

ASIO's Extraordinary Powers

NSWCCL Berenice and Ken Buckley Memorial Dinner, 19 October 2012

Professor George Williams, University of New South Wales

I have been asked to launch the campaign against the extraordinary powers granted to Australia's secret intelligence organisation, ASIO.

These powers are the most controversial of the anti-terror laws enacted by the Australian Parliament in the wake of September 11.

We responded to those attacks with a frenzy of lawmaking. In the following decade, the Federal Parliament passed 54 pieces of anti-terror legislation. 48 of these were passed under the watch of the Howard government, an average of one new anti-terror law every 7 weeks.

As one international commentator put it, Australia's response was one of 'hyper-legislation'. We even 'exceeded the United Kingdom, the United States, and Canada in the sheer number of new antiterrorism laws ... enacted since 9/11'.

However, the numbers only tell part of the story.

Of greater importance is the reach of the laws in introducing things such as:

- restrictions on speech through sedition laws and new rules of censorship;
- the banning of organisations by government decree;
- control orders that can enable house arrest for up to a year;
- detention without charge or trial for up to 14 days;
- covert surveillance of non-suspects; and
- warrantless searches of private property by police officers.

As these examples demonstrate, exceptional powers and sanctions thought to lie outside the rules of a liberal democracy except during wartime have now become part of Australian law. They were passed in fulfilment of the rhetoric of the 'war on terror', a conflict without a foreseeable end.

Collectively, these laws represent the greatest assault on civil liberties in Australia since World War II.

Much of the heat has now gone out of the terrorism debate, and the attention of our federal politicians has moved onto other matters, but the laws remain on the statute book.

This is not just a problem when it comes to the terror laws themselves. Unfortunately, these extraordinary powers are becoming seen as normal, and so applied elsewhere.

An example is the extension of the control order regime from our national anti-terror legislation to so-called anti-bikie laws (this is of course a misnomer as the laws do not mention bikies, and can be applied to any group).

In South Australia, Premier Mike Rann justified this by saying: 'We're allowing similar legislation to that applying to terrorists, because [bikie groups] are terrorists within our community.'

Laws of this kind are now spreading throughout the country, and are also encouraging the roll out of new offences for guilt by association and consorting.

The danger is that the exceptional powers granted to combat terrorism are being used by state governments to prosecute the law and order debate. They are becoming part of the state legislators' toolbox for demonstrating to the community how they are tough on crime.

ASIO Powers

This possibility is especially frightening when it comes to the powers granted to ASIO.

These were granted in the wake of the understandable anger, fear and grief that beset Australia after September 11 and the Bali bombings.

At the time, I described the ASIO Bill as ‘rotten to the core’ and one of the worst Bills ever introduced into the federal Parliament. Similarly, the Parliamentary Joint Committee on ASIO unanimously stated that it ‘would undermine key legal rights and erode the civil liberties that make Australia a leading democracy’.

Despite this, the powers were enacted after a bitter, 15 month national debate.

Today, the law permits ASIO to seek two types of warrants.

A Questioning Warrant:

- Compels a person to appear for questioning by ASIO where ‘there are reasonable grounds for believing that issuing the warrant ... will substantially assist the collection of intelligence that is important in relation to a terrorism offence’.
- It is not necessary that the proposed subject is suspected of committing any crime, or that the intelligence sought may enable ASIO to prevent a terrorist act.
- A person could be called into questioning in order to have them provide information about a family member, or a journalist about a source, or a priest about what they have heard in confession.
- Failure to give ASIO the information, records or things it requests is a criminal offence punishable by five years imprisonment.
- The person has no right to silence or privilege against self-incrimination, though information gathered through questioning cannot be used directly in criminal proceedings against them.
- Questioning can carry on for up to 24 hours, which is typically split over several days.

A Detention Warrant:

- Further empowers a police officer to take the subject into custody for up to a week, during which the person may be searched and, subject to certain criteria, strip searched.
- Detention can be sought in a number of grounds, including because the person may not appear at the time required for questioning or may destroy, damage or alter information sought by ASIO.
- While in detention the person may be prevented from contacting his or her friends, family, employer and medical professionals.

Under both warrants:

- The subject may be barred from contacting his or her lawyer of choice on national security grounds. The subject may be questioned before their lawyer arrives and so before they have received legal advice.
- A subject's lawyer (like the subject him or herself) is not told why the warrant was issued, is not permitted to ask questions, cross-examine or 'intervene in questioning ... except to request clarification of an ambiguous question', and may be ejected if deemed to be 'disrupting proceedings'.
- Most communication between a subject and his or her lawyer must be capable of being monitored by ASIO – thereby limiting access to legal professional privilege.

Broad 'Secrecy Provisions':

- Apply while a warrant is on foot and, in some cases, for two years after it expires.
- A journalist cannot report:
 - 'information (which) indicates the fact that the warrant has been issued or a fact relating to ... the questioning or detention of a person in connection with the warrant; and
 - the 'information that the Organisation has or had'.

- This applies to everyone – not just persons subject to a warrant. If the person making the disclosure is the subject of a warrant or their lawyer, the offence is one of strict liability. Any breach of the provisions is an offence punishable by five years imprisonment.
- In addition, the *ASIO Act* prohibits the publication of any information which indicates the identity of a (current or former) ASIO officer without the Director-General or Attorney-General's consent. The penalty for this is one year imprisonment.

The campaign

There are many things that need to be changed about our anti-terror laws. My view is that makes sense to focus now on ASIO's extraordinary questioning and detention powers for the following five reasons:

1. *The law should not permit the detention in secret and coercive questioning on pain of imprisonment of Australian citizens not suspected of any crime*

This is inconsistent with the most fundamental democratic and legal principles. Australians should not be detained by the government beyond an initial short period, except as a result of a finding of guilt by a judge or as part of the judicial process (such as being held in custody pending a bail hearing).

There are grave dangers in allowing a government to bypass the courts, especially where a secret government organisation is involved.

It would not be acceptable for a state police force to detain people in secret for some days, nor should it be for ASIO. Imagine the outcry if it was suggested that the NSW police should have the power to hold people incommunicado for a week in order to extract information from them about their family members.

2. *ASIO is not a suitable body to be given such powers*

ASIO is a covert intelligence gathering agency. It is not a law enforcement body. As such, it is not subject to the same checks and balances and public scrutiny as a police force.

If ASIO is to be granted coercive police-like powers, it should be subject to the political and community scrutiny and controls that apply to a police force. However, this is not compatible with its intelligence gathering work. These powers, even if they could ever be justified, are simply not appropriate to ASIO.

3. *The ASIO powers go further than similar legislation in other countries*

Despite the fact that Australia faces a lower threat of terrorism than many other nations, the ASIO powers go further than equivalent legislation in the United Kingdom, Canada and even the United States' *PATRIOT Act*.

Only Australia has authorised the *detention in secret of non-suspect citizens*.

I often speak about anti-terror laws internationally, and people from other countries such as these are stunned to hear that we have a law in place of this kind. No such law was ever contemplated in those countries, in part because they have strong legal protection to human rights.

4. *The powers are not needed*

ASIO Director General David Irvine said last year that his agency responded 'to literally thousands of counterterrorism leads ... [and] are currently involved in several hundred counterterrorism investigations and inquiries'.

Despite this, as its recent annual report shows, these powers were not at all used by ASIO last year. In fact, only one Questioning Warrants has been issued since 2006, and ASIO has never used its power to detain someone.

The inescapable conclusion is that ASIO does not regard the powers as particularly useful. The warrants are not needed in the fight against terrorism. ASIO and agencies such as the Australian Federal Police already have the powers they need at their disposal.

They also run counter to the work of ASIO more generally. For a covert agency, questioning and detaining someone naturally tips that person off that they are under surveillance.

There is also the possibility that using the detention power will lead to a community outcry (should people become aware of it ...). The case of Dr Mohamed Haneef demonstrates how the use of extraordinary powers that contravene accepted community standards can cause considerable damage to the reputation of government agencies.

I should also say that the fact that these powers are not being used does not justify their retention. The long experience of the law shows that a power may lay dormant for some time, only to be called into action in the future, potentially by an unscrupulous government 10, 20 or even 50 years down the track.

It is also the case that, so long as a power such as this remains on the statute book, it provides tempting precedent for lawmakers in other fields.

5. The powers are vulnerable to strong campaign against them

If any of the key aspects of Australia's anti-terror laws are to be wound back, the ASIO powers are the most likely.

Not only are they fundamentally inconsistent with community values, they are also temporary. The powers were regarded as so extraordinary, even compared to Australia's other anti-terror laws, that a three year sunset clause was included when they were enacted in 2003. However, in 2006, the Commonwealth Parliament renewed the powers and added a new 10 year sunset clause.

The Regime will now expire on 22 July 2016. If the government of the day does not act, the laws will simply lapse. This means that inertia favours repeal.

This, combined with the extreme nature of the provisions, makes them a strategic and sensible choice for what to target by way of a campaign to wind back Australia's anti-terror laws. The ASIO powers are the right place to start.

Conclusions

It is hard to generate political will on the part of any government to wind back any aspect of Australia's anti-terror laws.

With this in mind, a campaign focused on ASIO's powers provides an important opportunity.

The ASIO powers remain rotten at their core. They confer unprecedented powers on a secret intelligence agency that could be used against the Australian people by an unscrupulous government.

The powers are more consistent with the apparatus of a police state, such as General Pinochet's Chile, than the laws of a modern democracy.

They have no place in Australia, should be repealed.