

Strategies to protect academic freedom

George Williams

Last year's sedition laws were the latest and most controversial instalment in a raft of legislation since the war on terror was announced five years ago. George Williams argues that, while some security measures were necessary, the recent laws have far exceeded the modest scale of the threats that confront us.

In this article I take a step back from the array of laws that have been enacted in Australia after September 11. My aim is to explore some of the strategies that might be employed to protect academic freedom. At the outset, we should recognise just how much the legal and political landscape has changed. We need to be realistic about where governments and the community now stand on issues such as national security and fair comment. What was the accepted wisdom just a few years ago may not hold sway today, and we need to account for this in our thinking.

My approach is very much shaped by my background as an Australian public lawyer. After September 11, I supported new laws. The threat of terrorism requires a legal response to signal our society's rejection of such forms of violence and also to ensure that our police and other agencies have the powers they need to protect the community. However, such laws must be proportionate to the threat that we face. We should not damage our democracy and fundamental civil liberties in the name of defending them against terrorism. This analytical approach would also support the protection of values such as academic freedom.

Before thinking further about what strategies we might adopt, I want to assert an important caveat: any attempt to 'balance' the imperatives of national security and human rights is hampered by the fact that our knowledge of the degree of threat actually faced by Australia is extremely limited. We are dealing with a faceless and unknown threat encapsulated in the idea that we are now engaged in a 'war on terror'.

Australia might seem an unlikely target for a terrorist attack.

Indeed, Christopher Michaelson at the Strategic and Defence Studies Centre at the Australian National University has concluded that the actual risk of a terrorist attack on Australian soil is 'rather low'. After assessing the available evidence, he found that "a large-scale terrorism attack in Australia appears to be unlikely because of the country's geographical isolation and its effective system of border and immigration control".

Nevertheless, Dennis Richardson, the Director-General of the Australian Security Intelligence Organisation (ASIO), said in April 2004: "we now know that al-Qaida had an active interest in carrying out a terrorist attack in Australia well before 11 September and that we remain a target". This concern is reflected in the Government's 2004 white paper *Transnational Terrorism: The Threat to Australia*.

Such statements must be seen in light of the Government's publicly available information at the Australian National Security website, which was created to inform Australians of the threat and what is being done to meet it. It says: "There is presently no known specific threat to Australia." It also contains a four-level alert system (Low, Medium, High and Extreme) that assesses Australia as being at a Medium level of alert. The system was particularly unhelpful in defining a 'Medium' level of alert to be a "medium risk of a terrorist attack in Australia", although this has now been changed to a slightly more useful definition stating that a "terrorist attack could occur". The national level of alert has been at Medium since September 2001. The website states: "The Government acts on the advice of its intelligence agencies, and should any information come to light which causes the Government to change the assessed

level of threat, the public will be advised immediately.” This threat assessment is at odds with community fears. One Newspan conducted for Sydney’s *Daily Telegraph* in April 2004 found that 68% of adults (more than two thirds) agreed that terrorists would strike “before too long” and that a terrorist attack in Australia is inevitable.

Australia’s new laws and our response to them must be viewed both in the light of what we know about the threat to Australia as well as community fear of an attack. Even though there has been no attack on Australian soil and the Government’s own assessment is that there is “no known specific threat to Australia”, the community belief in the inevitability of a terrorist attack propels law reform forward in ways that had been unthinkable.

How can academics respond?

The way in which Australia has dealt with the issues of law and policy raised by the ‘war of terror’ since 2001 suggests two important lessons that should inform our strategies for protecting academic freedom. First, at least up to 1 July 2005 – the time that the federal Government gained control of the Senate, in addition to its control of the lower house – Australian political institutions played an important role in achieving the right balance between national security and human rights. Despite the stringent nature of some of the laws as enacted, the original bills were far worse.

The content of those original bills was not enacted because they sparked a well-organised campaign led by a range of community and legal groups and individuals. The concerns of these groups and individuals fed into the robust scrutiny provided by the two parliamentary committees that examined the bills and produced bipartisan reports recommending substantial changes. In many, but not all, respects those recommendations were implemented in the legislation.

The bottom line is that, without this parliamentary process, the balance struck between the protection of national security and the protection of civil liberties would have been disproportionately tipped even further toward the former, to the great detriment of the latter. Indeed, even Prime Minister John Howard was moved to say in his National Press Club Address on the first anniversary of the September 11 attack that “through the great parliamentary processes that this country has I believe that we have got the balance right”.

The second lesson is found in the recognition of the limited and arguably insufficient capacity of our political institutions to protect human rights in times of community fear of terrorist attacks. Even after a long and difficult parliamentary process that produced significant amendments and compromises, there are many aspects of the new laws (let alone the proposals for further change after 1 July 2005) that go far beyond what can be justified. These include the imposition of a five

year jail term for speaking about or reporting on the detention of a person by ASIO, including where that person has been mistreated. Another example is that non-suspect Australians can be detained at the behest of ASIO for one week, whereas actual suspects could (at least at that time) only be held by police for 24 hours before being charged. Indeed, it even seems possible that the current three-year sunset clause on these ASIO powers will be removed and these exceptional powers made a permanent part of the law.

One reason for these outcomes is that, even though our political system has many strengths, it also has a key weakness. Parliament often proceeds without an understanding of human rights principles, in part because human rights can lack legitimacy in political debate. The ineffectiveness of such principles may be attributed in part to the fact that they have little legal force in Australia. Unlike many other democracies, Australia must search for answers to fundamental questions about civil liberties and national security without the benefit of a Bill of Rights.

As other nations have shown, a Bill of Rights does not form an impenetrable barrier to bad laws. However, it can be especially important when, as after September 11, new laws are made and old laws amended with great haste in response to community fear. At such a time, legal systems, and the basic principles that underlie them, such as the rule of law and the liberty of the individual, can come under considerable strain.

At such a time a Bill of Rights can remind governments and communities of a society’s basic values and of the principles that might otherwise be compromised at a time of grief and fear. After new laws have been made, a Bill of Rights can also allow courts to assess the changes against an established framework of human rights principles. This provides a final check on laws that, with the benefit of hindsight, may be inappropriate.

In Australia, there may occasionally be a role for judges in assessing new terrorism laws, but this will usually be at the margins of the debate, such as where constitutional provisions are relevant to human rights enforcement or in the interpretation of legislation. However, Parliament can depart from fundamental rights by passing a law that operates within constitutional limits and is clear in its intent, and judges have no recourse to other principles that might militate against gross incursions upon civil liberties. For example, the High Court held in 2004 in the case of *Al-Kateb v Godwin* that it was possible to pass a law for the indefinite detention of asylum-seekers.

The lack of a legal check means that political and legal debate in the ‘war on terror’ is largely unconstrained by fundamental human rights principles. Instead, as was demonstrated by the legislation introduced into the federal Parliament after September 11, the contours of debate may match the majoritarian pressures of Australian political life rather than the principles and values upon which the democratic system depends. Any check upon the power of Parliament or governments to

abrogate human rights derives from political debate itself and the goodwill of political leaders. This is not a check that is regarded as acceptable or sufficient in other nations.

Strategies

The Australian experience since September 11 demonstrates that even the most basic rights of Australians are vulnerable. Moreover, in light of the new sedition laws recently enacted by the Federal Government, which represent an affront to basic principles of the freedom of speech, the chances of securing protection for what are seen as subsidiary civil liberties, such as academic freedom, are low indeed. Recent history also shows how rights can be picked off one by one in the name of the 'war on terror.' It is easier, it seems, to make such accommodations in a step by step fashion.

In this light we must employ two different approaches for the protection of civil liberties in general, and academic freedom in particular. The first is to accept the political and legal terrain as we find it and to seek to bring about changes, almost always at the margins, to specific proposals for new terrorism laws. This necessarily reactive approach is the dominant strategy now adopted. It has met with some success in having laws amended and in some cases has blunted the worst aspects of these laws, such as the changes made to the proposed legislative regime regarding the detention of non-suspect citizens for the purpose of intelligence gathering. However, this reactive approach accepts that the law will be changed to cut back basic rights and values like academic freedom, with the strategy being mainly to contain the damage. It is simply not feasible to deflect entirely the push for change to the law, the political and other imperatives usually being too strong to resist, especially in the aftermath of any attack.

The second approach is to seek to change the political and legal terrain such that, over the longer term, we might be better able to ensure the protection of fundamental rights. Such reform could consist of an Australian Bill of Rights. This longer term approach should form part of any strategy to protect academic freedom in Australia. The long term survival of concepts like academic freedom is dependent on the outcomes of larger debates about law-making processes in Australia and the absence of a sound human rights framework. Without such a framework, our capacity to fight for the protection of specific freedoms is severely limited.

My view then is that one of the ways forward in the fight to protect academic freedom is to argue for change to the political and legal system. Academic freedom cannot be separated from this larger debate. Lest this be seen as an impossibility, new human rights frameworks has been achieved, to varying degrees of success, in other comparable nations over the last quarter century, including Canada, New Zealand and the United Kingdom. Indeed, of all the democratic nations in

the world, Australia is now unique in not having a solid legal basis for the protection of basic rights like freedom of expression, a vital foundation for the long term future of ideals like academic freedom.

Those working in academia have particular advantages in supporting such change. Academics often have the capacity to see beyond the immediate pressures of the day and political cycle and thus beyond what is so often a politically driven response to the threat of terrorism or a terrorist attack. Academics often have the capacity, and intellectual space, to take a more analytical, long term perspective. Such a view is vital, especially in dealing with a threat such as terrorism that no government can solve in its own lifetime.

It might be said that universities and their staff lack the political or other power to have their way. However, they do have another major advantage. They are often the custodians of ideas, like the concept of universal human rights, which have the potential to be ascendant over the longer term. We need to remember the long term potential of ideas and our responsibility to promote them. Indeed, our promotion of such ideas and their realisation in the law is a necessary condition for ensuring the long term survival of concepts like academic freedom.

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