

An Unfinished Canvas

By Philip Ruddock

In matters of national security Governments must always ask themselves “how can we better undertake the task of ensuring the safety of the Australian community?” In times of peace and harmony national security often loses its lustre as a topic of discussion in the broader Australian community. The principle obligation of every government, however, is to ensure the personal safety and security of the Australian people, no matter whether times are peaceful or tumultuous. It is in this context that Labor’s proposals for updating Australia’s national security and counter-terrorism laws should be examined.

As a former Attorney-General of the Commonwealth of Australia, I see national security issues as ones that require competence and vigilance as well as cooperation, both with other countries and our own Australian people. Since the tragedy of 11 September 2001, we have all heard a great deal about the war on terror. We are warned from abroad that Australia is a terrorist target and that these threats should keep us alert, but not unnecessarily alarmed. To date, there has been no direct attack on Australian soil and we remain a free and open society. Nevertheless, it is easy to become complacent. To do so would be extremely risky for the Australian community.

When you examine the range of incidents that have impacted upon Australia or taken Australian lives - the Bali bombings, the Marriott Hotel bombing and the bombing of our Embassy in Jakarta to name a few - the tragedy of Australian deaths are confronting reminders. So far this decade Australians have been the subject of terrorist threats or acts, here or abroad, each and every year:

- 2000 – Jack Roche planning to attack Israeli embassy
- 2001 – Singapore authorities disrupt a Jemaah Islamiyah plot to attack the Australian High Commission
- 2001 – September 11 attacks on the World Trade

Centre in New York and the Pentagon in Washington

- 2002 – Bali bombings which kill 88 Australians
- 2003 – Willie Brigette and others planning to carry out terrorist attacks in Australia (including bombing the AFL Grand Final)
- 2004 – attack on the Australian Embassy in Jakarta
- 2005 – the second Bali bomb attack
- 2005 – the July attacks on the London transport system
- 2006 – the plans to blow up Transatlantic flights between the United Kingdom and the United States
- 2007 – bombs planted in the entertainment centre of London, and the attempt to bomb the Glasgow airport terminal.
- 2008 – Mumbai terrorist attacks.

Recently we have seen significant changes within our region - particularly in Pakistan, but also in Afghanistan. A resurgent Taliban in either of those countries cannot be discounted.

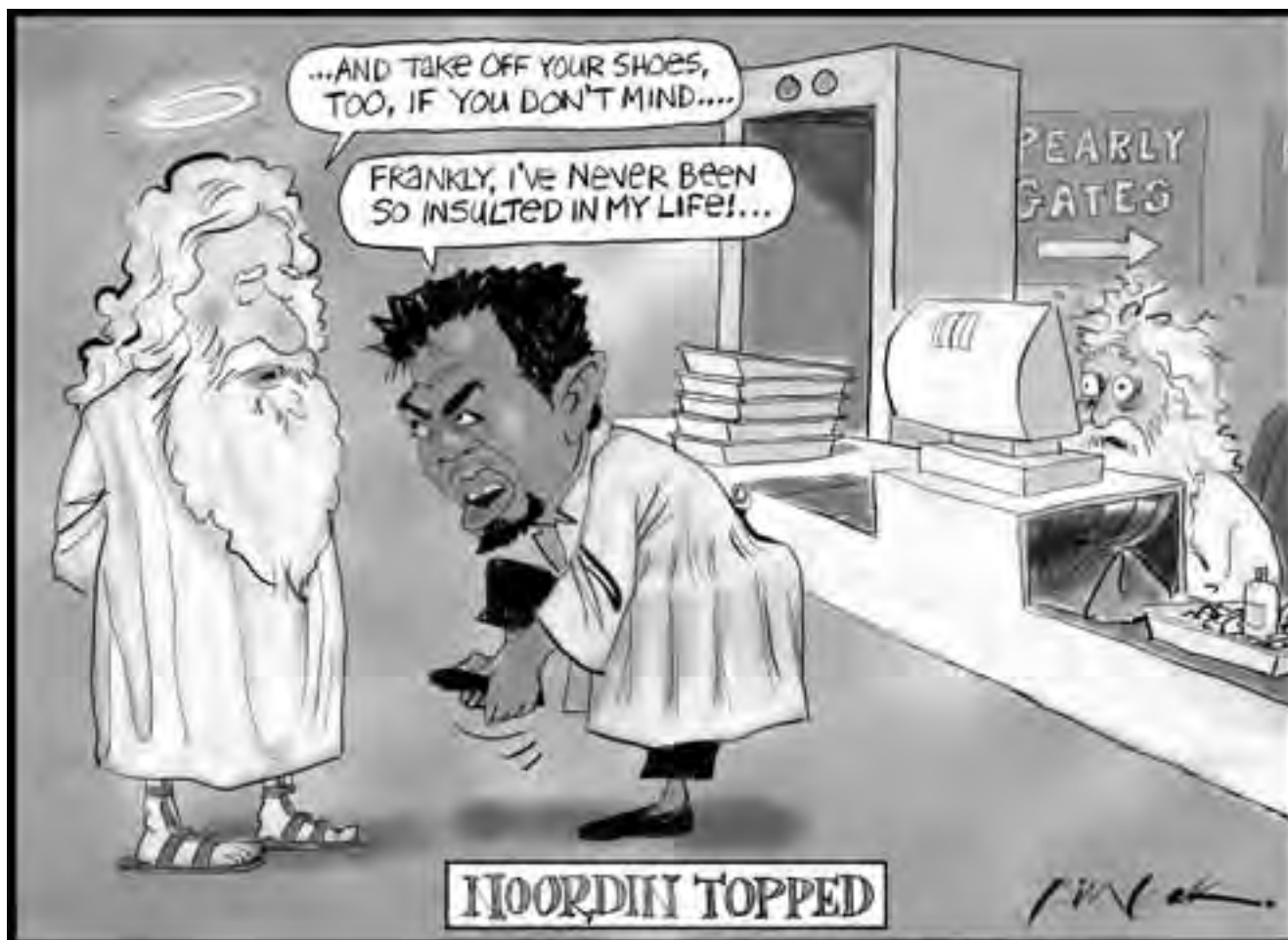
There have been a number of events here in Australia that should serve to highlight the fact that we have been targeted. Firstly there have been a number of convictions under the Criminal Code, including Bilal Khazal and Shane Kent in Victoria and Faheem Lodhi in New South Wales.

The fact that another 16 people in the last few months have also been convicted of terrorism related offences indicates that these are not isolated events and should serve as a very clear warning that we need to remain vigilant in ensuring that the Australian community is not at risk.

The former Government’s approach to dealing with terrorism was comprehensive. It recognised, as the former Canadian Attorney-General Irwin Cotler did, that terrorism “constitutes an assault on the security of a democracy and the most fundamental rights of its inhabitants, the right to life, liberty, and security of the person.” Governments of all persuasions, therefore, must work cooperatively and that was something the Howard Government managed to do successfully.

Intelligence information was shared with the security agencies abroad and they shared intelligence

Philip Ruddock has been a member of the House of Representatives since 1973.



Cartoon by Bill Leak cartoon from *The Australian*: 'Noordin Topped' Indonesian terrorist Noordin Top at the Pearly Gates. © Newspix/Bill Leak

information with our agencies. Within Australia there was a very high level of cooperation between governments of both political persuasions. A National Counter Terrorism Plan setting out the responsibility of government agencies was implemented. Counter terrorism exercises occurred regularly to ensure we were ready to take into account the lessons learned from overseas experiences. The National Counter Terrorism Handbook was also regularly updated.

The former government put in place over 100 security measures costing some \$4 billion as part of its approach to counter-terrorism. Similarly, the former government developed a comprehensive counter-terrorism legislative regime to compliment its policies. The Government sought to preserve our national security and create an environment where Australians could live safely and without fear.

This objective was supported by the former United Nations High Commissioner for Human Rights, Louise Arbor, who said criminal justice 'has become a weapon in the arsenal of peace.' It is for this reason that Australian legislation was developed to provide for the listing of terrorist organisations, based upon our national interest and security needs.

The Howard Government was always mindful of the

fact that the nature of terrorism is constantly changing and firmly believed it was important to review the effectiveness of its security legislation regularly.

Following the London Bombings in July 2005, we asked law enforcement and security agencies to examine whether further legislative reforms were necessary to enable them to effectively respond to such an attack in Australia. In response to that review, all Australian Governments agreed to update the existing sedition offence and to develop a new offence of inciting violence against the community to allow the Australian Federal Police (AFP) to seek twelve-month control orders on people who pose a terrorist risk; to allow for preventative detention of up to forty-eight hours in a terrorist situation; and for facilitating lawful police requests for information to assist with an investigation of terrorism and other serious offences.

Further, there were a range of additional inquiries established by the Howard Government, including the Sheller Review that looked into security legislation and reported in 2006. The Sheller Review committee was constituted with an independent judicial chair, security agencies, policing authorities, and members of other interested human rights and like organisations. There were also inquiries by the Parliamentary

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Joint Committee on Intelligence and Security into the proscription of terrorist organisations as well as a review of security and counter terrorism legislation following on the Sheller Review. Finally, there was the review of sedition laws by the Australian Law Reform Commission (ALRC) that also reported in 2006.

Drawing on these reviews, the Rudd Labor Government has now released a Discussion Paper on further proposed amendments to national security legislation. The Federal Opposition has stated that it will constructively consider the amendments proposed, and those where the laws are demonstrated to be inadequate will be supported. The Shadow Attorney-General has noted that Australian anti-terrorism laws have been comprehensively reviewed and significantly extended with particular emphasis on achieving a balance between protecting the public and respecting individual rights and liberties.

The introduction to this discussion paper notes that the proposed legislative amendments flow directly from the Sheller Review, the two separate inquiries of the Parliamentary Committee, the work of the ALRC and, more recently, the inquiry by the Hon John Clarke QC into the case of Mohammed Haneef (Clarke Inquiry).

The proposals reflect the need for clarification as to the operation of some of Australia's security legislation. In some cases additional safeguards are identified and in others a need for the extension of enforcement and investigatory powers is highlighted. The discussion paper notes the proposals include treason, sedition and terrorism offences and enforcement powers to investigate terrorism and serious crime. Further proposals are on terrorist listing regimes, both under the Criminal Code and the Charter of the United Nations Act, the protection of national security information in court proceedings and finally the oversight arrangements for the AFP. The Attorney-General also noted that the Government intended to legislate to establish a National Security Legislation Monitor. The monitor would review national security and counter-terrorism legislation on an annual basis.

Treason, sedition and terrorism offences

Two separate reviews have considered these offences - the Sheller Review and the review by the

ALRC. The recommendations arising out of these two reviews were further considered by the Parliamentary Joint Standing Committee on Intelligence and Security (PJCIS). The Government's proposal essentially accepts the recommendation of the Parliamentary Committee that the offence of treason should be restructured so that the offence only applies to those who owe allegiance to Australia or who have voluntarily placed themselves under Australia's protection. The conduct of others should be dealt with separately. It also recommended that the offence of assisting the enemy should be clarified to cover material assistance and to require knowledge of the existence of armed hostilities.

While the former government believed that sedition offences were understood broadly by the Australian community, the ALRC felt that there would be some benefit in clarifying them further. It suggested that sedition offences be replaced with offences relating to urging violence. In that context, the sedition offence would include urging the overthrow of the constitutional government, interfering with parliamentary elections and urging violence within the community. A good faith defence would apply and the Attorney-General's consent would no longer be required for a prosecution to take place. The government has

essentially accepted the recommendations of the ALRC, but has added an additional offence of urging violence against a group or individual based on race, religion, nationality, national origin or public opinion. It will be interesting to see how these extensions to the sedition offence – albeit by another name – are accepted by the broader Australian community.

Repeal of the requirement for the Attorney-General's consent is also questionable given the potential for considerable public controversy over the offences that in some circumstances may be seen to be trivial or constraining sensible public discussion or debate.

Proof under the Government's renamed sedition offences will become more difficult to secure. A person would commit an offence under the proposed amendment if he or she *intentionally* urges another person to interfere by way of force or violence with the lawful processes of the Commonwealth. The additional element is that the person must *intend* that the force or violence will occur. It is hard to see how, with this additional test, the Crown will readily be able to prove what is in a person's mind.

It is interesting to note that the Government sees these particular measures as being important and that it may be necessary to expedite their introduction ahead of the major package of reforms proposed.

The Government's proposals adopt a broader definition of who may commit an offence, whether as an individual or as part of a group. They also repeal the offence of urging a person to assist the enemy or those engaged in armed hostilities against the Australian Defence Force on the basis that treason offences already deal with this issue.

The Government intends to amend the good faith defence in accordance with the Australian Law Reform Commission's recommendations. The good faith defence is broadly expressed rather than a detailed recitation of the conduct that might be seen to be reasonable.

Each of the Parliamentary reviews has confirmed that in addition to the general criminal law, separate security legislation is necessary - including special terrorism laws. It was in that context that the Government's paper noted that the definition of terrorist act in the Criminal Code did not extend to international organisations such as the United Nations. Given that

the United Nations had been the target of terrorist attacks – including attacks on its headquarters in Iraq in 2003 and more recently in Afghanistan and Pakistan - I am of the view that this extension relating to coercing or influencing by intimidation the United Nations or one of its agencies or bodies should be included in the Australian Code.

The paper also notes that the Criminal Code currently contains hoax offences that are made by post or telecommunications. The Sheller Review and Parliamentary Committee recommended that a separate hoax offence be created to deal more broadly with acts that might not be made by post or over the telecommunications network. Specifically, it would cover a person who intentionally engages in conduct with the intention of inducing a belief that a terrorist act will occur or is likely to occur.

Several other recommendations were supported in the Government's paper, including a recommendation that the threshold that the 'mere risk of praise' might have the effect of leading a person to engage in a terrorist attack is too low and that the test be a 'substantial' risk.

In relation to listing of terrorist organisations, the Attorney-General has proposed that listing be for a period of up to three years, rather than two as is the case now. In order for an organisation to be specified as a terrorist organisation the Minister:

“must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur); or [a]dvocates the doing of a terrorist act (whether or not the terrorist act has or will occur).”

When evaluating what entities it believes should be proscribed under the Criminal Code, ASIO takes into account factors including:

- Engagement in terrorism;
- Ideology and links to other terrorist groups or networks;
- Links to Australia;
- Threat to Australian interests;
- Proscription by the UN or like-minded countries; and

- Engagement in peace and mediation processes.

A further matter of drafting places a more rigorous test in place in relation to the offence of providing support for a terrorist organisation. It is intended that the act require that there be *material* support in order to clarify the level of support required to commit the offence and to put it beyond mere support.

Another important matter addressed is the clarification of the delivery of humanitarian aid and a terrorist training organisation offence. The proposal is to develop a ministerial authorisation scheme to ensure that aid organisations would not be committing an offence if the organisation was declared either in its entirety or in part or in geographical regions to be exempt from the terrorist training offence. The Attorney-General has to be satisfied on reasonable grounds that the organisation is providing humanitarian aid and the benefits to the community of providing that aid outweigh any benefits that might be obtained by a terrorist organisation.

Investigations under the Crimes Act

These amendments relate to police arrest and investigation powers. They provide for an emergency search power when investigating terrorism and a right of appeal in bail cases. They arise from operational experience as well as the Clarke Inquiry into the Haneef matter.

It is proposed that the Act will be amended to redefine an authorising officer for the purpose of applying for an extension of the investigation period for terrorism offences to ensure that application is made by more senior and trained officers.

More importantly the Bill will amend the Crimes Act to set a maximum seven day limit for the time period in an investigation when a person has been arrested to ensure he or she is available for questioning. Given the fact that the time held was always judicially reviewable, a maximum time limit may compromise the ability of agencies to fully explore all avenues of inquiry.

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premises under a search warrant. This extension is from one hour to 12 hours and even longer where authorised by the authority issuing the warrant.

Another significant extension enables police to enter premises without a warrant to render them safe, seize dangerous objects and secure the premises to preserve evidence where terrorist activity is suspected. Finally, amendments in Chapter 2 of the Act would provide an appeal for both the prosecution and defendant for bail decisions in security matters.

Charter of United Nations Act 1945 Listings

Separate from listings under the Criminal Code, the Charter of the United Nations provides for listing regime dealing with financing terrorism.

The Government will now require the Minister for Foreign Affairs be satisfied on reasonable grounds that individuals or entities meet the criteria for listing as a terrorist organisation when seeking to freeze terrorist assets. In addition, arrangements will sensibly include requirements for periodic review of listings by the Minister.

Disclosure of National Security Information in Criminal and Civil Proceedings

National Security can be compromised if security



related information is placed in the public arena during trials. This legislation plays a very important role in protecting the safety and security of the Australian community. These amendments are designed to improve the operation of the *National Security Information (Criminal and Civil Proceedings) Act 2004*, applying lessons from recent cases.

Amending section 19 of the Act makes it clear that a court's general discretion should not be compromised by permitting (for example) hearings to be conducted *in camera*, that is, allowing for closed and private proceedings.

Other machinery matters seem largely unexceptional, such as the opportunity for the Attorney-General to be heard in pre-trial hearing and proceedings, as well as pre-trial conferences.

Likewise, amendments propose to limit a court's obligation to adjourn proceedings to only apply to those parts of the proceedings that may result in the disclosure of national security information.

Other amendments clarify provisions dealing with closed hearings, security clearances for legal representatives and the offences for breach of protection of security information. These proposals seem largely non-controversial.

Oversight of the Australian Federal Police

This Chapter establishes a Parliamentary Joint Committee on Law Enforcement. It replaces the Committee which presently deals with the Australian Crime Commission. A broad oversight role for the Committee will enable the Committee to examine trends and changes in criminal activities and recommend changes to the Australian Federal Police. This implements a recommendation for a wider role for the present Parliamentary Joint Committee on the Australian Crime Commission.

While this is a sensible expanded role, national security inquiries by the Australian Federal Police should be dealt with by the present Parliamentary Joint Standing Committee on Intelligence and Security. Its experience in dealing with sensitive issues undertaken by security organisations means it is especially well-placed to supervise the AFP when making counter-terrorism enquiries.

Conclusion

As Attorney-General, I regularly stated that our counter-terrorism laws were an unfinished canvas. It would be naïve and arrogant to assume that they could never be further refined to take into account improved knowledge and experience of the threat of terrorism. The Howard Government sought to ensure that it was able to respond quickly to issues identified by established reviews and one would expect that a new government would properly pursue these matters after the interruption of an election.

By providing security agencies with a dynamic framework of laws to work within, any government is standing itself in good stead for being able to effectively respond to the ongoing and evolving threat posed by terrorists.

On balance, while I question the efficacy of some of the initiatives proposed in the Rudd Government's discussion paper, I believe most do seem well taken in the context of appropriately responding to inquiries initiated by the Howard Government and lessons learnt during investigations and prosecutions of terrorist offences. ✨