Problems in drafting anti-terrorism laws in Australia

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What are the "anti-terrorism laws" in Australia?

Today's talk is called "Problems in drafting anti-terrorism laws". However, before I begin outlining some problems in drafting anti-terrorism laws, it is worth considering what constitutes an "anti-terrorism law". Although there have been a number of Anti-Terrorism Bills passed by the Australian Parliament, these have always been amending Bills. Intriguingly, there is no principal Act in Australia called the Anti-Terrorism Act. Rather, the laws that constitute "anti-terrorism laws" in Australia are dotted around the statute book and vary in nature.

By far the most obvious place to look for so-called "anti-terrorism laws" is in the *Criminal Code*. Chapter 5 of the Code is called "The security of the Commonwealth", and most of that Chapter is devoted to various offences related to terrorism.

Indeed, Part 5.3 of the Code is called "Terrorism". Division 101 contains offences relating to terrorist acts; Division 102 contains offences relating to terrorist organisations; Division 103 contains offences relating to financing terrorism or a terrorist. (I will discuss Divisions 104 and 105 in a moment.) However, other Parts of Chapter 5 of the Code can also be described as forming part of the "anti-terrorism laws" despite not forming part of Part 5.3. For example, Division 80 of Part 5.1 of the Code contains the offences for treason and sedition. Division 91 of Part 5.2 contains offences relating to espionage and similar activities. Division 115 of Part 5.4 of the Code contains offences for conduct outside Australia that causes the death or injury of an Australian citizen or resident of Australia.

Clearly, a large part of the "anti-terrorism" laws of Australia are in the nature of offences. However, there are other types of laws that are "anti-terrorism laws" that are not offences, such as Divisions 104 and 105 of the Criminal Code. Division 104 of the Code creates a scheme of control orders which "allow obligations, prohibitions and restrictions to be imposed on a person ... for the purpose of protecting the public from a terrorist act" (see section 104.1 of the Code). Division 105 of the Code creates a scheme of preventative detention orders which "allow a person to be taken into custody and detained for a short period of time in order to prevent an imminent terrorist acting occurring, or preserve evidence of, or relating to, a recent terrorist act" (see section 105.1 of the Code).

The final kind of laws that form part of the "anti-terrorism laws" are laws that relate to the conduct of proceedings related to terrorism offences. For example, the *National Security Information (Criminal and Civil Proceedings) Act 2004* protects information whose disclosure in a criminal or civil proceedings is likely to prejudice national security. Section 15AA of the *Crimes Act 1914* provides that a bail authority must not grant bail to a person charged with a terrorism offence unless the bail authority is satisfied that exceptional circumstances exist to justify bail.

Problems in drafting anti-terrorism laws

Having given a brief overview of anti-terrorism laws, what are some problems raised in drafting those laws?

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I'll begin with the 2 most obvious problems in drafting anti-terrorism laws in Australia.

Firstly, Australia has a written constitution. Our federal Parliament only has power to enact laws if it is found in the written Constitution. At the time that I was drafting the *Anti-Terrorism Bill 2005* and the *Anti-Terrorism Bill (No. 2) 2005*, it was not immediately clear that the federal Parliament had power to enact Part 5.3 of the *Criminal Code*. However, the States and Territories can, under section 51(xxxvii) of the Constitution, "refer" their power to make laws on a particular topic to the federal Parliament. It was such a referral that we relied upon in enacting the control order and preventative detention order provisions in the *Anti-Terrorism Bill (No. 2) 2005*.

However, in the 2006 case of *Thomas v Mowbray*,[2] a majority of the High Court of Australia found that the "defence power" in section 51(vi) supported the control order provisions (although interesting, some doubts were expressed about the validity of the reference of powers).

Secondly, there is the difficult issue of how to balance civil, legal and political rights with the constraints on liberty that anti-terrorism laws, by their very nature, require.

However, as today's topic is on "Problems in drafting anti-terrorism laws" I don't want to spend too much time on either of these issues.

Instead, I will begin with a quote about terrorism from Walter Laqueur of the Centre for Strategic and International Studies: "The only general characteristic of terrorism generally agreed upon is that terrorism involves violence and the threat of violence."3

At the heart of this quote is the fact that terrorism is amorphous and inherently difficult to define. The first point I want to make is that many of the problems raised in drafting anti-terrorism laws arise because of the amorphous nature of terrorism.

The use of the narrative in drafting anti-terrorism laws

The use of the narrative (that is, a prior reference to "a thing" which is followed by later references to "the thing") has become a popular plain English technique in legislative drafting. However, the technique is not without problems, as occurred in the case of some of the terrorism offences in the *Criminal Code*.

The *Security Legislation Amendment (Terrorism) Act 2002* inserted section 101.4 (among other offences) into the *Criminal Code*:

> **101.4 Possessing things connected with terrorist acts**
>
> (1) A person commits an offence if:
>
> (a) the person possesses a thing; and
>
> (b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
>
> (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).
>
> Penalty: Imprisonment for 15 years.
>
> ...

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2 (2007) 237 ALR 194; 81 ALJR 144; www.austlii.edu.au/au/other/HCATrans/2007/76.html.

3 From article entitled "Terrorism" on Wikipedia, http://en.wikipedia.org/wiki/Terrorism.

(3) A person commits an offence under subsection (1) even if the terrorist act does not occur.

The Director of Public Prosecutions was concerned about the reference to "the terrorist act" in subsection 101.4(3). He argued that it might imply that, in order for the offence to be committed, the offender had to possess a thing in preparation for a *particular* terrorist act. This potentially made prosecution difficult in a case where, for example, a person possessed explosives, but it was not clear what the person intended to blow up. Indeed, it was the view of the Director of Public Prosecutions that these kinds of cases would be more common than a case where it could easily be proven that the person possessed a thing in connection with a particular terrorist act.

In order to address this concern, we repealed and re-enacted subsection 101.4(3) of the *Criminal Code* in the following form:

(3) A person commits an offence under subsection (1) ... even if:
- (a) a terrorist act does not occur; or
- (b) the thing is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or
- (c) the thing is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.

The ill-defined nature of terrorism and terrorists meant that the use of the narrative, which assumes a degree of certainty, was problematic.

The use of broad expressions in drafting anti-terrorism laws

As I discussed above, many of the anti-terrorism laws are offences. The Australian Law Reform Commission ("the ALRC") has reviewed the sedition offences in the *Criminal Code* in a report called *Fighting words: A review of sedition laws in Australia*. The submissions made, and the ALRC's report, are instructive on some other problems that are raised in drafting anti-terrorism laws.

Let's begin by looking at the sedition offence in section 80.2 of the *Criminal Code* (see Attachment A). Many of the comments raised in relation to the sedition offence again related to the extremely broad nature of the offence. Concerns were expressed about the broad scope of the term "urges". It was also submitted that the expression "force or violence" was "unclear and too broad". Further, some people submitted that there should be a requirement for force or violence to be reasonably likely to occur as a result of the offending conduct.[4]

Although the ALRC did not recommend changes a result of these submissions (they did recommend a change that I will discuss below), the submissions all reveal the concern that these offences, which aimed to capture a broad range of conduct, were too broad and potentially ill-defined.

However, drafters are familiar with having to deal with concepts that are broadly expressed and are difficult to define. For example, there are 7 sections in the *Corporations Act 2001* that deal with the definition of "associate". Similarly, the definition of "control" in that Act is "the

4 ALRC Report 104, Fighting words: A review of sedition laws in Australia, paragraphs 8.59 to 8.75.

capacity to determine the outcome of decisions about [an entity's] financial and operating policies". As you can see, this is a very broad and far-reaching definition.

So are anti-terrorism laws any different from laws such as the *Corporations Act 2001*? On one level, I don't think that they are any different. However, the aspect of anti-terrorism laws that is different from many other kinds of laws is that, at least in Australia (and I suspect that it is the case in other countries), they are highly political and very high profile.

The intense scrutiny to which anti-terrorism laws are subject causes further problems in drafting anti-terrorism laws. How do you find the balance between drafting laws that need to be broad and far-reaching in order to be effective and that are subject to intense political and media scrutiny?

Fault elements in drafting offences for anti-terrorism laws

An example of the impact of political sensitivities on drafting anti-terrorism laws arose in the context of the fault elements for the sedition offence in the *Criminal Code*. Section 5.6 of the *Criminal Code* states that if a physical element consists only of conduct, intention is the fault element. If a physical element consists of circumstance or result, recklessness is the fault element. These are known as the "default fault elements": they apply even if they are not specified in the legislation creating the offence. It is our practice to rely on these default fault elements in drafting offence provisions, rather than specifying the fault elements.

Paragraph 80.2(1)(a) of the *Criminal Code* creates an offence of "urging another person to overthrow by force or violence the Constitution". The issue raised by the ALRC was whether this consisted of conduct only, or conduct plus result or circumstance. The Attorney-General's Department submitted that the physical element consisted only of conduct and therefore intention should apply.[5]

However, the ALRC report stated that "where interests in freedom of expression are constrained by criminal sanctions, community perceptions about what the law is and how it operates are especially important. Submissions to the Inquiry emphasised the importance of clarity in promoting community understanding of the law in order to avoid any chilling effect on freedom of expression."[6] The ALRC recommended that the fault element of intention be specified.[7]

Although the Government has not responded to this recommendation, my personal view is that, in hindsight, and despite our general drafting practice, it might have been better to be explicit about the fault elements of the sedition offence to avoid criticism and to provide complete clarity to the public.

Political awareness

Bringing an attuned political awareness when drafting anti-terrorism laws is essential. As drafters, we are constantly making decisions about different approaches to be taken to various provisions. When drafting anti-terrorism laws, the political sensitivity of each approach should be one of the factors taken into account in choosing between approaches. For example, an early version of a "use of force" provision in Division 105 of the *Criminal Code* stated that "an AFP

5 Op. cit., paragraphs 8.44 to 8.51.

6 Op. cit.., paragraph 8.55.

7 Op. cit., paragraph 8.58.

member must not, in the course of taking a person into custody or detaining a person under a preventative detention order do anything that is likely to cause the death of, or grievous bodily harm to, the person *unless* the AFP member believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person". Although this provision closely followed the existing provision in the *Crimes Act 1914* dealing with police powers in arresting a person for an offence, the provision was labelled by the media as the "shoot to kill" provision. As the public and the media were already concerned about the nature of the powers in the preventative detention provisions, the reference (albeit an indirect reference) to lethal force was problematic.

Because of the intense media coverage about this provision, it was changed to state that "A police officer, in taking a person into custody under and in detaining a person under a preventative detention order, has the same powers and obligations as the police officer would have if the police officer were arresting the person, or detaining the person, for an offence." Although this was the same in substance, it was more palatable for the media and commentators by avoiding the reference to lethal force.

Conclusion

I have argued today that the amorphous nature of terrorism can create problems in drafting anti-terrorism offences. Traditional drafting techniques (such as the use of the narrative), which rely on some degree of certainty, might not be appropriate. Words, tests and expressions that are required for anti-terrorism laws need to be broad and are therefore potentially vague. The breadth of these offences is often exposed by a media fascinated by anti-terrorism and government responses to anti-terrorism. However, by bringing an awareness of the political context to the drafting of anti-terrorism laws, and by aiming for as much clarity as is achievable in the circumstances, drafters can help draft anti-terrorism laws that withstand the media spotlight.

Appendix A — Sedition provisions of the Criminal Code

80.2 Sedition

Urging the overthrow of the Constitution or Government

(1) A person commits an offence if the person urges another person to overthrow by force or violence:
  (a) the Constitution; or
  (b) the Government of the Commonwealth, a State or a Territory; or
  (c) the lawful authority of the Government of the Commonwealth.

  Penalty: Imprisonment for 7 years.

(2) Recklessness applies to the element of the offence under subsection (1) that it is:
  (a) the Constitution; or
  (b) the Government of the Commonwealth, a State or a Territory; or
  (c) the lawful authority of the Government of the Commonwealth;

  that the first-mentioned person urges the other person to overthrow.

Urging interference in Parliamentary elections

(3) A person commits an offence if the person urges another person to interfere by force or violence with lawful processes for an election of a member or members of a House of the Parliament.

Penalty: Imprisonment for 7 years.

(4) Recklessness applies to the element of the offence under subsection (3) that it is lawful processes for an election of a member or members of a House of the Parliament that the first-mentioned person urges the other person to interfere with.

Urging violence within the community

(5) A person commits an offence if:

(a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and

(b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

(6) Recklessness applies to the element of the offence under subsection (5) that it is a group or groups that are distinguished by race, religion, nationality or political opinion that the first-mentioned person urges the other person to use force or violence against.

Urging a person to assist the enemy

(7) A person commits an offence if:

(a) the person urges another person to engage in conduct; and

(b) the first-mentioned person intends the conduct to assist an organisation or country; and

(c) the organisation or country is:

(i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and

(ii) specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth.

Penalty: Imprisonment for 7 years.

Urging a person to assist those engaged in armed hostilities

(8) A person commits an offence if:

(a) the person urges another person to engage in conduct; and

(b) the first-mentioned person intends the conduct to assist an organisation or country; and

(c) the organisation or country is engaged in armed hostilities against the Australian Defence Force.

Penalty: Imprisonment for 7 years.

Defence

(9) Subsections (7) and (8) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note 1: A defendant bears an evidential burden in relation to the matter in subsection (9). See subsection 13.3(3).

Note 2: There is a defence in section 80.3 for acts done in good faith.