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***BRIEFING ON PROPOSED AUSTRALIAN COUNTER-TERRORISM LAWS***

The July bombings in London again exposed the vulnerability of liberal democracies to terrorism, and quite properly motivated political leaders to reconsider Australia's security.

## *1. Appropriate Proposals*

Some of the proposals are appropriate responses to the terrorist threat facing Australia. Strong laws against terrorist financing are required by both international treaty law and mandatory resolutions of the UN Security Council. Similarly, strong offences against aviation security are required by international treaties, although Australia has long had federal offences in this area. Giving Federal Police the power to stop, search and question a person where there are reasonable grounds for suspecting their involvement in terrorism is unobjectionable, as long as legislation does not permit blanket searches of unconnected to evidence or suspicion.

Measures such as deterring unattended baggage, better screening of citizenship applications, and increases use of closed circuit television may also be justified. However, these measures may face practical difficulties of implementation: people may naturally or inadvertently leave baggage unattended (and should not be penalised as a result); and CCTV historically has had the effect of shifting criminal conduct off-camera, often making it harder to police.

## *2. Inappropriate Proposals*

In contrast, it seems difficult to justify very intrusive preventative detention measures, control orders, notices to produce, extended time limits on ASIO warrants, stop, search and question powers, and higher penalties for giving false or misleading information to ASIO. These proposals are considered in detail below.

Other proposals are still too vague to meaningfully comment on – how exactly will federal terrorism offences be 'clarified'? The Australian definition of terrorism is already very broad compared with the European Union definition, and attempts to broaden it further cannot be supported, particularly since it triggers exceptional powers.

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### *3. The Comparative Legal Context*

A striking feature of the legislative proposals announced by the Prime Minister is the extent to which they borrow ideas from other countries, particularly the UK and the US. While there is nothing wrong with learning from others, there is a danger in selectively transplanting laws from legal systems which are very different to our own.

While Australia inherited British common law, the last decade saw an increasingly wide divergence between Australian and British law. Since the adoption of the UK Human Rights Act in 1998, human rights principles now permeate British law in ways unknown in Australia, not least in controlling excessive responses to terrorism.

The British courts can independently supervise the impact of terrorism laws on the rights and freedoms of people in Britain – whether citizens or foreigners. For example, in 2004 the House of Lords found that the indefinite detention of suspected terrorists was unjustifiably discriminatory because it targeted only foreigners (***A v Home Secretary***).

Human rights law does not prevent effective responses to terrorism, since it allows rights to be limited or suspended if necessary to protect other social values, including security. Indeed, the UK courts have accepted the government's view that terrorism is a serious threat which may justify temporarily suspending some human rights (***A v Home Secretary***).

At the same time, human rights law does ensure that governments are held to account for restrictions they place on rights, so that they do not abuse their power under the guise of protecting security. It provides a principled framework for evaluating terrorism laws, ensuring they are strictly necessary and proportionate to the threat.

In the absence of similar rights protections in Australia, parliament should proceed carefully before agreeing to further terrorism laws.

### *4. Preventative Detention*

Australia has already given ASIO wide powers to question and detain for up to 7 days people who are not even terrorist suspects, while the Federal Police may hold terrorist suspects for an extended period of 24 hours. In this light, it is difficult to see how the power of preventative detention is necessary, unless the intention is to indiscriminately detain whole groups of people (such as Muslims) in the absence of reasonable suspicion or evidence of terrorism.

ASIO has seldom used its existing powers – detaining no-one in the last year, and questioning only three suspects (according to its annual report). Further, the terrorism threat level in Australia has been constantly set at 'medium' since 2001, which, according to the National Counter-Terrorism Committee, means only that a terrorism attack 'could' occur. Terrorism 'could' have occurred in Australia ever since the rise of modern terrorism in the 1960s, yet never before have such exceptional powers been considered necessary.

The proposals for federal preventative detention for 48 hours in a 'terrorism situation', and preventative detention for up to 14 days in the States and territories, are seriously flawed. The government claims that they are based on UK legislation, but that seriously misrepresents the British position. Police in the UK can detain ***terrorist suspects*** for up to 14 days in exceptional cases, but they have no power of preventative detention in a more general 'terrorist situation', and certainly no power to detain non-suspects.

### *5. Control Orders*

If the proposed control orders are to be based on the British law adopted in 2005, that is a cause for concern. The British law only permits the courts to review a (non-derogating) control order if it is 'obviously flawed', signalling that the courts are expected to defer to the government's judgment, greatly limiting independent judicial supervision. In addition, the types of restrictions that can be placed on a person under British law are very extensive.

At the same time, British law distinguishes between control orders that suspend human rights and those that do not, with greater judicial protections attaching to the former. In contrast, Australia lacks a human rights framework (including independent external supervision by the European Court of Human Rights), so it is unlikely that our law would be as sophisticated.

Australia risks depriving individuals of their liberty without such measures conforming to the derogation procedures of human rights law in emergencies. Moreover, there is little evidence that Australia faces the kind of 'public emergency threatening the life of the nation' which would justify suspending rights under the International Covenant on Civil and Political Rights.

### *6. Extending ASIO Warrants*

Tripling the length of ASIO search warrants from 28 days to three months, and mail warrants from 90 days to 6 months, cannot be justified. Reasonably short time limits on warrants are designed to ensure that warrants are not abused by the authorities to conduct fishing expeditions over extended periods, where there is little evidence of criminal activity.

### *7. Notices to Produce*

Allowing the Federal Police to issue notices to produce information that may assist with the investigation of terrorism 'and other serious offences' goes far beyond police powers in the UK, where provisions are limited to the sharing of information between government agencies. The Australian proposal would extend to private groups or companies, as well as institutions such as libraries. One student at Monash University already received an unwelcome visit from ASIO officers, for merely borrowing a library book about terrorism for research purposes.

In this context, even wider 'sneak and peek' powers under the US PATRIOT Act, allowing secret searches for information, have been widely criticised. One problem is that such powers have been justified as necessary to combat terrorism, yet have been used to gather evidence about ordinary crime. This intentional overreach is evident in the Australian proposal for notices to produce, which aim to assist in investigating 'other serious offences'. Thus exceptional powers are being manipulated for use against ordinary crime, which would otherwise be considered an impermissible intrusion on privacy and liberty.

### *8. Citizenship Provisions*

Extending the waiting period for citizenship by 12 months to three years is not, of itself, problematic, since many countries require longer periods of residency. However, characterising this proposal as a counter-terrorism measure casts unwarranted suspicion on foreigners as somehow linked to terrorism, and conflicts with Australia's immigration aims of encouraging migrants to become citizens.

Fortunately, the government has not followed up on suggestions to allow persons involved in terrorism to be stripped of their Australian citizenship. Nor has it proposed, as in the UK, that foreign terrorist suspects be deported even where they are at risk of return to a place of torture – in plain violation of international law. It has also rejected the rather ridiculous proposal to ban headscarves in schools. When this was done in France a few years ago, it soon backfired as Catholic nuns in schools found themselves required to doff their habits.

### *9. Incitement to Violence and Advocacy of Terrorism*

The proposal to replace the crime of sedition with a new offence of inciting violence against the community (and Australia's armed forces) is drawn from the Gibbs Review of federal criminal law in 1991. Yet, the Prime Minister's proposal tells only part of the story. The Gibbs Review recommended modernising many archaic security offences (such as treason and treachery), and the Prime Minister has cherry-picked part of those recommendations and taken them out of context – which had little to do with terrorism.

In fact, the UK Law Commission had earlier rejected an incitement offence, as proposed by Gibbs, as unnecessary. Australia already has strong anti-vilification laws which protect groups in the community against hate speech and violence based on race, religion and so on.

If the law is to criminalise support for Australia's enemies, or incitement to violence against Australian forces, it must tread very carefully. How will Australia's 'enemies' be identified? By executive certificate, to which courts must defer, or by proscription of groups? Consider the invasion of Iraq in 2003, widely regarded as unlawful under international law. A country that has been invaded is entitled to use lawful force in self-defence, and Iraqi combatants cannot be criminalised for defending their country under humanitarian law (unless they commit war crimes). Why then should Australians be criminalised for condemning unlawful violence by the Australian government, and for upholding the law of the United Nations Charter?

The proposed new offence is linked to a proposal to ban groups for 'advocating' terrorism. Both the incitement offence and banning these groups risk criminalising legitimate expressions of political opinion, fair media comment, and academic views. The criminal law already allows the prosecution of incitement to crime, and it is a hasty and imprudent overreaction to extend the law further through these vague proposals, especially if they are aim to criminalise general statements of support for terrorism, rather than specific incitements to crime.

There is also a danger that criminalising the expression of support for terrorism will force such beliefs underground. Rather than exposing them to public debate, which allows erroneous or misconceived ideas to be corrected, criminalisation risks aggravating the grievances underlying terrorism, and thus increasing, rather than reducing, the likelihood of terrorism.

### *10. No sunset clause*

Underscoring all of the recent proposals is a further deficiency – the lack of a sunset clause. The proposals are silent on whether they are intended to be temporary emergency powers to confront specific terrorist threats, or permanent laws which can be deployed over the coming decades, regardless of the changing nature of the terrorist threat. The purpose of placing time limits on terrorism powers is to ensure that exceptional intrusions on personal liberty are strictly necessary to counter the particular terrorist threat faced, and do not exceed that threat. Powers can always be renewed before they expire if the threat still justifies the response.

### *11. Conclusion*

The Prime Minister claims that the proposals reflect 'world's best practice'. If the government is really committed to pursuing 'world's best practice', then it has every reason to adopt a national bill of rights – as in the UK. An Australian Human Rights Act would ensure that there is independent judicial scrutiny of counter-terrorism laws, to help ensure that rights and security do not tip dangerously out of balance.

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