The war against terrorism

National security and the Constitution

Hon Daryl Williams AM QC MP

On 3 October 2002 the Constitutional Law Section of the Bar Association hosted a series of lectures in the Banco Court on terrorism. The speakers included the Commonwealth Attorney-General, the Hon Daryl Williams AM QC MP and Dr James Renwick, whose addresses appear below.

Hon Daryl Williams AM QC MP

Introduction

Before I examine the nature of the terrorist threat to Australia and our response, let me first say a few words about the concept of 'national security'.

National security encompasses a broad range of matters, and has an international and a domestic focus. Protecting the community from terrorism is just one aspect of national security. Other aspects include the work conducted by the various intelligence and law enforcement agencies, including ASIO, the protection of classified information, and protection against espionage, to name a few.

National security is something that the government takes very seriously. In my time as Attorney-General, there have been many changes, both legislative and administrative, in the way we approach our national security. These changes reflect the changing nature of the issues that governments and the various agencies face. An obvious example is the counter-terrorism legislative package enacted by the federal parliament in June this year as part of the government's response to the events of September 11. Another is the espionage Bill, currently before the Senate, which updates the offence of 'espionage' in response to the Jean Philippe Wispelaere case.

National security is a very important part of the 'national interest'; that is, attempting to secure the best outcome for Australia and its people at all times. Like the national interest, national security is not set in stone. It will change from time to time according to varying domestic and international pressures.

Since September 11, of course, the greatest pressure upon our national security comes from the threat posed by terrorists.

We must look carefully at the changed environment, at what has changed and is changing, and whether our response is appropriate.

Our position as a potential target for terrorists seems clear. Osama bin Laden has twice mentioned Australia since the events of September 11, including a reference to our troops in East Timor as part of a 'crusader force'.

Nature of the terrorist threat to Australia.

Australians have traditionally viewed themselves as removed from the conflicts that occur in other parts of the world. This is no longer the case. Our profile as a terrorist target has risen and we have been on a heightened security alert since September 11.

On Christmas Eve last year, our threat level was upgraded still further as a result of information suggesting a potential terrorist threat within Australia, possibly to United States or United Kingdom interests.

Our position as a potential target for terrorists seems clear. Osama bin Laden has twice mentioned Australia since the events of September 11, including a reference to our troops in East Timor as part of a 'crusader force'.

Our High Commission in Singapore has been the target of a foiled terrorist plot. And it was a particular terrorist threat that saw our Dili embassy close for two weeks around the anniversary of September 11 this year. On the actual anniversary, Australian, UK and US embassy operations in many countries were scaled down as a sensible precaution.

ASIO is aware that some terrorist groups with global reach have a small number of supporters in Australia and a small number of Australians have trained in Afghanistan and Pakistan. Not all the latter are in US military custody. It is likely that other Australians, who are not known to us, have trained in Afghanistan or Pakistan.

ASIO's unclassified annual report tells us that there are sympathisers of extremist organisations in Australia. Perhaps the most worrying of organisations for Australia in the post-September 11 environment is Jemaah Islamiyah.

Jemaah Islamiyah has the stated ambition of an independent Islamic state encompassing Indonesia, Malaysia and the Muslim islands of the southern Philippines. FBI Director Robert Mueller recently singled out this organisation as al Qaida's foremost South-East Asian collaborator[1].

On September 21, the Singapore government announced the arrest of 21 suspected members of Jemaah Islamiyah. It is alleged that they were plotting to attack several western embassies, including the Australian High Commission.

This is not the first time that Jemaah Islamiyah has included Australian interests among its targets. In December 2000, Philippine authorities found more than a ton of explosives and over a dozen M-16 rifles in Mindanao in the southern Philippines. These evidently were to be used by Jemaah Islamiyah associates to attack US, Australian, British and Israeli targets in Singapore[2].

And just recently, on 23 September, a grenade exploded near a US Embassy building in Jakarta, killing one of four would-be terrorists, another of whom was captured. It is not presently known if these individuals are affiliated with Jemaah Islamiyah.

If September 11 was a wake-up call for the world, these developments reveal the risk that our region could become a focal point for a new terrorist campaign.

Australia has been working hard to address local issues and develop a consistent regional approach to dealing with terrorism. In the last year, we have signed memorandums of understanding with Indonesia and Malaysia on cooperation to combat terror. Another such MOU is presently being negotiated with Thailand. We are also active in various multi-lateral forums to achieve further regional harmony in counter-terrorist arrangements.

Australia's preparedness for the terrorist threat

Of course, the most important measures to combat the terrorist threat to Australians are those we undertake at home. Following September 11, we immediately reviewed our counter-terrorism arrangements.

In response to needs clearly identified in this review, the government immediately allocated increased resources for agencies

such as ASIO, the Protective Security Coordination Centre and the Australian Federal Police, which had to meet much greater operational demands than before.

We also consolidated some activities to achieve a better-coordinated government response. For example, the Australian Protective Service was merged with the AFP and Emergency Management Australia was transferred to my Department.

The government also put in place a number of practical longer-term measures to upgrade air security and more effectively screen people and goods. And we reviewed our national counter-terrorist plan.

Counter-terrorism legislation

A key response was the development of a comprehensive package of legislation to strengthen Australia's ability to combat terrorism. With the exception of a Bill to enhance ASIO's ability to gather intelligence about possible terrorist attacks, this legislation has been passed by parliament and become law. The ASIO Bill was passed by the House of Representatives last week and is currently awaiting debate in the Senate.

It is this new legislation which has been addressed by Dr Renwick in his paper.

Dr Renwick provides an overview of the major changes that these new laws bring to the counter-terrorism environment in Australia: the new treason offence, the new terrorism offences, the listing of terrorist organisations and the ASIO Bill. I will not revisit this material other than to note his acknowledgment that the government has adopted the majority of recommendations made by the parliamentary committees that have reviewed the legislation. It is unfortunate that not all commentators are willing to acknowledge this fact.

Before I address some of the issues raised by these laws, it is worth examining the process of their enactment. It is not an understatement to say that this is one of the most controversial packages of legislation to come before the federal parliament.

All the legislation was referred to the Senate Legal and Constitutional Legislation Committee. The ASIO Bill was also referred to the Parliamentary Joint Committee on ASIO, ASIS and DSD. The two committees received hundreds of written submissions and spoke to numerous witnesses at hearings in Sydney, Melbourne and Canberra. The legislation was also debated fiercely in the media.

By the time the committees handed down their respective reports in the middle of this year, every contentious aspect of the security legislation package had been well and truly scrutinised. A number of recommendations were made by the committees and the government accepted most of these. Where we were unable to accept recommendations because they would prevent the effective operation of the legislation, we provided a clear explanation and put forward alternative ways to address the concerns raised.

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The Opposition has indicated the ASIO Bill will be referred to yet another Senate committee. This is yet to occur. The Opposition is yet to engage with us on their specific concerns with the Bill, despite our repeated attempts to do so, and despite the support it has received from senior ranks within the Opposition. Given that three parliamentary committees already have considered the Bill, one has to question their motives. But this is perhaps not the forum to debate the divisions within the Labor party that has led them to stall taking a final position on this Bill.

Constitutional issues

The question of the constitutionality of the counter-terrorist legislation, including the ASIO Bill, has been raised by a number of commentators. Some have focussed on the adequacy of the existing constitutional powers which serve as the basis for the new laws, while others have questioned whether particular powers created by the legislation are constitutionally valid.

Adequacy of constitutional powers

On the first issue, the new counter-terrorist laws rest upon a number of constitutional powers. These include powers relating directly to criminals (sec 51(xxviii), sec 119); to Commonwealth places (sec 52(i)) and territories (sec 122); other express powers (including those dealing with foreign, trading or financial corporations – sec 51(xx), electronic, postal and other like services – sec 51(v), and external affairs powers – sec 51(xxix)), in addition to the implied power to protect the Commonwealth or its authorities.

The powers of investigation and detention proposed in the ASIO Bill can generally be supported by the constitutional powers supporting the creation of the offences to which the ASIO powers relate, together with the Commonwealth's incidental power (sec 51(xxxix)).

While there is a sound constitutional basis for the counter-terrorist legislation we have already enacted, it is impossible to rule out unforeseen gaps in the coverage offered by offences based on existing powers. For example, investigation and prosecution of offences in relation to coordinated terrorist action on 'state' land perpetrated by Australian citizens with no direct overseas links, using weapons that are not the subject of international treaties. While these gaps may be considered to pose a small risk, any such gaps may become a focus for litigation about the effectiveness of the laws.

At a summit in April this year, the Prime Minister and state and territory leaders agreed on the importance of comprehensive, national coverage of terrorism offences.

In particular, they agreed that the states would remove any lingering constitutional uncertainty by means of constitutional 'references' to the Commonwealth Parliament in accordance with sec 51(xxxvii) of the Commonwealth Constitution. It is worth noting that we have seen similar considerations justify the recent state references in support of the new Commonwealth corporations legislation.

The leaders agreed, among other things, that the states would refer power to support the federal terrorism offences. They also agreed that the state references would refer the 'text' of the offences, together with a power to amend them once enacted, along the lines of the corporations law references.

The referred text will include provisions dealing with consultation and agreement with the states and territories on future amendment of the federal offences; and 'roll-back' of the federal offences to prevent any unintended displacement of state or territory laws. These are to be identified by the states and territories.

The leaders agreed that the target date for commencement of the new federal offences would be 31 October 2002. While that date is ambitious, we are currently working with the states and territories with a view to implementing the agreement as soon as possible.

ASIO Bill

An example of specific provisions that have been questioned on the basis of constitutional validity are the proposed detention

provisions of the ASIO Bill. Based on advice I have received, I am confident that the ASIO Bill is constitutionally sound.

Professor George Williams, of the Faculty of Law of the University of New South Wales, and the Law Council of Australia, have both asserted that the detention provisions are constitutionally suspect[3].

Briefly, the argument is that the power to detain for punitive purposes exists only as an incident of the judicial function of adjudging and punishing guilt and can not be vested in the Executive.

Whether detention is punitive is a matter of substance and not form.[4] The express purpose of the ASIO Bill and the process of detention it creates demonstrate that the detention is for a legitimate non-punitive purpose. The express purpose is to gather intelligence regarding serious terrorism offences[5], not to punish those detained.

In addition, there are a number of safeguards with respect to detention which further establish the non-punitive character of the detention. These include:

- limits on the initial period of detention, as well as the total period of detention[6];
- the need to obtain further warrants for further periods of detention[7]- this includes the need to obtain a warrant from a federal judge if the period of detention is to exceed 96 hours[8];
- rights and protections accorded to detained persons, such as the requirement for humane treatment[9] and access to a security-cleared lawyer;
- video recording of the procedures before the prescribed authority [10]; and
- the obligation to desist action under a warrant when the grounds on which it was issued have ceased to exist[11].

While ASIO is empowered to seek search warrants, computer access warrants, tracking device warrants, telecommunications interception warrants and to inspect postal articles, ASIO is not currently empowered to obtain a warrant to question a person.

In my view, which is based on legal advice, it is clear that the detention is of a non-punitive character and I am confident that the Bill is constitutionally valid.

It is clear that the detention is designed to deal with particular types of serious threats. While there is no known specific threat to Australia, our profile as a terrorist target has risen and we remain on a heightened security alert. Our interests abroad also face a higher level of terrorist threat. Australia needs to be well-placed to respond to this new environment in terms of our operational capabilities, infrastructure and legislative framework.

While ASIO is empowered to seek search warrants, computer access warrants, tracking device warrants, telecommunications interception warrants and to inspect postal articles, ASIO is not currently empowered to obtain a warrant to question a person. In order to prevent potential perpetrators of terrorism offences from completing their crimes, it is necessary to enhance the powers of ASIO to gather relevant intelligence in relation to terrorism offences.

In developing this legislation, the government has been conscious of the need to protect the community from the threat of terrorism without unfairly or unnecessarily encroaching on individual rights and liberties that underpin our democratic system. Consequently, strict safeguards have been included in the Bill to ensure that the new powers are properly exercised.

A person may only be detained for 48 hours under each warrant. Subsequent warrants may be issued in relation to the same person. But if the issue of a subsequent warrant would result in a person being detained for more than 96 hours, it can only be issued by a federal judge. The maximum period for which a person can be detained will be seven days (168 consecutive hours). People will not be able to be detained indefinitely.

In addition, all persons detained under a warrant will have the right to contact a security-cleared lawyer. Access to a security-cleared lawyer may be delayed for up to 48 hours, but only in exceptional circumstances. In order to delay access to a lawyer, the attorney-general must be satisfied that it is likely that a terrorism offence is being or is about to be committed. Access to a lawyer may alert those involved in the terrorist offence to the investigation or delay action to prevent the terrorism before it occurs. I note also that access to a lawyer may only be delayed in relation to adults. After 48 hours all persons have the absolute right to contact a security-cleared lawyer.

These and the other significant safeguards in the Bill will ensure that the powers under the Bill are properly exercised and that the rights of individuals will not be unnecessarily impeded.

To add teeth to the safeguards, offences have been included in

Nur Hakim (right) sits next to his wife Michico and his family giving account of an ASIO raid at their Brookvale home. *Photo: Jeff Darmanin / News Image Archive*

the Bill for officials who contravene the safeguards. An official who fails to comply with a direction of the prescribed authority, or fails to afford a person his or her rights under the Bill will be punished by a maximum of two years imprisonment.

A number of commentators have criticised the Bill. Public consideration and debate on important legislation is essential to our democratic system.

However, it is disappointing that some commentators have not presented an accurate picture of the legislation. A number of commentators have ignored or misrepresented the safeguards that were built into the Bill as introduced. Of even more concern, some have chosen to ignore the additional safeguards that were included in the Bill by way of government amendments in the House of Representatives.

The government has worked hard to ensure that the Bill accommodates many of the concerns expressed by parliament and the community. It would assist further debate on the Bill if commentators acknowledged the changes that have been made, rather than restating their original comments, many of which are no longer relevant.

Conclusion

Australia's security environment has changed forever. The events of September 11 were a chilling reminder that there are forces in the world that are determined to attack and undermine the very basis of our civilised society.

The government has responded to these threats quickly and decisively. But we have not let the magnitude and the urgency of the situation cloud our judgment. The additional security measures and the new counter-terrorism legislation have been developed with two very clear and straightforward objectives. They have been developed to protect our national security. And they have been developed to give our security agencies the tools they need to identify, and where possible, prevent terrorist attacks.

I acknowledge that the new counter-terrorism laws rely upon a number of constitutional powers. Despite this I am confident that the constitutional validity of the legislation is sound. This is reinforced by the agreement by the states to refer powers to the Commonwealth.

In relation to the ASIO Bill, we must remember that the underlying aim is to protect the community. We can not afford to sit back and wait for a terrorist attack to occur, for the harm to be done, before we take action. I am confident that the non-punitive detention of persons in order to protect the community is something that is supported by law and the Constitution.

The protection of Australia's national security is something that this government takes very seriously. We need to respond to terrorism in an effective and authoritative way. But this response must respect and work within the constitutional framework that has served us well for over a century. I believe our approach has achieved this.

1 http://www.cdi.org/terrorism/ji-pr.cfm

2 Center for Defence Information, http://www.cdi.org/terrorism/ji-pr.cfm

3 *Submission of Professor George Williams, University of New South Wales to the Parliamentary Joint Committee on ASIO, ASIS and DSD inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, 30 April 2002, and *Submission of the Law Council of Australia to the Parliamentary Joint Committee on ASIO, ASIS and DSD and to the Senate Legal and Constitutional Legislation Committee inquiries into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, 29 April 2002.

4 'In exclusively entrusting to the courts designated by Ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form.' Per Brennan, Deane And Dawson JJ. *Chu Kheng Lim And Others V. The Minister For Immigration, Local Government And Ethnic Affairs And Another* (1992) 176 CLR 1 FC 92/051 at 23.

5 secs 34C(3) and 34D(1)(b), *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (ASIO Bill).*

6 secs 34D(1)(c) and 34F(4)(a) and (aa), ASIO Bill.

7 secs 34C and 34D; sec 34F(7), ASIO Bill.

8 sec 34C(5), ASIO Bill.

9 sec 34J, ASIO Bill.

10 sec 34K, ASIO Bill.

11 sec 34R, ASIO Bill.

Dr James Renwick[1]

In the second of the addresses, Dr Renwick provides an overview of Australia's legal responses to the war against terrorism. In the course of doing this, he considers some of the constitutional and legal policy issues which have confronted, or might confront, Australia.

Introduction

There has been a considerable legislative response by Australia to the events of September 11, 2001. The response has attracted controversy. This is not surprising. The vexed policy conundrum faced by our law-makers was lucidly stated over 200 years ago by Alexander Hamilton in *The federalist papers* when he wrote:

> Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.[2]

This tension between a general desire to be safe from danger, but free from too much government interference, is at the heart of the policy debate that much of the western world has been having for over a year now.

Definitions

Of the three aspects of the topic, two, at least, defy easy definition or familiar categorisation. In some ways, the constitutional component is the easiest to come to grips with.

In contrast, 'national security', although a familiar phrase, is hard to define much beyond the deceptively simple notion that it involves the safety of a country and its people, particularly from, but not only from, foreign domination.[3] As will be seen, the law – whether statutory or judge-made – rarely defines national security much beyond this point.

And finally, the war against terrorism altogether defies familiar categorisation.

The Constitution

There are a number of constitutional provisions which deal explicitly with defence and security:

- There is the defence power itself in sec 51 (vi), which I will consider shortly;
- There is the somewhat dated power to legislate for Commonwealth control of railways for naval and military transport in sec 51(xxxii);
- sec 68 confers command in chief of the naval and military forces on the Governor-General – although this role is 'essentially a titular one';[4]
- By sec 114, the states may not raise or maintain any naval or military force without the consent of the Commonwealth Parliament and, finally;
- By sec 119, the Commonwealth 'shall protect every state against invasion' and, on the application of the executive government of a state, from domestic violence. (The protection of states against domestic violence is often known as 'aid to the civil power'. I do not propose to deal with this topic here beyond noting that it was the subject of well publicised legislation prior to the Sydney Olympics. My views on this legislation appear in an earlier edition of *Bar News*.)

But there are also a number of other heads of power of real importance in this field.

Presuming that terrorists will often be agents of a foreign state or organisation, the Commonwealth Parliament's capacity to make laws, variously, with respect to 'aliens',[5] 'immigration',[4] and the 'influx of criminals',[7] are all of potential utility.

The external affairs power[8] is a crucial power in this context, not only because of the many anti-terrorist treaties to which Australia is a party,[9] but also because of the positive obligations imposed on 'all states' – including Australia – by a number of UN Security Council resolutions passed since September 11, 2001.[10]

The centrepiece of the international community's response to the events of September 11 was UN Security Council Resolution 1373, which was adopted unanimously by that Council under Chapter VII of the Charter of the United Nations on 28th September 2001.[11] The theme of the resolution was the prevention of terrorism, the suppression of the financing of terrorist acts, and the denial of safe havens for terrorists. The resolution imposed a binding obligation on 'all states' to act to achieve these ends.[12]

There has been a considerable legislative response by Australia to the events of September 11. I will consider aspects of the response shortly. In the course of scrutinising that response, various Commonwealth parliamentary committees have brought to attention the *Charter of the United Nations Act 1945* (Cth) which I suspect had been overlooked by many people. Perhaps this was because it was wrongly assumed to have remained unchanged since 1945. In fact it was significantly amended in 1993[13] to allow for UN sanctions to be applied more easily by regulations made under a single Act rather than by separate regulations made under many Acts. This was done following the experience of imposing sanctions on Iraq in 1990-91.

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In any event, this statute, relying on the external affairs power, permits regulations to be made to give effect to decisions of the UN Security Council under Chapter VII of the UN Charter, in so far as those decisions require Australia to apply measures *not* involving the use of armed force.[14] Measures involving the use of armed force will be taken under the executive power of the Commonwealth in sec 61 of the Constitution, as part of the prerogative to wage 'war', albeit as regulated by defence legislation.

Regulations were passed under this Act after September 11 freezing suspected terrorist assets and imposing sanctions against the Taliban.[15] In substance, these provisions are now found in the *Suppression of the Financing of Terrorism Act 2002* (Cth).

Australia's legislative response

Acting to fulfil Australia's obligations flowing from UN Resolution 1373, the parliament has enacted the following statutes. Their titles give some flavour of their contents:

- The *Security Legislation Amendment (Terrorism) Act (No. 2) 2002*;
- *The Suppression of the Financing of Terrorism Act 2002*;[16]
- The *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*;[17]
- The *Border Security Legislation Amendment Act 2002*;[18]
- The *Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002*;[19]
- The *Telecommunications Interception Legislation Amendment Act 2002*.[20]

The parliament has yet to enact the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*.[21]

The ASIO Bill has already been considered by the Parliamentary Joint Committee on ASIO, ASIS and DSD. The others were principally considered by the Senate Legal and Constitutional Legislation Committee. Both committees produced detailed reports containing a number of recommendations, most of which were accepted by the government. The ASIO Bill has not yet been passed. The others, as amended, have been. It is of course not possible tonight to consider these statutes in detail. I therefore commend the parliamentary reports to you.

Tonight, I wish only to consider four aspects of these statutes, namely:

- A wider definition of treason;
- The new criminal offences involving terrorist acts;
- Proscription of terrorist organisations; and
- The ASIO Bill.

1. A wider definition of treason

The Criminal Code now contains a new definition of treason. Formerly, a person committed treason by, for example, levying war against the Commonwealth, or assisting an enemy proclaimed to be at war with the Commonwealth.

As the Attorney-General said in his second reading speech on 13 March 2002, 'the realities of modern conflict … do not necessarily involve a declared war against a proclaimed enemy that is a nation state.' If I may say so, that is precisely correct and it is a reason why we should not be calling the current fight or armed conflict against terrorists a 'war'.

Be that as it may, the offence of treason now includes conduct where a person engages in an armed conflict that is intended to assist, and does assist, another country, or an organisation that is engaged in armed hostilities against the Australian Defence Force. So now, for example, an Australian who fights against our forces on foreign soil will fall within the terms of the offence.

2. An offence of terrorism

The Senate Legal and Constitutional Legislation Committee received many submissions opposing the enactment of specific terrorism offences. The submissions often argued that the bill was not demonstrably necessary, and that existing criminal offences such as murder, grievous bodily harm, criminal damage, arson, conspiracy and attempt, were adequate to address terrorist acts.[22]

There is a respectable argument that preventing and deterring terrorism does not require a specific new crime and that it is better to deal with terrorists under normal criminal provisions. There are three reasons why I do not think the argument is correct.

First, there is the international law obligation on Australia derived from UN Resolution 1373 requiring that terrorist acts 'be established as serious criminal offences in domestic laws'. It is arguably implicit in that Resolution that anti-terrorist offences be established in their own right.

Secondly, we do enact criminal laws using international language covering acts which can fairly be described as murder, grievous bodily harm etc. The *Geneva Conventions Act 1957* (Cth) is one example. Another is the *International Criminal Court (Consequential Amendments) Act 2002* (Cth), which created offences in Australian law for such acts as 'genocide' and 'crimes against humanity'.

Finally, in my view, the new terrorism offences, as defined in the

Criminal Code, are different in nature to the general criminal offences to which I have earlier referred. This may become clearer when the elements of the offence are considered.

I note that there are different schools of thought about what constitutes terrorism. There are presently attempts to define it for example in a Comprehensive Terrorism Convention in the UN.[23] My paper is limited to the definition which is now part of Australian law.

A 'terrorist act' (the name of the new offence) is the subject of a complex definition, both because terrorist activities are protean in nature, and because the Commonwealth Parliament has no general legislative power to make laws with respect to criminal acts (although there is a current proposal that power to make laws with respect to national security be referred by the states to the Commonwealth under sec 51 (xxxvii) of the Constitution).

The essence of the definition of 'terrorist act' is fourfold.

First, there must be action which causes, for example,:

- death or serious physical harm,
- serious damage to property, or
- serious risk to the health and safety of the public (or a section of the public)
- *and in each case the action must have been intended to have had those consequences.*

Second, the action must *not* comprise advocacy, protest, dissent or industrial action.

Third, the act must be done 'with the intention of advancing a political, religious or ideological cause'.

Finally, the act must be done either with the intention of coercing, or influencing by intimidation, an Australian or foreign government; or with the intention of intimidating the public or a section of the public.

In my view, to kill people for ideological purposes with an intent to coerce or intimidate governments, or the populace generally, is to commit a criminal act which is different in nature to, for example, murder. Accordingly, creation of a separate offence was justified.

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Proscription of terrorist organisations

Division 102 of the Criminal Code now deals with what are called 'terrorist organisations'. Division 102 creates offences for those who, variously:

- direct the activities of a terrorist organisation,
- are knowingly members of terrorist organisations,
- recruit for terrorist organisations,
- raise funds for such organisations, or
- provide support to them.

A crucial matter which concerned the Senate committee considering the Bill for this Act was how a terrorist organisation should be defined. For some witnesses before the committee, the Bill echoed the *Communist Party Dissolution Act 1950*.

Originally, there was to be a ministerial power simply to declare an organisation to be a terrorist organisation.

The final definition arrived at provides that a terrorist organisation is either:

- an organisation which a court has found to be directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act, whether or not that act occurs; or, alternatively;
- is an organisation so specified in the regulations made under the Act following identification of the organisation by the UN Security Council as a terrorist body *and* ministerial satisfaction that the organisation has terrorist links.[24] (Such regulations are of course, disallowable and under the Criminal Code there is a sunset provision which means a regulation ceases to operate after two years, although it can be remade.)

The ASIO Bill

This Bill, quite correctly, has received a great deal of attention. It has been the subject of one advisory report by a parliamentary committee, and looks likely to be the subject of scrutiny by another committee when the amended Bill – the government having largely accepted the amendments proposed by the first parliamentary committee – is brought before the Senate.

This Bill proposes to expand ASIO's investigative powers in a significant way by permitting ASIO, with the concurrence of the Attorney-General, to seek a warrant for apprehension of a person suspected of having information about a terrorist offence. The person named in the warrant can then be interrogated in private before a prescribed authority and required to answer questions on pain of committing an offence.

The original Bill permitted the person to be held incommunicado, and without access to a lawyer.

As to the general proposal, there is much force in what Bret Walker SC wrote on 6 March this year in a newspaper article, albeit before the Bill was introduced. He wrote:

> from what we know of it so far, this is the genuine emergency case where detention is authorised for the purpose of questioning a person who may not be a criminal suspect, but is thought to have information which could avert death and destruction. With appropriate safeguards, this intrusion into our usual freedom to be left alone and to not be required to answer questions from the government can easily be justified. The devil is in the details of any safeguards.

He went on to say:

> these [safeguards] must surely include an absolute guarantee that nothing revealed by a person under compulsory questioning can ever be used to prove that person's guilt of any other offence. Otherwise, we should stop beating around the bush and start devising regulated torture.

In fact there are many safeguards built into the Bill.

The Attorney-General has recently announced significant amendments. The original Bill would have permitted:

- the person issuing the warrant to preclude access to a lawyer,
- children as young as 12 to be detained,
- the warrant to be extended for a considerable period, and
- the responses given by the person to be able to be used in evidence against them.

The amendments the government now proposes will:

- permit interrogation only of persons aged 14 or more – 14 being the age of general criminal responsibility in Australia;
- provide a use immunity on the evidence given by the person during questioning, so that their answers cannot be used against them in prosecution for a terrorism offence;
- will, except in special circumstances, give the person detained access to a lawyer. The Attorney's press release states: 'All detained persons [are] to have access to a security cleared lawyer unless specific grounds exist for denying that right for the first 48 hours of detention.'

A panel of security cleared lawyers in private practice, who hold

themselves out for this purpose, is to be established.

But the benefits of access to a lawyer are significantly confined. When the person the subject of the warrant contacts their lawyer 'the contact must be made in a way that can be monitored by a person exercising authority under the warrant' – that is, as the government's commentary on the amendments states 'Contact must be carried out in the hearing of'[25] the warrant holder, usually, an ASIO officer. So it appears that there will be no guarantee of giving confidential advice.[26]

I don't wish to say more at this stage about this Bill – which, I am sure, will be the subject of lively debate during question time – except to note a possible role for Federal (and Family) Court judges.

Under the former Bill, the persons issuing the warrant had either to be a federal magistrate or an officer of the Administrative Appeals Tribunal. The Federal Court was not mentioned.

The parliamentary committee and indeed many persons who made submissions to the committee, felt strongly that AAT members, who generally only have fairly short, though renewable terms of office, lacked the necessary appearance of independence to be suitable to perform the function of issuing these warrants. They considered magistrates should perform the role. Furthermore, the parliamentary committee recommended that where a warrant was issued in circumstances where detention exceeded 96 hours (out of a maximum possible 168 hours), it was preferable for a Federal Court judge to issue the warrant. The new amendments will so provide. The question of course is whether any Federal Court judges will accept that role.

The parliamentary committee noted that in 1997, the judges of the Federal Court had advised the government that they would no longer be involved in issuing *Telecommunications (Interception) Act* (Cth) warrants, first, because they considered issuing warrants was an administrative not a judicial function, secondly because there was a significant additional workload involved and thirdly, because they increasingly found themselves as respondents to judicial review applications in their own courts.

An additional factor is that although the current state of High Court authority as for example set out in *Grollo v Palmer*[27] is that Chapter III judges, acting in their personal capacity, can issue telephone interception warrants consistently with the terms of the Constitution, it remains the subject to judicial and academic criticism.

It will be interesting to see whether any Federal Court judges acting *persona designata*, are prepared to issue warrants under the ASIO Bill, if it is enacted.

I accept that there is an important question of principle involved as to whether the judges should, even if they constitutionally can, undertake what is an administrative function, but is also an important role requiring manifestly independent persons, such as federal judges. After all, many state supreme court judges perform similar roles.

The only additional matter I would add is that in the United States, for example, federal judges perform these types of functions. The *Foreign Intelligence Surveillance Act* (US) allows warrants to be issued to permit foreign intelligence suspects to have their phone tapped, their mail opened and their premises searched. There are 11 federal judges who constitute the Foreign Intelligence Surveillance Court. They are appointed to this court for a limited, non-renewable term. They hold this appointment under an additional commission. They hear ex parte applications on behalf of the US Government, and issue warrants.[28]

National security

To the lawyer, the term 'national security' is an exotic animal, perhaps familiar in theory, but rarely encountered in practice. I now give a few examples of the species, most of which are concerned with protecting secret information affecting national security.

First, a document the disclosure of which would, or could reasonably be expected to, cause damage to the security or defence of the Commonwealth is an exempt document under the *Freedom of Information Act 1982* (Cth).[29]

Similarly, material concerning 'defence secrets and the nation's diplomatic relations with foreign governments… are archetypes' of public interest immunity privilege claims.

Such claims, if made out, prevent the information to which the privilege attaches being produced under compulsory process whether in oral evidence or through production of documents: see also sec 130 of the *Evidence Act 1995*.[30]

Next, where the government seeks the intervention of equity to restrain publication of its confidential information, the court, to use the words of Mason J in *Commonwealth of Australia v. John Fairfax & Sons Ltd*[31]

> will look at the matter through different spectacles and will not generally restrain publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action [His Honour continued] … If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained.

The little known provisions of sec 85B of the *Crimes Act* (Cth)[32] permit a federal or territory court, or a court exercising federal jurisdiction, if satisfied 'that such a course is expedient in the interest of the defence of the Commonwealth', to:

- exclude some or all of the public from the hearing,
- prohibit publication of a report of the proceedings, and
- prevent access to any documents on the court file.

Section 50 of the *Federal Court of Australia Act 1976* (Cth) is to similar effect.[33]

Consistently with international law, and under the *Migration Act 1958* (Cth), a refugee may be expelled from Australia 'on grounds of national security' provided the relevant Minister personally decides that, because of the seriousness of the circumstances giving rise to the making of that decision, that this is in the national interest'.[34]

Yet, in none of the examples just given, is national security really defined. This is not unusual in common law countries. For example, in *Secretary of State For The Home Department v. Rehman*[35] a case decided in October last year, the House of Lords considered a statutory provision which specified 'the interests of national security' as a ground on which the Home Secretary of State could consider deportation to be conducive to the public good, and so order deportation. In his speech, Lord Hoffman said: 'there is no difficulty about what 'national security' means. It is the security of the United Kingdom and its people. [36]

One example of 'security', although, for reasons I will explain, not *'national security'*, being defined, is sec 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth). The Act prescribes the Organisation's functions, one of which is 'to obtain, correlate and evaluate intelligence relevant to security'; and another of which is 'to advise ministers and authorities of the Commonwealth in respect of matters relating to security'.[37]

Security is defined in the Act to mean the protection of the Commonwealth, the states, the territories *and their people* (a phrase not often found on our statute books) from

- espionage;
- sabotage;
- politically motivated violence;

- promotion of communal violence, and
- attacks on Australia's defence system or acts of foreign interference;
- whether in any case these are directed from, or committed within, Australia or not; and – an important 'and' – 'the carrying out of Australia's responsibilities to any foreign country in relation to any of these matters'.

That is, security as defined, includes the security of Australia directly, and corresponding obligations to our allies. Presumably that is why the term '*national* security' is not used.[38]

The war against terrorism

As I mentioned in the introduction, the war against terrorism altogether defies easy categorisation. The fundamental reason for this is that it is not a war at all – as we understand wars.[39] I suggest that for a century or so, lawyers and laymen alike have thought of war as a state of (usually) open and declared, armed conflict between nation states.[40]

This war, at least so far, has state actors on only one side of the ledger. And its duration and the location of the battlefield are seemingly at large. So, President Bush has said that 'Afghanistan is only the first step, the beginning of a long campaign to rid the world of terrorists'. And this is a war where, to quote Mr Bush again, terrorists 'view the entire world as a battlefield'. [41]

As far as the United States is concerned, there has been no formal declaration of war by the Congress – in which the power formally to declare war resides. In fact, there has been no such declaration by the Congress for 60 years. It is suggested by some that this congressional function is now a dead letter as it was necessary only for wars of aggression – a notion outlawed by the UN Charter.

In the case of Afghanistan, the United States has exercised its rights of self-defence, which are recognised in – but exist independently of – the United Nations Charter. And in fact there is strong congressional approval for the action in Afghanistan, evidenced for example by a supportive formal resolution of each chamber.

Nor has Australia declared war. In our system, declarations of war are classically the prerogative of the executive. [42]

There are legislative definitions of war, for example in the *Defence Act 1903* (Cth) which defines war as 'any invasion or apprehended invasion of, or attack or apprehended attack on, Australia by an enemy or armed force.' This definition is relevant because, where there is a state of war so defined, a proclamation may be made by the Governor-General (which must be approved by *both* Houses of federal parliament within 90 days) and there can then be a compulsory call up of all persons aged between 18 and 60 to serve in the defence forces.

Rather than a war, there is an armed conflict, or as it was put in relation to Malaya in the 1950s, an 'emergency'.

The nature and intensity of the armed conflict has constitutional significance, particularly given the variable nature of the defence power under section 51(vi) of the Constitution. As Dixon J put it in *Australian Communist Party v Commonwealth*[43]

> what the defence power will enable the parliament to do at any given time depends upon on what the exigencies of the time may be considered to call for or warrant. The meaning of the power is of course fixed but as, according to that meaning, the fulfilment of the object of the power must depend on the ever changing course of events, the practical application of the power will vary accordingly.

So, when Australia is involved for example in a world war, the fulfilment of the object of the defence power permits legislation in relation to a very wide range of activities.

What then of the detention of persons who might be threats to the nation, but have not been convicted of any crime? As Dixon J also said in the *Communist Party case*

> I think that… it is futile to deny that when the country is heavily engaged in an armed conflict with a powerful and dangerous enemy the defence power will sustain a law conferring upon a minister power to order the detention of persons whom he believes to be disaffected or of hostile associations and whom he believes that it is necessary to detain with a view to preventing their acting in any manner prejudicial to the public safety and the defence of the Commonwealth.[44]

There is an unresolved question about the extent to which the courts can review parliament's claim of the necessity of legislation to the security and defence of the Commonwealth. The *Communist Party case* also stands for the proposition that the courts, while deferential to parliament's view, will not leave this field. It is obviously an important but fraught matter.

If I may give an example by way of an analogy. The International Covenant on Civil and Political Rights (the ICCPR) has a prohibition against arbitrary detention and arrest, but allows for that right to be derogated from 'in time of public emergency which threatens the life of the nation': see article 9.[45] There is a similar provision in the European Convention on Human Rights.

In December last year, the United Kingdom enacted a statute which provided, among other matters, for the detention of those persons whom the Secretary of State certified as threats to national security and who were suspected of being terrorists, where their removal was not possible for the time being. They may be held for an undefined period. That provision required a derogation, and thus a declaration that there was a public emergency threatening the life of the nation, that is, the United Kingdom. The declaration was made. The derogation will continue at least until March 2003, and possibly until 2006, under the current statute.[46]

(The Law Council of Australia, in its submission to the Senate committee considering the Australian post-September 11 laws I have previously discussed, argued that there was no evidence of an emergency within the meaning of Clause 9 in relation to Australia.[47])

In the case of the United Kingdom, when the executive government concluded that there was a state of public emergency which would continue for at least 18 months, and that the derogation was a necessary and proportionate response to that emergency, parliament accepted the decision almost without demur. Because of the nature of this conflict, the decision and the prediction inherent in it had largely to be taken on trust. However, there is evidence that the level of acceptance of that judgment is diminishing.[48]

There are obvious difficulties in decisions of this sort being assessed by a court or indeed the public. To take an example, what if the September 11 bombings in America had also occurred here? Could the Australian Parliament then have enacted detention legislation of the type to which Sir Owen Dixon referred?

We know from the government's defence white paper, published prior to September 11, 2001 that the least likely threats to Australia which are predicted are a full scale invasion of Australia or a major attack on Australia.[49] The threats to Australia are more likely to come from weapons of mass destruction or other terrorist activities of the type seen in America last year. These threats are often called 'asymmetric threats' because the damage which results is quite disproportionate to the risk involved to the perpetrators, compared with 'normal', if there is such a thing as normal, conflict on a battlefield.

There is an unresolved question as to the extent to which asymmetric threats or successful asymmetric attacks would fully enliven the defence power.

I should also note that it is not merely the defence power which may be relied upon by the Commonwealth. The incidental power is also said to support 'laws which are directed to the protection and maintenance of the legal and political organisations of the Commonwealth'.[50]

May I conclude this address by referring to an important case now proceeding through the American courts. It is *Padilla v Bush*. You may recall that Jose Padilla, an American citizen, was overheard, when in Pakistan, plotting to set off a 'dirty bomb', that is to say a bomb with some radioactive components, in America. He was arrested when he returned to America under a 'material witness statute' whereby he was not charged with any crime. He was held for the maximum period of time, some weeks, permissible under this law. He was brought before a federal judge who indicated that the United States government should charge him or release him. It did neither. Instead, the government took him into military custody (in fact a naval brig in South Carolina), not in reliance on any statute permitting his detention, but rather based on the asserted authority of the President to detain Mr Padilla in military detention as an enemy combatant for the length of the combat – however long that is.[51]

This action highlights another difficulty with having an unconventional war of the type going on at present. It is entirely unclear what comprises victory, and so, when the conflict is to end. Be that as it may, it seems a fair prediction that *Padilla v Bush* will end up in the Supreme Court.

In conclusion, I suggest that, whether we are legislators, judges, lawyers or citizens, this case, and indeed tonight's topic, cast up two questions which demand our attention in these difficult times.

To paraphrase Alexander Hamilton:

- does the threat we face mean we are willing to run a *risk* – I emphasise, a risk – of being less free?, and
- will any diminution of our freedoms which occur in the name of this threat in fact make us safer?

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2 Alexander Hamilton, ***The federalist***, No 8. Hamilton was writing about the evils of war between the former colonies if there was no union. Nevertheless, the excerpt is apt in this context as well.

3 See generally, Norton-Moore, Tipson and Turner, ***National Security Law***, Carolina Academic Press, 1990; and Norton-Moore, Roberts and Turner, ***National Security Law Documents***, Carolina Academic Press, 1995; H P Lee, ***Emergency powers***, Law Book Company, 1984; Commonwealth of Australia, Department of the Parliamentary Library, Research Papers 2002, ***Terrorism and The Law in Australia: Supporting Materials, Terrorism and the Law in Australian: Legislation, Commentary and Constraints***.

4 ***Coutts v Commonwealth*** (1985) 157 CLR 91 at 109.

5 sec 51(xix)

6 sec 51(xxvii)

7 sec 51(xxviii)

8 sec 51(xxix)

9 See the Report of Australia to the Counter-Terrorism Committee of the United Nations Security Council pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001.

10 The external affairs power supports legislation to implement treaty obligations and matters of international concern: eg, ***Commonwealth v Tasmania*** (1983) 158 CLR 1 at 131-2, 171, 220, 258.

11 See www.un.org

12 It specifically required them to review and strengthen
- border security operations;
- banking practices;
- customs and immigration procedures;
- law enforcement and intelligence cooperation; and
- arms transfer controls.

All of these – except criminal law, of course – are principally or solely matters of Commonwealth concern.

13 By the ***Charter Of The United Nations Amendment Act*** 1993

14 Section 6. By operation of sec 9 of the Act (and, in relation to states, by operation of sec 109 of the ***Constitution***) such regulations prevail over inconsistent Commonwealth Acts and state and territory laws. By sec 10, later Acts are not to be interpreted as overriding the regulations.

15 These included the ***Charter of the United Nations (Anti Terrorism Measures) Regulations 2001***, and the ***Charter of the United Nations (Sanctions – Afghanistan) Regulations 2001***. The former froze suspected terrorist assets contained on a list promulgated as an Executive Order by President Bush. The latter regulation imposed a sanctions regime on Afghanistan by restricting the supply of arms, or the use of Australian aircraft and ships, and prohibiting dealing with Taliban or Bin Ladin assets. The Attorney-General was able to seek injunctions to prevent current or proposed breaches of the regulations.

16 ***The Suppression of the Financing of Terrorism Act 2002*** amends the ***Criminal Code Act 1995***, the ***Extradition Act 1988***, the ***Financial Transactions Reports Act 1988***, the ***Mutual Assistance in Criminal Matters Act 1987*** and the ***Charter of the United Nations Act 1945***. The Act implements obligations under United Nations Security Council Resolution 1373 and the ***International Convention for the Suppression of the Financing of Terrorism***.

17 The ***Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*** amends the ***Criminal Code Act 1995*** to make it an offence to place bombs or other lethal devices in prescribed places with the intention of causing death or serious harm or causing extensive destruction which would cause major economic loss.

18 The ***Border Security Legislation Amendment Act 2002*** deals with border surveillance, the movement of people, the movement of goods and the controls Customs has in place to monitor this activity.

19 ***The Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002*** amends the Criminal Code Act 1995 to insert new offences directed at the use of postal and similar services to perpetrate hoaxes, make threats and send dangerous articles.

20 The ***Telecommunications Interception Legislation Amendment Act 2002*** amends the ***Telecommunications (Interception) Act 1979*** to recognise offences involving terrorism as falling within the most serious class of offences for which interception warrants are available.

21 In addition, the government proposes to enact the ***Criminal Code Amendment (Espionage And Related Offences) Bill 2002*** which is relevant in this area, although its genesis is unrelated to the events of September 11. The genesis of this Bill was in fact the 'Wispelaere affair'.

22 Senate Legal and Constitutional Legislation Committee Report, May 2002, paragraph 3.3

23 See Press Release L/2993, UN Ad Hoc Committee on Assembly Resolution 51/210, Sixth Session, 26th Meeting (AM); http://www.un.org/News/Press/docs/2002/L2993.doc.htm

24 The actual definition is more complex than that.

25 Proposed sec 34U(2).

26 Proposed sec 34U(7).

27 (1995) 184 CLR 348

28 www.uscourts.gov/ttb/june02ttb/interview.html

29 Thirty-three documents affecting national security, defence or international relations
(1) A document is an exempt document if disclosure of the document under this Act:
(a) would, or could reasonably be expected to, cause damage to:
(i) the security of the Commonwealth;
(ii) the defence of the Commonwealth; or
(iii) the international relations of the Commonwealth…'

30 '[Cabinet minutes] have often been coupled with defence secrets and with the nation's diplomatic relations with foreign governments as archetypes of Crown privilege.' ***Sankey v Whitlam*** (1978) 142 CLR 1 per Gibbs ACJ. See also the Evidence Act (Cth), in sec 130

31 (1980) 147 CLR 39 at 51.

32 These statutory powers, together with the availability of public interest immunity claims, may not provide adequate scope or flexibility in court proceedings. Take the case of an espionage prosecution where the defendant is familiar with highly classified material and seeks production of this material for deployment in his or her defence. The prosecutor always risks being forced to drop the case because the disclosure of material to the defence or the jury, even in camera, is thought to be an unacceptable security risk. And Public Interest Immunity Claims can be blunt instruments in the sense that they do not permit the judge to re-write a document to strike the right balance between the interests of security and a fair trial. In the United States the ***Classified Information Procedures Act*** (US) permits the Court to rewrite or 'redact' such material so as strike a better balance between the two.

33 The Court may, at any time during or after the hearing of a proceeding in the Court, make such order forbidding or restricting the publication of particular evidence, or the name of a party or witness, as appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth.

34 Migration Act sec 502. In ***Re Patterson; Ex parte Taylor*** [2001] HCA 51, Kirby J, for example, considered that the national interest was not synonymous with 'the public interest'. Similarly, in ***David Irving v Minister of State for Immigration, Local Government & Ethnic Affairs*** [1996] 663 FCA 1, the Full Court of the Federal Court considered provisions of the Migration Act which deemed a person not to be of good character in the migration context where they had been excluded from another country because the 'the authorities of that country considered the person to be a threat to the national security of the country.'

35 [2001] UKHL 47

36 [He went on] On the other hand, the question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.'

37 ASIO Act sec 17.

38 ***The National Security Act 1947*** (US) which establishes, among other things, the Central Intelligence Agency, contains no definition of what it describes as 'the national security'. The definition used in the ***Security Service Act 1989*** (UK) is similar to the ASIO Act, although it goes on to provide that MI5's functions include protection against 'threats from espionage, terrorism and sabotage … from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.'

39 This also leaves aside the notion that the UN Charter has abolished war, leaving only armed conflict.

40 In 'civil wars', the threshold for application of the Second Protocol to the Geneva Convention is that armed groups opposing the government both be under responsible command, and that they control sufficient territory to be able to mount sustained attacks.

41 http://www.whitehouse.gov/news/releases/2002/02/20020204-1.html – 47.0KB

42 Renfree, ***The executive power of the Commonwealth of Australia***, Legal Books Pty Ltd, 1984, pages 462-463

43 (1951) 83 CLR 1

44 Ibid. Three earlier decisions of the court are cited in support of that proposition. Neither ***Lim*** (176 CLR 1), nor ***Kruger*** (190 CLR 1) overturn this principle.

45 This states:
' In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states Parties to the present Covenant may take measures derogating from their obligations under the present Covenant [with some limitations] to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'

46 The ***Home Office's Anti-Terrorism, Crime & Security Act 2001: Summary*** states:
'The provisions of Part 4 are intended to prevent terrorists from abusing our immigration and asylum procedures and the safe haven we offer refugees. Sections 21 to 32 ('Suspected international terrorists') allow the detention of those the Secretary of State has certified as threats to national security and who are suspected of being terrorists where their removal is not possible at the present time. Such detention would be subject to regular independent review by the Special Immigration Appeals Commission (SIAC). These provisions change the current law, which allows detention with a view to removal only where removal is a realistic option within a reasonable period of time. They require a limited derogation from Article 5 of the ECHR (right to liberty and security). Such derogation is permitted during a time of public emergency, but any derogation must be limited to the extent strictly necessary as a result of that emergency. The government has concluded that there is a state of public emergency, and the derogation is a necessary and proportionate response to that emergency. The detention provisions in section 21 to 23 will need to be reviewed by parliament in March 2003, and annually thereafter, otherwise they will lapse. These provisions will cease to apply in November 2006, if they have not lapsed by that date because they have not been used.'

47 Senate Legal and Constitutional Legislation Committee Report, May 2002, paragraph 3.24-8.

48 See http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmdfence/uc518-xii/uc51802.htm,

49 Commonwealth of Australia, White Paper, ***Australia's Defence Policy***, AGPS, 2001, page 23.

50 See generally Renfree pages 447-450

51 http://news.findlaw.com/hdocs/docs/terrorism/padillabush82702grsp.pdf