided an additional report on the new proposals.¹²

Back in Canberra, the Senate, on 3 November 2005, referred the *Anti-Terrorism Bill (No. 2) 2005* to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 28 November 2005.¹³ Whether this inquiry will improve the overall Bill and/or recommend the inclusion of any oversight mechanisms is unlikely but remains to be seen. Whatever the inquiry’s outcome, however, it is about time that the Government considers the establishment of an independent body to monitor the operation of the antiterrorism laws. These laws, after all, are unprecedented in Australia’s history and curtail the rights and liberties of every Australian citizen to a previously unseen extent.

¹¹ Privy Councillor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review*, Report, HC 100 (December 2003).

¹² Lord Carlile of Berriew, *Report on the Proposals for Changing the Laws against Terrorism*, 12 October 2005; <http://security.homeoffice.gov.uk/news-and-publications1/publication-search/independent-reviews/>.

¹³ Senate Legal and Constitutional Committee, Inquiry into the Provisions of the Anti-Terrorism (No. 2) Bill 2005, http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/info.htm.