ASIO TODAY

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As some of you are aware, I have taken a layperson's interest in administrative law for some time, and going back to well before I took up this job in 1996.

Today I want to discuss ASIO's new powers and the global and national security picture against which the new powers should be viewed. Not surprisingly perhaps, I will outline why I believe the new laws were necessary, why I believe the community can have confidence that the new powers will not be abused and why, subject to careful thought and proper consideration, we should keep an open mind about further changes to Australia's counter-terrorism legislative framework.

Terrorism and Australia

Terrorism has been global for a long time. But historically, Australia has not been a terrorist target. Terrorism was something we saw on TV, often in less developed countries and directed against local targets or the diplomatic and/or military interests of the United States. it was something we deplored but it did not touch us personally. In addition to being a very direct attack on an ally who played a decisive role in preventing an invasion of this country 60 years ago, September 11 was something with which ordinary Australians did identify - in particular, with the ordinary men and women of New York and Washington who were murdered whilst going about their daily lives. 'It could have been us' was a familiar response.

Leaving aside principle and alliance, there are strong pragmatic reasons of self-interest why, in my view, we continue to have no choice but to actively engage in the fight against terrorism.

We have an interest and a responsibility to ensure that those very few Australians with links to international terrorism do not involve themselves in acts of terrorism, either in Australia or elsewhere. We have an interest and a responsibility to ensure that foreign interests in Australia are properly protected. We have an interest and a responsibility to the hundreds of thousand Australians who travel overseas every year, to do what we can to minimise the risk of global terrorism.

As we saw in Bali and New York race, religion and/or nationality does not provide protection. Finally, we now know that al-Qaida had an active interest in carrying out a terrorist attack in Australia well before 11 September and that we remain a target - so we don't have the option of standing aside in the vain hope that, by not looking at terrorism, it will not look at us.

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We know this:

- from what bin Laden and his deputy, al Zawahiri, have stated explicitly several times since 11 September;
- from what happened on 12 October 2002;
- from the debriefings of the likes of Khalid Sheikh Mohamed and Hambali; and
- from the Willy Brigitte investigation.

While a continuing and as yet unfinished investigation, it is clear that Brigitte was in Australia to do harm - a reminder that terrorism is not something which can only happen 'over there'. Terrorism does not respect borders. It does not necessarily use the weaponry of a nation state. It does not negotiate as a nation state. Its targets of choice are innocent civilians. And, as I have stated previously, we should be in no doubt that, should bin Laden and al Qaida ever get their hands on WMD, they will seek to use them to devastating effect. That is not an alarmist comment, it is a measured assessment.

It is not possible to successfully overcome a global terrorist network like al Qaida and its associated groups such as JI, by seeking to put a fence around one country or one region. Al-Qaida's links are global and its battle ground is global. Certainly, ASIO simply could not do its job without global linkages and the information sharing and cooperation of our allies and close friends. The same is true for the Australian Intelligence Community as a whole and for the AFP.

Counter Terrorism Legislation

Following 11 September and 12 October, many countries reviewed and subsequently made major changes to their counter terrorism laws - Canada, the UK, Indonesia and the United States amongst them. In Australia, the Government announced on 14 October 2001 a wide-ranging counter terrorism review. Part of the review covered possible legislative changes. Subsequently, over the first half of 2002, the Parliament debated and passed a suite of new laws. The reforms included:

- the Security Amendment (Terrorism) Act, which created a new offence of terrorism and created a regime for making regulations listing organisations with terrorist links and which made membership or other specified links with such an organisation an offence;
- the Suppression of the Financing of Terrorism Act, which inserted a new offence into the Criminal Code directed at persons providing or collecting funds used to facilitate a terrorist act;
- the Criminal Code Amendment (Suppression of Terrorist Bombings) Act, which created an offence to place bombs or other lethal devices in prescribed places with the intention of causing death, serious harm or extensive destruction;
- the Border Security Legislation Amendment Act, which dealt with border surveillance, the movement of people and goods, and clarified the controls which Customs has to monitor such movement; and
- the Telecommunications Interception Legislation Amendment Act, which clarified that offences involving terrorism fall within the most serious class of offences for which interception warrants are available.

The legislation as passed had bi-partisan support.

The Bill containing ASIO's new powers was introduced into the House of Representatives on 21 March 2002, nine days after the legislation I have just detailed. The new ASIO powers were given Royal Assent on 22 July 2003, exactly one year and 17 days after the other legislation, and following three separate Parliamentary Committee hearings and reports. Understandably, the ASIO Bill was also the subject of extensive public debate. And like the ASIO Act of 1979, and all subsequent amendments, it was eventually passed with bi-partisan support.

ASIO's New Powers

The ASIO Act amendments of July 2003 provided a new power which permits the Director-General, with the Attorney-General's consent, to seek a warrant authorising the questioning (and, in limited circumstances, detention) of a person where to do so would substantially assist the collection of intelligence in relation to a terrorist offence, and relying on other methods of collection would be ineffective. The new power also covers persons who are not, themselves, engaged in terrorist activities, but who may have relevant information or documents.

So, the new powers only apply to terrorism offences and may only be issued as a measure of last resort. Unlike all other ASIO warrants, questioning and detention warrants are not subject to approval within the Executive arm of Government - ie. the Attorney-General - but can only be issued or approved by a Federal Magistrate or a Judge. Detention may only be authorised in circumstances where there are grounds to believe that the person may alert other persons to the investigation, or may destroy or damage relevant documents, or may not turn up for questioning. Any one warrant may authorise detention for a maximum period of seven days. A person subject to a questioning or detention warrant has the right to contact a lawyer of choice, although, in the case of a detention warrant, ASIO may object to a particular lawyer on security grounds, in which case the final decision rests with the 'prescribed authority'. All questioning must take place before a 'prescribed authority', being a former judge, a currently serving judge or a President or Deputy President of the AAT.

A person may be subject to questioning adding up to a maximum total of 24 hours, except where an interpreter is required, in which case the maximum total is 48 hours. After each eight hours of questioning, the prescribed authority must be satisfied that further questioning is justified for questioning to continue. Persons detained are held by the police in accordance with the conditions approved by the issuing authority and in accordance with the Protocol to the Act. A person under 16 cannot be the subject of a warrant. A person aged 16 or 17 can only be the subject of a warrant if the Attorney-General and Issuing Authority are satisfied that the person will commit, is committing, or has committed, a terrorism offence. If a person aged 16 or 17 is detained, he/she must be allowed to contact a parent or guardian and can only be questioned before a prescribed authority, in the presence of a parent or guardian, and questioning cannot be for periods of more than two hours at a time.

Under the legislation, it is an offence:

- not to appear before a prescribed authority;
- to knowingly make a materially false or misleading statement; or
- to fail to produce any record or thing requested in accordance with the warrant.

These offences attract a maximum penalty of five years imprisonment. However, anything said by a person under a questioning or detention warrant is not admissible in evidence

against the person in criminal proceedings, other than in relation to one of the above offences.

The new powers were used for the first time during the Brigitte investigation. Two questioning warrants have so far been sought and approved, To date, ASIO has not sought a detention warrant. As you will understand, I cannot comment on the substance of the warrants issued. What I can say is that, so far, the process has worked smoothly from a legal and administrative viewpoint. It is very resource intensive, but I suppose that is not unreasonable given the unusual nature of the powers. Secondly, the new powers can be a valuable tool in intelligence collection. As a direct result of our experience in the Brigitte investigation we identified three practical issues:

- the need to be able to prevent a person seeking to leave the country who is subject to a questioning warrant;
- the need for more time where an interpreter is required for questioning; and
- the need for a secrecy provision.

These issues were addressed in a Bill which was passed by the Parliament in December. From our perspective, the amendments were urgent because, as the Brigitte case demonstrated, things can come out of the blue. Having identified the issues, we believed it would have been irresponsible not to bring them to attention immediately for consideration by the Government.

The most controversial of the December amendments was, of course, the secrecy provisions, which make it an offence for any person:

- while a warrant is in force, to disclose anything about the existence of the warrant, or any ASIO operational information obtained as a result of the warrant;
- in the two years after the warrant ceases to be in force, to disclose any ASIO operational information obtained as a result of the existence of the warrant.

The secrecy provisions were considered necessary because of the fact that, to obtain information during questioning, it may be necessary to disclose operational or other sensitive information which, if revealed, could damage ASIO's capacity to do its job.

Given some of the commentary on this issue, I think it is worth noting that the secrecy provisions now in the ASIO Act are consistent with those which were already in the Australian Crime Commission Act, except that the secrecy provision in the latter is for five years with a one year imprisonment for unauthorised disclosure, whereas in the ASIO Act it is a two year secrecy provision with up to five years imprisonment for unauthorised disclosure.

Community Confidence

Given the nature of the new powers, why should the community have confidence that they will not be abused? ASIO is conscious of the fact that the new powers are unusual. We have a responsibility to act with propriety and legality, with due regard for cultural and other sensitivities and to be accountable for our actions. We also have a responsibility to do our job and not to back away from it simply because it may be difficult and/or controversial.

So, what is new and where is the balance? In recognition of the fact that the new powers break new ground, the approval regime for questioning and detention warrants is very different from that for the exercise of ASIO's other special powers, such as telecommunication interception. Notably the final approval and issuing authority is outside the Executive arm of Government.

A warrant permits a person to have a lawyer of choice although, in the case of a detention warrant, ASIO has the right to object on security grounds. All questioning must take place before a prescribed authority, who is a person independent of ASIO and Government. When first brought before a prescribed authority, a person must be informed:

- of the right to complain to the Inspector-General of Intelligence and Security in respect of ASIO or to the Ombudsman in respect of the AFP; and

- of the fact that they may apply to the Federal Court in relation to the warrant or their treatment.

The Inspector-General of Intelligence and Security, in addition to the virtual powers of a standing Royal Commission which the Office carries, may also attend any questioning.

Finally, the new powers are the only provision in the ASIO Act which is subject to a 'sunset clause', which means that the powers will cease to operate from 23 July 2006, unless the Parliament approves their continuation before that date. The Parliamentary Joint Committee on Intelligence will, in fact, conduct a review six months before July 2006. All of this is in addition to the accountability arrangements which already apply to ASIO, including the fact that the Director-General must consult regularly with the Leader of the Opposition, who must also receive a copy of ASIO's classified Annual Report.

In brief, while in theory at least, all laws are open to abuse, the special arrangements put around ASIO's new powers are such that the community can have confidence that they will not be abused.

Further Changes?

I believe it important that we keep an open mind about the need for further changes to Australia's counter-terrorism laws, if new issues or challenges are identified. For instance, the machinery governing the listing of prescribed organisations is being revisited. Also, the issue of the protection of classified and security sensitive information has been the subject of a background paper last July and a recent discussion paper by the Australian Law Reform Commission and, sooner or later, this will be a critical issue in a terrorism case in this country.

In the context of keeping an open mind, I believe it relevant to note that liberal democracies today probably remain more dependent than many of us appreciate on a range of other countries taking action under laws which, in different times, we might criticise, a situation which raises some interesting philosophical issues. I make no judgement about it, but it does highlight the fundamental nature of the challenge of terrorism when it is up close.

Properly considered, balanced tough laws are an essential component in the fight against terrorism. The notion that in a liberal democracy such laws constitute a victory for terrorists is a nonsense.Their victory lies in the death of innocent civilians, ours lies in its lawful prevention.