Assessing the Social Contract Equilibrium in a Post 9/11 World:
An Australian Perspective

Robyn Cooper

This thesis is presented in fulfillment of the degree of Bachelor of Arts (Honours) in Security, Terrorism & Counter-Terrorism

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DECLARATION

I declare that this thesis is my own account of my research.

ROBYN COOPER
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Author: Robyn Cooper

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ABSTRACT

Ever since al Qaeda attacked America on 11 September 2001, terrorism has been recognised as a global threat. This, coupled with a United States alliance in ventures such as the Iraq and Afghanistan wars, has elevated the threat faced by Australia, both domestically and abroad.

As a result of this increased threat and driven by a directive issued by the United Nations Security Council, Australia introduced a wide range of anti-terrorism legislation. The purpose of these new laws was to detect, prevent, investigate and prosecute those involved in terrorist activity. However, these new laws had the potential to greatly erode individual rights and freedoms, factors that are considered to be the hallmark of a liberal democracy.

Arguing that Australia adheres to a Lockean version of the social contract, this thesis is based on the premise that the main function of a government is to provide a safe environment so that an individual is free to live their life with no more interference than is necessary. In return, the individual must abide by that country’s rules and regulations.

A decade has elapsed since the events of 9/11 and it is now an appropriate moment in time to assess the current status of Australia’s social contract. The key issue is whether the Government’s security measures unjustifiably overrides the balance needed to uphold the individual civil rights and liberties of the Australian people.

Taking into account a range of different perspectives, including parliamentary debates, public perceptions and judicial comments, it is put forth that the Government is achieving the right balance in the quest to provide protection against terrorism whilst at the same time preserving fundamental civil rights.
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INTRODUCTION

The aftershocks of al Qaeda’s attack on the United States (US) on 11 September 2001 reverberated around the world in a cataclysmic manner. A horrified global audience sat with their eyes glued to television or computer screens, watching the drama unfold as instantaneous and graphic footage of the chaos and destruction was beamed across the earth, courtesy of world media outlets.

In the aftermath of the event it became increasingly apparent that there was an aura of change in the atmosphere. The world had witnessed something of such a sinister magnitude that there could be no return to life as it was before. Confidence had been shattered.

A relatively inferior enemy had attacked the almighty America on US home soil, seemingly with a degree of ease. As a consequence the message was clear; if it was possible for the undisputed superpower of the time to be a victim of such an act and in such a manner, then it was possible that the same could occur to anyone, particularly American allies.

As a response to the 9/11 attacks and with recommendations from the United Nations (UN), individual countries set about instigating tough legislation and implementing stricter security controls to address the increased transnational threat. Australia was one of these countries.

However, these enhanced security measures came with a trade off and the price of increased protective measures was not cheap. A certain degree of personal freedom and civil liberties, the hallmark of a truly liberal democracy, were reduced in favour of the increased protection being offered by the Australian Government.

These freedoms consist of the right to perform certain actions free from government interference. This includes freedom of speech, freedom of association and expression, freedom to practice religion, freedom of movement, the right to privacy,
the right to a fair trial, freedom from arbitrary detention and arrest, and the right to non-discrimination (Australian Human Rights Commission [AHRC], 2008, Waldron, 2003:195). Subsequently, when the new security measures were implemented a number of these rights were affected and the fine balance of the social contract equilibrium shifted\(^1\).

The world currently finds itself at the tenth anniversary of the 9/11 attacks, which is an appropriate juncture to take a hindsight approach and review the ramifications of the security measures embarked upon during the last decade. Specifically, this thesis will explore if the Australian Government is upholding its end of the social contract by analysing if, and how, the undertaken security measures have impacted upon the rights and liberties of the Australian community.

It is anticipated that this evaluation will result in one of three outcomes. Firstly, the evidence may suggest that the level of security is too onerous when measured against the perceived threat, which would indicate a government that yields excessive intrusive powers to the detriment of its citizen’s rights. The second outcome is a direct antithesis of the first, and could reveal that the current security provisions are seen as deficient and unable to adequately protect Australia and its people; a sign that the Government is failing in its role to uphold its side of the social contract.

Finally, the most desirable outcome would be to find that the current perceived threat level is proportionately representative of the current security measures and that there are adequate safeguards in place to protect against infringements of civil rights and liberties. This would lead to a fair supposition that an even balance has been struck.

To reach a definitive outcome, this thesis will be segregated into three main areas. It is important to note that the first two chapters will be of a technical nature, the purposes of which are to provide background information necessary to make an informed evaluation of the current social contract status.

\(^1\) The social contract refers to the understanding that a government will provide protection to an individual in exchange for the individual abiding by its laws (Goodwin, 2007:373-374). This will be discussed in greater detail in Chapter 3.
Chapter One will identify what changes were made to the Australian security environment following 9/11. It will highlight variations made to existing legislation, outline the provisions of the introduced terrorism-related laws, and identify extra powers given to law enforcement agencies. In doing so it will explore the different ways the changes could potentially impact upon rights that are protected under international human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), which Australia has ratified (AHRC, 2008, UN General Assembly, 1966).

Chapter Two will delve deeper and touch more on the social implications of the changing security environment. It will explore how and why the changes identified in Chapter One were brought in and the reasoning behind them. In particular, it will examine how the changes were introduced and expedited through Parliament as well as outlining the public justification as to how they would make Australia more secure.

The third chapter will evaluate what impact, if any, has occurred on the social contract. It will do so by exploring the consequences and ramifications that the introduced measures have had on Australian democracy and how they have affected the Australian way of life since 9/11. This will be achieved by providing an understanding of what the social contract entails, which will assist in evaluating if the executive branch is upholding its obligation to ensure individual protection and freedoms.

It will then explore the current security environment, focusing on viewpoints of the judiciary in terrorist cases, issues of community marginalisation, whether the perceived terrorist threat has diminished or grown over the last decade and Parliament’s current position pertaining to anti-terrorism legislation.

An overall analysis of the findings will then be conducted to assess the current balance of Australia’s social contract.
CHAPTER ONE: LEGISLATIVE CHANGES

The purpose of this chapter is to provide an outline of the changes made to Australia’s security environment in the aftermath of 9/11 and how they may be at odds with the civil rights standards that Australia has pledged to uphold through treaties such as the ICCPR. It will begin by discussing the mechanisms that existed to deal with terrorism in Australia in a pre-9/11 world. It will then follow with an overview of the subsequent changes and introduction of new anti-terrorism legislation that began with the Security Legislation Amendment (Terrorism) Act 2002[No.2] (Cth). Lastly, it will describe the increased powers afforded to government agencies to be used as tools in the fight against terrorism.

Pre-9/11 Measures

Before we begin an important point needs to be raised, and that is that it would be misleading to suggest that Australia did not take the threat of terrorism seriously prior to 2001. The issue of terrorism did exist and was acknowledged as a credible risk by Australian security organisations.

This is evidenced by a review conducted in 1979 following the Sydney Hilton bombings, where Hope J found that Australia faced threats in the form of international and transnational terrorism (Hope, 1979:17-24). Furthermore, at the time when 9/11 occurred, terrorism was recognised as one of the main non-military threats faced by Australia, along with cyber attacks and organised crime (Commonwealth of Australia, 2000:12).

However, in 2001 Australia as a nation had no specific legislation in place to deal with terrorist-related offences (Hancock, 2002). Some of the laws that may have been applicable were primarily in place to deal with treason, unlawful associations, organised crime and politically motivated violence. As can be seen in the examples below, the provisions of existing criminal legislation was utilised as the need arose (Hancock, 2002:5-6, Lynch & Williams, 2006:9).
**Case Study: French Consulate Bombing, 1995**

In 1995 the French Government declared that it was resuming nuclear testing in the South Pacific region. In protest to this announcement on 16 June 1995, approximately one hundred students held a peaceful demonstration outside the French Consulate in the suburb of West Perth, Western Australia. In the early hours of the following morning, Bosco Boscovich and Maya Catts attended that same premises and in what has since been described as an act of terrorism, each threw an ignited wine bottle filled with petrol through different windows of the building. These improvised Molotov cocktails resulted in a damage bill of approximately half a million dollars. After the event, Boscovich contacted several media outlets claiming that he represented a group called the Pacific Popular Front and that the firebombing took place in protest against the French nuclear testing (Not So Pacific, 1995 72-73, *R v Catts*, 1996).

Shortly thereafter both offenders were arrested and charged by police, with Boscovich receiving three years imprisonment on a plea of guilty for the damage caused by the arson attack, which had been carried out with the intention of making a political statement (Maslen, 1995, *R v Catts*, 1996:8).

On 1 December 1995, Catts received twelve months imprisonment after pleading guilty to wilfully and unlawfully damaging a building and contents by fire under section 444(a) of the *Criminal Code Act Compilation Act 1914* (WA), which carried a possible term of fourteen years imprisonment. Her penalty was later increased by a year on appeal as the original sentence was deemed to be manifestly inadequate given the level of damage and the potential for harm to human life as a direct result of her actions (*R v Catts*, 1996:8-9, Second Person Pleads Guilty to Firebombing, 1995:3A).

**Case Study: Conspiracy to Attack Israeli Embassy, 2000**

In 2002 Jack Roche was arrested and charged with conspiring with al Qaeda members to commit an offence contrary to section 8(3C)(a) of the *Crimes (Internationally Protected Persons) Act 1976* (Cth). This section deals with the offence of destroying or damaging by fire premises connected to an internationally
protected person, with the intention of endangering that person’s life. It carries a maximum penalty of twenty-five years imprisonment.

The circumstances surrounding the case were that during the year 2000, Roche conspired with al Qaeda to bomb the Israeli Embassy in Canberra. His role in the plot was to try and recruit someone to be part of an al Qaeda terrorist cell. He also received money and purchased a vehicle to traverse Australia and undertake surveillance by photographing and filming the Israeli Consulate in Sydney and the Israeli Embassy in Canberra. Finally, he took steps to acquire igniters to construct an explosive device. After changing his plea to guilty midway during his trial, he was ultimately sentenced to nine years imprisonment, which took into account his promise of future cooperation with AFP and ASIO in their investigations (R v Roche, 2005).

During an appeal on sentence, McKechnie J pointed out that terrorism-related offences are abnormal crimes and their penalty range may not necessarily align with that of normal crimes (R v Roche, 2005). As the offence occurred in 2000, none of the post-9/11 terrorism offences were available to investigators; however this viewpoint from within the judiciary provided an insight that despite Roche being charged with a normal criminal offence, the terrorism-related aspect of his behaviour elevated the seriousness of the offence.

**Post 9/11 Legislation**

**Terrorism Offences**

After al-Qaeda’s attack on American soil, the UN Security Council issued a directive that states needed to take necessary precautions to tackle the threat of terrorism on a global scale. Adopted under Chapter VII of the UN Charter, Resolution 1373 (2001) sought to ensure that acts of terrorism would be recognised and legislated as serious criminal offences with commensurate penalties by all UN member states (UN Security Council, 2001:2).
Even before the Resolution came into existence there was speculation of the need to increase security. It was argued that security measures were needed to deal with instances of terrorism, create a measure of control over terrorist organisations and to boost the powers available to law enforcement agencies in Australia. However, these new measures would need to integrate successfully with existing preventative procedures, investigations, intelligence gathering, emergency management and law enforcement capabilities to be effective (Hancock, 2002).

The fact that Australia had limited domestic experience in dealing with terrorist acts meant that the laws of other jurisdictions, such as the United Kingdom (UK), were used as a guide when creating the framework for the Australian legislation (Lynch, 2008:159). Subsequently, in 2002 a range of very powerful counter-terrorism legislation was passed through the Australian Commonwealth Parliament, which included the Security Legislation Amendment (Terrorism) Act 2002 [No.2] (Cth) (Jull, 2006:1).

As part of this enhanced security package the Criminal Code Act 1995 (Cth) was amended to provide for the first time an Australian legislative definition of a terrorist act. The legislation stipulated that in order for an act to fall within the realm of terrorism, it must involve the threat of, or actual action done, with the intention of advancing a political, religious or ideological cause. It must also be made or carried out with the intention to coerce or intimidate government bodies or parts of states, territories or foreign countries, or alternatively, must have the intention to intimidate the public (Criminal Code Act 1995 (Cth) s.100.1(1)).

Furthermore, a list of six criteria was provided and before an act or threat could be classed as terrorism, it needed to align with at least one of the options listed under this area. These options essentially provided for threats or actual harm done to human life, property or electronic systems including, but not limited to, telecommunications, transportation facilities, financial systems and public utilities (Criminal Code Act 1995 (Cth) s.100.1(2)).

Also provided were circumstances where an act would not be considered terrorism. This included advocacy, protest, dissent or industrial action as long as it was not
intended to pose a danger to human welfare or life or pose a serious risk to health or public safety (*Criminal Code Act 1995* (Cth) s.100.1(1A)). The reasoning behind this inclusion was to safeguard against the possibility of legitimate protestors having the provisions incorrectly applied to their circumstances, resulting in peaceful demonstrators improperly being labelled terrorists (Lynch & Williams, 2006:15-16).

It is important to bear in mind that on 29 September 2010 the *Anti-Terrorism Laws Reform Bill 2010* (Cth) was introduced into Parliament by the Australian Greens Party. Should it be passed in its current form, it will ensure that an act will only be classified a terrorist act if actual action is done; no longer will the threat of action be accepted within the definition. Similarly, the reference to advancing a political, religious, or ideological cause will be removed.

What this essentially means is that a terrorist act will be defined as action taken with the intention of coercing or intimidating government bodies or parts of states, territories or foreign countries, or alternatively, must have the intention to intimidate the public (*Anti-Terrorism Laws Reform Bill 2010* (Cth)). This Bill will be discussed further in Chapter Three.

Going back to the changes that were made in 2002, as well as providing a tangible definition of a terrorist act, the *Criminal Code Act 1995* (Cth) was further amended to provide an array of terrorism-related offences, which are found under Divisions 101, 102 and 103.

Division 101 outlined the following offences relating to individual offenders:

- Committing of terrorist acts
- Receiving or providing terrorist-related training
- Possession of terrorist-related items
- Collecting or creating documents likely to facilitate terrorist acts
- Other acts done in relation to the planning or preparation of a terrorist act.

In the 1995 bombing of the French Consulate example given earlier, the offenders were charged with damage offences under existing criminal legislation. The offence
had a maximum sentence of fourteen years imprisonment available to the sentencing judge.

Should Boscovich and Catts have carried out the offence after the terrorism-related offences were created in 2002, they may have been facing a different outcome. It is possible that investigating officers may have considered laying charges under the new legislation, claiming that the perpetrators committed a terrorist act, which carries a potential penalty of life imprisonment (Criminal Code Act 1995 (Cth) s.100.1(1)).

When looking at the requirements needed to fulfil the current definition of a terrorist act it is possible to see how Boscovich and Catts could have been treading a fine line between being labelled ordinary criminals or terrorists. Firstly, their actions caused serious fire damage to property. Secondly, their actions were done with the intention of advancing a political cause, particularly with respect to Boscovich, who was publically claiming to be objecting to French nuclear testing. Lastly, the target of the attack was the building that housed the French Consulate, which clearly demonstrated a case of intimidation towards the government of a foreign country.

It is apparent that a conviction under one law rather than the other could have resulted in a much lengthier term of imprisonment for the pair. Again, similarly to the comments made by McKechnie J in the Roche case, the inference can be drawn that acts which have the stigma of terrorism attached to them would appear to have a greater degree of severity assigned to it by the judiciary. However, should the proposed amendments be passed under the Anti-Terrorism Laws Reform Bill 2010 (Cth), exclusion of property damage under the definition of a terrorist act would characterise the pair’s actions as ordinary criminal behaviour once again.

Division 102 deals with the following offences relating to terrorist organisations:

- Directing the activities of the organisation
- Membership of the organisation
- Recruiting on behalf of the organisation
- Providing or receiving training on behalf of the organisation
• Receiving or providing funds to the organisation
• Providing support, such as resources, to the organisation.

There are two ways that a group can fall within the category of a terrorist organisation. The first is if an organisation is found by the court system to have directly or indirectly had a hand in the preparation or facilitation of a terrorist act, despite the fact that the act may not have actually occurred (*Criminal Code Act 1995* (Cth) s.102(1)).

The second way is if the group is proscribed and listed as a terrorist organisation under the *Criminal Code Regulations 2002* (Cth) by the federal Attorney-General (Lynch & Williams, 2006:21-22). In order to do this the Attorney-General needs to be similarly satisfied of the group’s direct or indirect involvement in a terrorist act, even if the act doesn’t occur, or alternatively, that the organisation has advocated the carrying out of a terrorist act. Under the definition provided in the legislation, advocating includes instances where the organisation has directly praised the carrying out of a terrorist act in circumstances where there is a significant possibility that this encouragement might actually result in a person engaging in an act (*Criminal Code Act 1995* (Cth) s.102.1(1A)).

Before a group can be listed in the regulations, the Leader of the Opposition in the House of Representatives needs to be apprised of the situation (*Criminal Code Act 1995* (Cth) s.102.1(2) & (2A)). Presently there are nineteen groups listed, including al Qaeda, Jemaah Islamiyah, Lashkar-e-Tayyiba and Al-Shabaab (*Criminal Code Regulations 2002* (Cth) Part 2, 4A, 4B, 4L & 4X).

Division 103 deals with the financing of terrorism as an offence, which stipulates that it is illegal to actively provide or collect funds whilst at the same time being reckless as to whether the funds will be used in conjunction with a terrorist act. Again, a person can be convicted of this offence even if a terrorist act doesn’t take place. This particular section is seen as an important tool in the counter-terrorism effort, as it has been recognised that disrupting the flow of funds to terrorists needs to be treated as a priority (Australian Government, 2004:94).
Control Orders

Having been described as a “shocking departure from Australia’s proud tradition of protecting individuals from an overly powerful state” (Human Rights Watch, 2005), control orders, preventative detention orders and prohibited contact orders were introduced in Australia as a response to the July 7 London terrorist attacks in 2005 (Bachman, 2010:148).

As a result of the passing of the Anti-Terrorism Act [No 2] 2005 (Cth), Division 104 was inserted into the Criminal Code Act 1995 (Cth). Classified as civil proceedings rather than criminal, the purpose of a control order is to place restrictions, prohibitions and obligations upon a person for up to twelve months as a way to protect the public from acts of terrorism (Criminal Code Act 1995 (Cth) s.104.1).

Before an interim order can be considered by the court, a senior Australian Federal Police (AFP) member must first, unless urgent circumstances dictate otherwise, obtain the consent of the Attorney-General prior to making the court application (Criminal Code Act 1995 (Cth) s.104.2). Once the consent is obtained and if the court is satisfied on the balance of probabilities that an order will either assist in preventing a terrorist act or that the person has been involved in the training aspects of a listed terrorist organisation, then an interim order may be granted. This is done ex parte, or in other words, in the absence of the accused (Criminal Code Act 1995 (Cth) s.104.4).

This process differs from traditional criminal legal rights, where the burden of proof placed upon the prosecution is generally beyond a reasonable doubt, rather than the balance of probabilities. According to Lynch (2008:165,175), given the fact that a control order has the potential to substantially impact upon a person’s liberty, it is debateable whether the civil burden of proof is a better option than the criminal standard, especially considering that control orders are a civil response to alleged criminal behaviour.

Subdivision D deals with the procedure of having an interim control order confirmed. If the AFP elects to confirm an interim order then the subject is to be
personally served with relevant disclosure so that the subject may have the
opportunity to attend court and tender evidence in their defence. Under the
legislation, the AFP does not need to disclose any information that might prejudice
national security, put at risk law enforcement or intelligence operations, including
the safety of their operatives, put at risk the safety of the community or disclose
information that is protected by public interest immunity. This would significantly
restrict the subject from knowing what the case is against them, making it difficult to
build a strong argument in their defence (Lynch 2005:166).

A list of constraints is available to the court when issuing a control order. These
include confining a person to a specified place, preventing a person from leaving
Australia, ordering a person to wear a tracking device, preventing a person from
associating with specified people, and preventing a person from using certain
technology, such as the internet (Criminal Code Act 1995 (Cth) s.104.5(3)). Breaches
of a control order can attract a penalty of up to five years imprisonment (Criminal
Code Act 1995 (Cth) s.104.27).

According to the AHRC (2008), some of these constraints violate a person’s
fundamental rights to privacy and liberty as well as freedom of movement,
expression, and association. For example, although control orders don’t set terms of
imprisonment in facilities such as prisons, the available provisions mean that a
person can be ordered to remain at a particular place within a particular timeframe,
which in essence can be likened to a form of house arrest, a measure which is

On face value, this appears to be in contravention of Article 22 of the ICCPR, which
outlines that everyone has the right to freedom of association and that there should be
no restrictions put in place that may hinder this right. The same can be said for
Article 12, which outlines that everyone has the right to leave any country and has
the right to choose where to reside. However, these Articles come with a disclaimer
in that democratic societies can legislate against certain associations in name of
national security or if it is deemed necessary to protect the rights and freedoms of
others (UN General Assembly, 1966:175).
Case Study: Jack Thomas, 2006

In 2004 Joseph Thomas was found guilty of possessing a false passport and of receiving funds from al Qaeda. These convictions were later overturned on 18 August 2006 after it was found by the court that a heavily relied upon confession he had given to AFP officers in Pakistan was not made voluntarily, rendering it inadmissible (R v Thomas, 2006).

Despite the fact that no conviction was recorded against Thomas, on 27 August 2006 he was issued with the first control order made under the Australian anti-terrorism legislation. This was based on the grounds that he had admitted to having received weapons and military training from al Qaeda, a listed terrorist organisation, and had also associated with key al Qaeda figures. In issuing the order it was found by the court that Thomas’s skills and experience could possibly be sought out and used as a tool in the planning or facilitation of a terrorist act in the future (Jabbour v Thomas, 2006).

Some of the more restrictive terms of his order included a residential curfew between the hours of midnight and 5.00am, reporting to a specified police station three times a week, providing fingerprints to authorities, prohibited from leaving Australia, prohibited from communicating with certain individuals, restricted to using telephones and email accounts that had AFP approval and prohibited from using public telephones unless in case of an emergency (Jabbour v Thomas, 2006).

Thomas unsuccessfully tried to challenge the control order on the grounds that it was unconstitutional (Thomas v Mowbray, 2007). What this example has shown is that even though the criminal charges against Thomas were not proven in a court of law, he was deemed a terrorist threat by authorities that adjudicated his guilt and made him subject to the restrictions of the control order.

This action by Australian authorities directly attracted words of caution from the UN Human Rights Council, where questions were raised about the perception of control orders being used as a substitute for criminal proceedings when a conviction couldn’t be secured, which emphasised the need for due process and transparency (Scheinin,
Control orders have since been described as a potential mechanism to avoid testing and challenging evidence in a criminal trial in cases where the authorities don’t have enough evidence to charge a suspect (Williams, 2007:48). This seemingly goes against the intention of the ICCPR’s inclusion of the national security disclaimer under Article’s 12 and 22.

Incidentally, after the original criminal trial had concluded in 2004, an interview was broadcast on ABC’s Four Corners where Thomas made self-incriminating statements which, had they been available at the time, may have assisted in securing a conviction in the first trial in the absence of the inadmissible AFP Pakistan interview. Subsequently, a retrial was allowed (R v Thomas, 2008) which resulted in Thomas being acquitted of the terrorism charges but found guilty of the false passport offence (“Jack Thomas”, 2008).

**Preventative Detention Orders**

The AFP can use preventative detention orders to detain a person for up to forty-eight hours if it is believed that their confinement will prevent an imminent terrorist act or preserve evidence relating to a terrorist act that has occurred within the previous twenty-eight days. These orders can also be issued to juveniles under the age of eighteen but not under sixteen, albeit with certain restrictions (*Criminal Code Act 1995* (Cth) s.105.1(a)&(b), s.105.4(6)(a), 105.5(1), 105.12(5)).

When in detention, a detainee may be permitted to contact certain people such as family members, employers and employees, but only for the purpose of advising that they are safe and are not able to be contacted. Detainees are not allowed to disclose that they have been subjected to a preventative detention order, that they are being detained or the period of detention. These restrictions also extend to the detainee’s legal representative, interpreters, parents and guardians, with breaches resulting in a possible term of five years imprisonment (*Criminal Code Act 1995* (Cth) s.105.35, 105.41).
Prohibited Contact Orders

Whilst in detention a person may also be subjected to a prohibited contact order, which if granted means that a person might be restricted from contacting certain individuals that are named in the order. When an order is made the AFP is under no obligation to inform the detainee of its existence, or of the name of a person specified in the order (Criminal Code Act 1995 (Cth) s.105.15, 105.28(3)(a)&(b)). This essentially means that a detainee would not be in position to challenge the order, as they would be unaware that it was in place.

Article 17 of the ICCPR deals with a person’s right to protection against unlawful or arbitrary interference with their family (UN General Assembly, 1966:177). The AHRC argues that prohibited contact orders breach this Article as well as infringes upon a person’s right to argue against violations of their human rights (AHRC, 2005).

Increased Powers for Authorities

Along with an increased number of offences and stricter penalties, government agencies were also afforded greater powers in the name of preventing and detecting terrorist activity. Most notably were the legislative provisions applicable to the Australian Security Intelligence Organisation (ASIO), that have been described as an authority with powers similar to police but which are not similarly restricted by the due process requirements found in the criminal justice system (McCulloch, 2007:406).

ASIO

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth), was introduced into Parliament in early 2002 and generated much debate until it was finally passed in 2003, making amendments to the Australian Security Intelligence Organisation Act 1979 ['ASIO Act'] (Cth) (Lynch & Williams, 2006:32-33).
Under the new provisions, once the appropriate warrant was obtained ASIO could detain and compulsorily question people who weren’t suspected of committing or being involved in terrorism but who may be able to provide information that could be of use in the intelligence gathering process (Lynch & Williams, 2006:29) This also applied to children who were between the ages of sixteen and eighteen as long as they were suspected of being involved with the activity in question (McCulloch, 2007:402).

These amendments now meant that a person could be detained and interrogated for a period of up to seven days, with questioning permissible for twenty-four hours in eight-hour segments (Lynch & Williams, 2006:35-37). During this time the interviewee would not have the right to silence, no right against self incrimination and would only have limited access to legal representation (Grieg, 2003:11674, Hocking, 2004:213, McCulloch, 2007:402).

The UN Human Rights Council has expressed concerns that there are no mechanisms in place that allow a person in detention to seek a judicial review of the validity of their warrant before an independent and fair authority (Scheinin, 2006:17-18). This contravenes Article 2 of the ICCPR, which states that a person is entitled to go before a competent authority to seek a remedy to breaches of their rights, and also Article 9, which stipulates that a person who is detained has the right to be brought before a court to determine the lawfulness of their detention (UN General Assembly, 1966:173-176). Some have argued that detention is to be viewed as an intelligence gathering exercise rather than punitive punishment dealt out by the judiciary, hence the practice should be seen as legitimate (Hocking, 2004:215).

There is also what is known as secrecy offences, which were brought in with the ASIO Legislation Amendment Bill 2003 (Cth) and can be found under section 34ZS of the ASIO Act. This section deals with secrecy relating to warrants and questioning and was designed to prevent people from warning others who may be involved in the offence. It does this by prohibiting people from revealing what they may have learnt about ASIO operational information, with the penalty for noncompliance being five years imprisonment. A person is subject to the secrecy provisions for up to two years following the expiry of the warrant.
This effectively means that detainees, lawyers, politicians, civil libertarians and the media are severely restricted from commenting upon ASIO’s investigations. The added concern was that this impacts upon the freedom of the press to report on alleged abuses of power by the organisation (McCulloch, 2007:404).

As such, these particular provisions impinge upon freedom of speech, which is protected under Article 19 of the ICCPR (UN General Assembly, 1966:178). However, this Article comes with a disclaimer that certain restrictions are excusable if they are deemed to be necessary in the name of national security and if they are properly legislated. Essentially, this has meant that in their quest to ensure that human rights are upheld, civil liberties and human rights organisations have limited opportunity to monitor ASIO’s practices, which some argue creates the potential for lawlessness on ASIO’s behalf (McCulloch, 2007:405, 406).

AFP
The passing of the Anti-Terrorism Act [No 2] 2005 (Cth) heralded changes for the way the AFP could conduct investigations relating to terrorist suspects, particularly in relation to detention without charge. Part 1C, Division 2 of the Crimes Act 1914 (Cth) now provided specific guidelines as to how terrorism offences could be investigated. Its inception meant that a person arrested for a terrorism offence could be held without charge for the purpose of investigating if a person committed the terrorist offence or another Commonwealth offence that they were reasonably suspected of having committed (Crimes Act 1914 (Cth) s.23DB). Although technically a person could only be detained for questioning for up to twenty-four hours, investigative dead time provisions meant a person could be held indefinitely during periods where questioning was reasonably delayed. (Crimes Act 1914 (Cth) s.23CA(8), Ludlam, 2009:4022).

The AHRC argued that this breached Article 9 of the ICCPR in that it violated the prohibition on arbitrary detention, it impinged on the right of a person to be promptly informed of charges brought against them at the time of arrest and denied them of their right to be brought before a judge to make a determination of the lawfulness of
their detention (AHRC, 2008:13). These dead time provisions were used in the case of Dr Mohamed Haneef; the circumstances of which are outlined below.

**Case Study: Dr Mohamed Haneef, 2007**

On June 30 2007 two men driving a Jeep Cherokee were involved in a terrorist attack on Glasgow International Airport, Scotland. Shortly thereafter it was alleged that a SIM card in the name of Dr Mohamed Haneef had been linked to the terrorist attack. The then Australian based Haneef was subsequently arrested for providing support to a terrorist organisation. During his detention AFP officers made numerous successful applications to the court to have his period of detention extended, which were granted primarily due to the concurrent investigations and volume of evidence that was being processed in the UK. In total, Haneef was detained for a period of eleven days (Clarke, 2008:45-69).

On 14 July 2007 Haneef was charged under section 102.7(2) of the *Criminal Code Act 1995* (Cth). On 27 July that same year the charges were withdrawn by the Commonwealth Director of Public Prosecutions, however by this stage Haneef’s visa had been revoked by the Australian Minister of Immigration and Citizenship, which had occurred on 16 July. This revocation was later overturned. The decision to cancel Haneef’s visa led to speculation that the Government and AFP were conspiring to keep Haneef in custody, even if he was granted bail by the courts or the charges weren’t proven (Clarke, 2008:86,162, 174-181). This can be seen as an example of a blurring of the roles of the executive and the judiciary.

In the aftermath an inquiry into the circumstances relating to the case was undertaken. Known as the Clarke Inquiry, the findings made certain recommendations into aspects of the anti-terrorism legislation, including the provisions dealing with dead time and indefinite periods of detention. Subsequently, with the passing of the *National Security Legislation Amendment Act 2010* (Cth), the periods of detention are now subject to a seven day limitation (*Crimes Act 1914* (Cth) s.23DB (9)(m) &(11)).
The purpose of this chapter was to provide an overview of the legislative tools that Australia put in place to manage terrorism-related behaviour and how the implementation of increased security provisions after 9/11 were potentially at odds with Australian civil rights standards.

It began by explaining and demonstrating how existing criminal legislation was traditionally used to address instances of terrorist-related activity. It then provided an outline of some of the key changes made to the Australian security environment post-9/11 in line with a directive issued by the UN. This included the insertion of terrorist-related offences into the *Criminal Code Act 1995* (Cth) and the introduction of control orders, preventative detention orders and prohibited contact orders. It then capped off with an overview of some of the extra powers afforded to authorities, such as ASIO and the AFP, in relation to detention and investigative procedures. Along the way it highlighted how the introduced changes have the potential to breach certain human rights standards under international conventions, such as the ICCPR.

Whilst this chapter has dealt with the legislative changes to Australian security, the next will look at the issue from another perspective. It will take a closer look out how the changes were viewed in Parliament and what the intentions of the lawmakers were at the time. It will also explore how the changes were sold to the Australian public and what justifications were given for the diminishing civil rights that were likely to follow.
CHAPTER TWO: SOCIAL PERSPECTIVES

The previous chapter outlined what changes took place to the Australian security environment in the wake of the terrorist attacks of 9/11. Globally it was recognised that there was an increased threat from transnational terrorism and in the case of Australia, changes were made accordingly.

We enter into this chapter acknowledging that these changes possessed the ability to impinge upon personal liberty and undermine the democratic freedoms of the Australian people. What now needs be assessed is why these changes came about and how they were integrated into the fabric of society. From a social perspective, this section will look at some of the arguments and counter-arguments that were put forth in Parliament and the speed at which the legislation was enacted.

It will do this by looking at the parliamentary debate surrounding the four main pieces of legislation that have been passed in period since 9/11, all of which featured heavily in the preceding chapter. These are the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] (Cth), the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2003(Cth), the ASIO Legislation Amendment Bill 2003 (Cth), and the Anti-Terrorism Bill [No 2] 2005 (Cth).

This chapter will finally round off with speculation about how the laws were able to be so easily integrated into the lives of Australian public.

The Parliamentary Debates

As part of its duty a government needs to strike a balance between the level of security it provides in order to minimise the harm an individual may inflict upon society against the personal freedom for that same individual to live their life with minimal interference. Any increase in threat levels will inevitably lead to a change in that balance and the danger is that whilst the reduction in civil liberties may serve to
prevent a harmful act from taking place, there is also the danger that increasing the power of the state can cause damage in circumstances where that power is abused (Waldron, 2003:192,205).

History has taught us that people are fallible and the potential for corruption by executive power is a real risk. The rights of citizens are a fundamental cornerstone of a liberal democracy and any infringements upon those rights can be seen as a danger to the democratic way of life (Stott Despoja, 2002:2407). Therefore, legislation that is passed through the legislature should aim to uphold liberal values and minimise interference in an individual’s life.

In saying that, there is no denying that the threat of terrorism was globally magnified after 9/11 and that changes were needed to tighten security. This is supported by the aforementioned UN Resolution 1373, which essentially forced member states to take action against the highly publicised terrorist threat by enacting relevant domestic laws (UN Security Council, 2001:2). As will be seen below, the biggest driver of the parliamentary debates was whether or not the proposed legislation would unduly impinge upon civil liberties in the name of national protection.

**Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]**

As outlined in Chapter One, on 13 March 2002 the *Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] (Cth)* was introduced in the House of Representatives by representatives of the Howard regime as part of a security package that would strengthen Australia’s existing counter-terrorism measures. The overall aim of the Bill was to criminalise terrorism and obliterate terrorist groups and their networks (Hancock, 2002:4, 6).

Also included in the legislative security package were four other Bills; namely the *Border Security Legislation Amendment Bill 2002 (Cth)*, the *Suppression of the Financing of Terrorism Bill 2002 (Cth)*, the *Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (Cth)*, and the *Telecommunications Interception Legislation Amendment Bill 2002 (Cth)*.
Presented by the Parliamentary Secretary to the Minister for Finance and Administration, Mr Peter Slipper, these Bills were passed that same day, with seventy-nine votes to sixty and with relatively little debate (Parliament of the Commonwealth of Australia, 2002:103). The package of security legislation was then introduced in the Senate on 14 March 2002, where it generated a great deal of discussion (Parliament of the Commonwealth of Australia, 2002:540).

At the time it was put forth that after the events of 9/11, Australia faced a greater risk of a terrorist attack, both domestically and abroad. During the Second Reading Speech in the House of Representatives it was stated that the security package was “designed to bolster our armoury in the war against terrorism and deliver on our commitment to enhance our ability to meet the challenges of the new terrorist environment” (Slipper, 2002:1139).

Furthermore, the Coalition were of the view that given that terrorists were violently working to undermine democracy and fundamental rights across the globe, all necessary resources immediately needed to be thrown into protecting the community and bringing justice to perpetrators (Slipper, 2002:1141).

During debate in the Senate, the Australian Labor Party acknowledged that 9/11 created global hysteria and despite the fact that Australia’s fears of an attack did not come to fruition in the ensuing months, there was a need for security agencies to adequately ensure that Australia remained safe in the future. In fact, the Opposition Party claimed that they were staunch supporters of Australia’s participation in the global war against terrorism and were critical of the fact that the Government only introduced the proposed legislation in March 2002, some six months after 9/11 (Faulkner, 2002:2334).

However, the Opposition was also concerned that the Government was overstating the threat of terrorism in order to seize more power to the detriment of democracy (Bolkus, 2002:2393). Senator Lundy of the Australian Labor Party accused the Coalition of attempting to rip up the rights of Australians and alleged that the Government were guilty of using hysterical fear to manipulate the Australian public into accepting an undemocratic bill (Lundy, 2002:2344-2345).
Coalition member Senator Brandis dismissed her view, stating that the Bill was not driven by a desire to enact laws contrary to democratic values, but to enact measures that defended and protected Australia’s national security. Furthermore, it was said that the Attorney-General displayed great cooperation in addressing the concerns raised by opposing members about the Bill in its original form that related to unnecessary intrusions on citizen’s liberties. This collaboration was reflected by the amendments made to the Bill, which the Coalition took as an indication that Parliament was working together in a cooperative, democratic manner (Brandis, 2002:2347-2348).

The view of the Greens Party in relation to the security package was one of total opposition, with the belief being held that there already were sufficient laws in place to deal with criminals and surveillance, all of which could be adequately applied in circumstances of terrorism (Brown, 2002:2400). However, the Howard administration recognised the fact that whilst the proposed legislation was complex and unusual, terrorism was not considered to be ordinary criminal activity and needed to be dealt with accordingly (Ellison, 2002:2444).

Whilst in support of legislation that would address shortcomings in the way Australia dealt with terrorism, the Australian Democrats were strongly opposed to the package on the basis that the Bills were unbalanced and attacked the rights of Australian citizens. Part of their concern was that public fears were being used as an excuse to enact unnecessary and undemocratic legislation (Stott Despoja, 2002:2404).

In response to this, the Coalition argued that the events of 9/11 served to illustrate that Australia could not take the threat of terrorism lightly. Mechanisms that balanced the rights of Australians whilst providing adequate security were needed in order to complement international counter-terrorism efforts and to provide a measure of deterrence, prevention and punishment for those engaged in terrorist activity. It was argued that the proposed legislation did just that (Ellison, 2002:2445).

One of the biggest bones of contention related to the matter of proscription. In the Bill’s original form it would have been possible for the Attorney-General to declare an organisation as a terrorist group, proscribing them without any parliamentary
oversight. However, the Bill was amended so that there may be parliamentary input into the decision (Lynch, McGarrity & Williams, 2009:5) As it stands, before a group is listed in the regulations, the Opposition Party needs to be briefed about the proposed insertion (Criminal Code Act 1995 (Cth) s.102.1 (2A)).

At the time the Opposition Party claimed that punishing someone because of membership alone and in the absence of any evidence supporting a persons involvement in terrorist activity would be akin to penalising someone for their thoughts, rather than their behaviour. It was argued that the only organisations that this legislation should be applicable to should be those deemed terrorist organisations by the UN Security Council and that granting arbitrary powers to a minister of government would allow abuse to flourish (Faulkner, 2002:2336-2337).

The Greens argued that proscribing an organisation would simply send the group underground, making it much more difficult to monitor their activities. Again, they were of the belief that existing criminal legislation would be more appropriate to deal with someone once the individual had crossed the line. This would ensure that the defendant had their day in court, rather than simply being labelled a terrorist due to association (Brown, 2002:2401). The Australian Democrats also opposed the criminalisation of organisations, stating that not all of the organisation’s members would support the activities of other members within the group and punishment of association should not be condoned (Stott Despoja, 2002:2406).

In defence of the proscription provisions, the Coalition put forth that the act of listing an organisation would serve as a powerful deterrent. A strong message would be sent to members of an organisation who may be engaging, or contemplating engaging, in terrorist activity that they should desist or find themselves facing the full force of the authorities (Ellison, 2002:2446).

Another point that was raised was that if a proscription charge was to be contested, the onus would be on the defendant to establish their innocence on the balance of probabilities. This is a reversal of the burden of proof usually applicable in criminal offences, where the prosecution has to prove a defendant’s guilt beyond a reasonable doubt. The justification given for this was that strong measures were needed to battle
terrorist organisations and that offences under this section are all the more serious because the decision to have an organisation proscribed would not have been made lightly (Slipper, 2002:1140).

The Opposition Party argued that the reversal of the onus of proof was unprecedented and unacceptable; claiming that the presumption of innocence was an integral part of Australian law that should be upheld, especially considering that some of the terrorist provisions carried a penalty of life imprisonment. Subsequently, the Government agreed to restructure some of the legislation and included an element of negligence and recklessness based on an objectivity test (Faulkner, 2002:2335-2336).

One of the other aims of the Bill was to provide a working definition of a terrorist act that would protect the rights of law abiding Australians. Intended to reflect the severity of the offending, the punishment for committing a terrorist act would be life imprisonment (Slipper, 2002:1140). Again, concern was raised about the proposed terrorist offences and the definition’s broad nature, with the legislation being seen as a tool to potentially vilify protests that are an inherent part of a robust democracy and to stifle political opposition and dissent (Stott Despoja, 2002:2406).

The definition of a terrorist act was to be inserted in the Criminal Code Act 1995 (Cth) and was largely based on the definition provided in Britain’s Terrorism Act 2000 (UK). As seen in Chapter One, this did in fact come to pass and the definition was then found under section 100.1. In fact, when the Australian anti-terrorism legislation was drafted, a great deal of inspiration came from other jurisdictions’ laws, particularly the UK (Lynch, 2008:159).

The Government at the time acknowledged this heavy reliance on international influence when creating the Australian legislative framework. The justification for this was that Australia was part of a global alliance that stood together to condemn terrorism and that other countries within this community had already enacted, or were in the process of enacting, legislation to tackle this universal threat. As such, it was only natural that the laws of other countries were taken into consideration when drafting the Bill (Slipper, 2002:1139).
However, unlike other western democracies, Australia does not have a Charter of Rights. This has meant that when the laws were passed there were not enough checks and balances in place to ensure that fundamental civil rights were adequately protected (Bachmann 2010:151-152, Williams, 2007:52). This, coupled with the rushed nature of the legislation, has lead to concerns that there were insufficient measures in place to protect against abuse or remedy mistakes (AHRC, 2008).

Criticism has since been levelled at the Howard regime about the manner in which the anti-terrorism legislative package was rushed through Parliament after 9/11. Two hundred pages of explanatory memoranda and legislation was given to the House of Representatives at eight o’clock in the evening, with debate to begin at noon the following day. This left little time to sufficiently review the proposals and with the Senate only having access to amendments within twenty-four hours of their debate, the laws that subsequently passed did not strike an acceptable balance that preserved democratic rights (Ludlam, 2009:4019).

This was reiterated by Senator Stott Despoja of the Australian Democrats, who claimed that her party only found out about the final amendments when the Attorney-General issued a press release on 4 June 2002. She claimed that initial attempts to obtain copies of the amendments were refused, which led her to question the transparency of the legislative process. Having been given a copy at 7.30pm the evening before the debate in the Senate, she put forth that there was not enough time for proper preparation and scrutiny (Stott Despoja, 2002:2405).

Also under attack was the two-week consultation period for submissions prepared for the Senate Legal and Constitutional Legislation Committee. Political party One Nation described this as a national scandal and an affront to the democratic process. They also claimed that the fleeting submission time resulted in members of the public lamenting the fact that they could not adequately comment on the contents of the proposed security package (Harris, 2002:2397). During this time the Committee waded through 431 submissions, placing a great deal of strain on its members and leading them to speculate that they were not given enough time to adequately carry out their task (McKiernan, 2002:2339).
The Coalition disputed these comments by pointing out that six months had elapsed since the Government had publicised key features of the legislation and that the Bills had been in Parliament for over three months. They claimed that the legislation had been subject to adequate parliamentary and public scrutiny, which was further enhanced by the Bills going before the Committee (Ellison, 2002:2444-2445).

On 27 June 2002, the Bills were passed with fifty-one votes to twelve, with the date of Assent being 5 July 2002 (Parliament of the Commonwealth of Australia, 2002:540, Security Legislation Amendment (Terrorism) Act 2002 [No.2] (Cth). This legislation was only the starting point of wide range of security laws that would come to pass in the following years.

_Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No.2]_

As discussed in Chapter One, this Bill was initially introduced in Parliament by the Howard Government in 2002 and after radical changes were made, passed in the latter half of 2003. Amending sections of the ASIO Act, it dealt with the issuing of warrants for the apprehension, detention and questioning of people, including juveniles, who weren’t suspected of having committed a crime but who may be able to provide information in relation to terrorist activity.

The instigating factor for the implementation of this Bill greatly revolved around the events of 12 October 2002 where a number of Australians lost their lives to a terrorist attack in Bali, Indonesia (Campbell, 2003:10583). Incidentally, it was amidst this debate that one of the terrorists responsible for the Bali bombing was undergoing court proceedings for his crimes. During his trial he stated that he specifically planted the bombs in a location where he could target and kill a large number of westerners. His claims were used as ammunition to justify the need for the Bill (Macdonald, 2003:11676).

Once again, the Australian Democrats accused the Government of exploiting the fear felt by Australians in order to obtain greater power through the enactment of unnecessary and excessive draconian laws (Greig, 2003:11673). The Australian
Greens were also strongly opposed to the legislation and were highly critical of the Labor Party’s decision to agree to it, albeit with a large number of amendments. They were of the view existing legislation was more than adequate to address the threat of terrorism and described the enactment of the legislation as a sad and dangerous day for democratic rights (Brown, 2003:11679, 11681).

One of the more contentious aspects of the Bill was the circumstances surrounding the detention and questioning warrants. The intention of the proposed legislation was that they would only be sought as an option of last resort in order to avert a terrorist attack. An example was provided of what would be considered an acceptable condition of their use. In the scenario that was given a sympathetic supporter of the terrorist’s cause may have crucial knowledge of an intended bombing and whilst they may not be participating in the attack themselves, they may not be inclined to assist authorities with their inquiries, thus complicating efforts to prevent an attack (Campbell, 2003:10584-10585).

The interrogation and detention of Australians in circumstances where they would have no right to silence, no protection against self-incrimination and a reversal of the presumption of innocence were all seen as a departure from traditional legal principles. The Australian Democrats viewed this with great concern, claiming that Australians did not want to live in a society where innocent civilians could be locked up with limited rights (Greig, 2003:11673-11674).

According to the Opposition Party, one of the more extreme inclusions found in the Bill’s original form was that it allowed for children above the age of ten to be detained and questioned in the absence of a parent or legal guardian. This was later rectified and at the time the Bill was passed, a person needed to be at least sixteen years old before they could be questioned and if under eighteen, had to first be suspected of being involved in the event. This questioning could only take place if a parent or guardian was present (Faulkner, 2003:11669-11671, Hancock, 2003:4, Macdonald, 2003:11677).

Described as undergoing the highest levels of scrutiny, this Bill was subject to three parliamentary enquiries and generated much debate in Parliament before it was passed with significant amendments included to provide safeguards against breaches
of civil liberties (Campbell, 2003:10583, Faulkner, 2003:11672). The amendments included raising the detention age from fourteen to sixteen, a limitation of twenty-four hour questioning to be carried out within a seven day period, greater access to legal representation, and the inclusion of a three year sunset clause (Macdonald 2003:11677).

**ASIO Legislation Amendment Bill 2003**

Also discussed in Chapter One were secrecy provisions, which made it illegal to reveal certain information about ASIO’s operation that may have been learned during the interrogation process. This Bill was introduced in the House of Representatives on 27 November 2003, with the date of Assent being less than a month later and making amendments to the ASIO Act.

The purpose of the Bill was to enhance ASIO’s ability to gather intelligence in relation to terrorism and to rectify potential instances of undesirable disclosure of ASIO’s operations. It was put forth by the Coalition that ASIO needed a greater set of tools to carry out its job effectively. In providing justification for this proposed legislation, the events of 9/11, the 2002 Bali attack and other recent bombings in Indonesia, Turkey, Saudi Arabia and Iraq were cited as examples of threats that needed to be prevented (Ruddock, 2003:23107).

The Labor Party supported the Bill, stating that it was merely a mechanism to close loopholes and were of the view that it should have been included as part of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2003* (Cth) that had passed earlier on in the year (Faulkner, 2003:18799).

The Australian Greens were not supportive of the Bill and again critical of the Oppositions support. During debate, the Greens claimed that groups such as Amnesty International and the former Victorian Council for Civil Liberties were highly critical of the legislation’s provisions. Essentially, concerns were held that the secrecy provisions would stifle political discussion and allow the government of the day to impose sanctions on opposing parties and sections of society (Brown, 2003:18803-18805). The Democrats agreed with the Greens, also referring to the
concerns held by Amnesty International. They were of the view that the Bill needed significant deliberation before it was passed to ensure that the legislation was balanced (Greig, 2003:18808).

However, the Coalition put forth that the secrecy offences were needed as up until this Bill, there were no provisions in place to deter people from warning others who may be involved in an impending attack, thus stymieing efforts by authorities to prevent an incident (Ruddock, 2003:23109). In support of this, the Opposition Party described the secrecy provisions as sensible, claiming that ASIO and law enforcement officials couldn’t be expected to carry out effective investigations if their movements were constantly under scrutiny and potentially broadcast by the media (Faulkner, 2003:18800).

On 5 December 2003 the Bill passed through the Senate without amendment, with very little publicity and in spite of opposition from the media, academia and human rights organisations (McCulloch, 2005:403).

*Anti-Terrorism Bill [No 2] 2005*

This Bill was introduced in the House of Representatives by the Coalition on 3 November 2005. This was in response to the London attacks that had occurred a few months earlier in July. The proposals included the control orders that were discussed in Chapter One as well as expansions to sedition laws, preventative detention orders and increased stop and search powers for police. A few weeks after the proposals were released, they were endorsed after limited discussion and passed with the enactment of the *Anti-Terrorism Act [No 2] 2005* (Cth) before the end of the year (Lynch, 2008:161).

At the time this Bill was brought in the Howard Government was being criticised for failing to take adequate precautions necessary to safeguard against threats to aviation and maritime security (Parliament of the Commonwealth of Australia, 2005:804). Not surprisingly, the Government placed some urgency on the passing of this Bill, stating that they would like to see it enacted before Christmas that year (Ruddock, 2005:102).
One of the criticisms was that this legislation was enacted whilst two inquiries were still being carried out to assess and report on the effectiveness of the previously enacted measures (Williams, 2007:51). This being the case it is difficult to see how the legislators could take into account any lessons learned from the mistakes previously made in relation to Australia’s anti-terrorism laws.

**Public Justification**

When matters are before Parliament there needs to be some semblance of public support for their implementation to be successful. This is entrenched in the social contract that will be discussed in the next chapter. This section will canvass some of the reasons why the legislation appeared to be supported by the wider community.

To get a feel for this one needs to ask whether the point of stricter security measures is to prevent another 9/11 from occurring or is it rather to placate the psyche of the masses by lulling them into a stronger sense of security? There is conjecture that increased security measures have a symbolic function in that when attacked or under the threat of attack, people need to feel that their government is doing something about it (Waldron, 2003:209).

If this is accurate, then in the case of Australia’s security measures, people may find some psychological reassurances in the fact that there are measures in place to not only punish those engaged in terrorist activity, but to also prevent attacks from occurring. By this way of reasoning it can be asserted that people believe that the Government has an obligation to make its citizens feel secure, and hence the implementation of the legislation may be justified to a certain extent.

This is supported by Bronnit (2008:68), who claims that the balancing act needs be measured not only by a state being physically secure, but also by the psychological sense of security provided to its people. It is also supported by Hancock (2002:25), who says that pressure from community outrage at perceived attacks on society contributed to the creation of specific terrorism offences. These viewpoints closely align with the terms of the social contract, which will be discussed in greater detail in Chapter Three.
In addition to the psychological factor, the fact that there had been no domestic laws in place to deal specifically with terrorist acts which have the potential to cause death and injury as well as intimidation to the Australia public on a widespread scale meant that it was easier for the Government to initially introduce the security legislation (Lynch, 2008:160).

Public support was further solidified after the Bali bombings in 2002, which made the threat of terrorism more of a reality due to the close proximity to Australia (Lynch, 2008:160-161). This was in line with the stance that was vocalised by the Government, who claimed that 9/11 and the Bali bombings should serve as reminder that no country was safe from terrorism and that the threat was right on Australia’s doorstep (Campbell, 2003:10583).

As was mentioned in Chapter One, the 2005 London attacks saw the subsequent introduction of control orders in Australia. The existence of the UK’s control orders were widely portrayed as a justification for Australia to implement something similar, with the argument being made that it was clearly a reasonable response by a liberal government in countering such threats and that their implementation was not an extraordinary measure (Lynch, 2008:174).

To date, the Australian Government has enacted fifty-four pieces of anti-terror legislation, with forty-eight of those coming into existence during the Howard regime (Williams, 2011). The anti-terrorism legislation that has thus far been referred to in this paper was enacted over a period of four years. When taking the different parliamentary debates and the public justification as a whole it is possible to see certain patterns within.

Firstly, each of the Bills were introduced in response to acts of terrorism that had taken place on international soil, including the US, Indonesia, Turkey, Saudi Arabia, Iraq and the UK. In terms of public justification, parallels were drawn between the security measures that other countries possessed, such as the US and the UK, and the fact that these countries were similarly liberal democracies. Secondly, the Bills all incited opposing arguments pertaining to the impact that the legislation would have
on civil rights and liberties, particularly in relation to the transparency of the Government and law enforcement agencies such as ASIO.

Lastly, there were a number of concerns raised about the legislation being rushed through Parliament, meaning that there was insufficient time to adequately reflect and draft effective legislation that would protect fundamental democratic rights. An offshoot of this was that public scrutiny and input was also limited, as was claimed during parliamentary debate of the *Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]*.

Chapter One outlined some of the legislative changes made to Australia’s security environment after 9/11. This chapter essentially built on from that by discussing how and why the changes came about. It did this by outlining the parliamentary debate and public justifications of four of the main security Bills that were passed in Parliament since 9/11. The purpose of the next chapter is to discuss the impact that these changes had on the social contract between the Australian Government and its people.
CHAPTER THREE: THE IMPACT ON THE SOCIAL CONTRACT

The previous chapters both provided a technical overview of what the security changes were and how and why they came about in Australia in a post 9/11 world. This chapter is a culmination of the information gleaned in the preceding sections in that its purpose is to assess the impact that the changes had on Australia’s social contract equilibrium.

This chapter will begin by describing what it is that people are referring to when discussing the social contract, specifically from the viewpoint of liberal theorist, John Locke. Next, it will explore the consequences and ramifications that the measures have had on the Australian way of life. This will involve looking at the legislation from the viewpoint of the judiciary, followed by a discussion of whether the increased security measures have created a sense of marginalisation in the community, which could be indicative of a government failing to ensure that certain individuals are afforded adequate protection of their rights.

It will then follow with an exploration of both the actual and perceived terrorism threat levels, and whether they have diminished or grown over the last decade. Finally, it will touch upon the Government’s current stance by looking at whether there has been an increase or a reduction of the legislations’ provisions since their implementation as a result of lessons learned, the parallels that now exist between criminal and terrorism legislation and a brief overview of the current attitude towards terrorism legislation from the viewpoint of the UK, a country from which Australia drew great inspiration when creating its own terrorism laws.

An overall analysis of the findings will then be conducted to ascertain where the line is currently situated between individual Australian freedom and government control.

Locke & The Social Contract

An inherent notion of liberalism is that individuals should be able to live their own lives and pursue their own interests free from political interference. However, a state still has an obligation to ensure that it provides adequate protection whilst at the

In his writing ‘The Two Treatises of Government’, liberal theorist John Locke maintained that by nature all men are free and equal and live in an atmosphere that naturally leads to participation in commerce and the acquisition of property. By choice, people come together as a community and unite in forming a government that can exercise power to enforce laws that the society consent to abide by. The intention of handing over the natural individual rights of equality, liberty, and executive power to the Government is to ensure that society and individuals may be in a better position to enjoy and preserve liberty and property (Locke, 1993:122, 163-164, 180-181).

According to Locke, mankind exists in a world bound by the laws of nature, which dictate that individuals should live their lives in line with basic principles of morality. He argued that as humans are rational beings, they are capable of following the law of nature on a free and equal platform and thus entitled to natural rights. These rights are the ability to manage one’s own affairs, the ability to dispose of one’s own labour, the ability to possess property and the right to enforce the law of nature against transgressors. In return, individuals also have an obligation to respect other people’s rights. Compliance of these principles ensures that the community does not exist in a state of warfare (Held, 2006:63).

The hurdle presents itself when individuals do not abide by the law of nature principles and conflicts may arise when attempting to rectify breaches of these rights. In order to alleviate this risk, an agreement needs to be in place that upholds the notion of an independent society coexisting with a form of government. Hence, the main function of a government is to provide a safe environment for an individual to enjoy the highest level of freedom within the structure of the law (Goodwin, 2007:38).

However, in order for this to work, an understanding needs to exist whereby it is acknowledged that the purpose of the Government that is put in place by a society is to pursue and protect the interests of that society; namely individual freedom of life,
liberty and property. In return, individuals have a duty to obey the law and must give up their natural right of self-protection and the right to punish transgressors, instead entrusting the Government with these tasks (Goodwin, 2007:39). Failure by the Government to fulfil their end of the contract would erode the Government’s legitimacy and would mean that society has the right to rebel and install a new administration (Held, 2006:63-64). This tacit agreement is referred to as the social contract.

Unlike other theorists of his time, Locke strongly believed that the role of the Government was to assist in the preservation of rights and the quest for private property. He believed that the acquisition of property was a direct result of one’s labour and that this was something to be protected and encouraged by society (Locke, 1993:128,178). His version of the social contract very much aligns with the ethos of western capitalism and the political system that has been embraced by Australian society.

The aim of this thesis is to assess whether the Australian Government is still operating within the boundaries of this social contract due to its implementation of the security measures outlined in the previous chapters and when viewed in conjunction with the factors below.

**The Judiciary**

It has been demonstrated how and why the laws were introduced and passed through Parliament. The next step is to observe circumstances where the laws have been put into operation and drawn comments from members of the judiciary as to how they have been applicable in protecting Australia and its interests. This is an important perspective, as judicial functions should operate separately from the legislative branch (Head, 2006:64). Hence, comments made by the court are delivered with a level of impartiality that is separate from that of the lawmakers.

One of the concerns that had been raised on numerous occasions in Parliament was that the Government was overstating the terrorist threat in order to implement excessive legislation. However, during the trial of Jack Roche in 2004, the trial judge
commented upon the fact that due to Roche’s activities and his personal contact with several al Qaeda operatives, including Osama bin Laden and Jemaah Islamiya’s Abu Bakar Bashir, Australia needed to realise that it wasn’t immune to the global terrorist threat (R v Roche, 2005). This signifies that the Judge, having directly heard all of the evidence and being in a position to formulate his own informed opinions, was satisfied that there was indeed a credible risk to Australia’s national security.

In terms of the legislations intended application, it is important to note that the introduced security measures were not only to serve as tools that advocated punishment and deterrence, but would also place a heavy emphasis on prevention in the first instance (McGarrity, 2010:93). This was reflected during the sentencing of Faheem Lodhi, who was charged with several offences under the anti-terrorism legislation. During this case, Whealy J reiterated that the purpose of the legislation was to specifically avert a terrorist act before a perpetrator had the opportunity to damage property and kill innocent people (R v Lodhi, 2006:373). Again, this was an unbiased observation by the judiciary who seemingly accepted that there was a need to tackle terrorism in a proactive, rather than reactive, manner.

However, whilst the judiciary may support the existence of legislation to deal with the terrorist threat, there have been instances where they have been critical of the Government’s use of the terrorism legislation. In the first chapter, the case of Mohamed Haneef was discussed and attention was drawn to the fact that even though the court had made no finding of his guilt, a government official was still able to overlook the traditional presumption of innocence in revoking Haneef’s visa. Spender J subsequently found that the Minister had been incorrect in his application of the requisite character test. This was later upheld on appeal (Minister for Immigration & Citizenship v Haneef, 2007).

What has been demonstrated by these comments is that there is a general justification for the existence and implementation of specific anti-terror legislation. However, it is also evident that the courts are able to discern cases where the authorities may have overstepped the boundaries and have commented and ruled accordingly.
Marginalisation

The Government has stated that an open and democratic way of life is one of the very things that make Australia a target, with terrorists aiming for the relinquishment of freedom and tolerance in the name of counter-terrorism efforts (Australian Government, 2004:74). When addressing the terrorist threat care needs to be taken to preserve the freedoms of all Australians.

One factor that is present in the current environment is the ratio of distribution in relation to the erosion of liberties. Whilst it has been demonstrated that a certain amount of individual freedom has been curtailed collectively, what has not been discussed is whether there are any discrepancies between the rights of certain individuals over others.

In the past the Australian Government has asserted and continues to maintain that the Australian terrorist threat predominantly emanates from Islamic extremists intent on destroying the western way of life (Australian Government, 2010:8, 2004:vii). This view is evident when looking at the types of groups that are proscribed terrorist organisations within Australia, where there is only one non-Islamic group on the list (AHRC, 2008).

By addressing the Islamic extremist threat it is inevitable that a certain amount of profiling is likely to occur, with Muslims receiving more attention from law enforcement officials than other groups. As such, it may be the case that a select few have had their individual freedom more greatly eroded in favour of the safety of the majority (Waldron, 2003:194).

In this sense, marginalisation can be quite damaging as it essentially singles out targeted individuals from the greater community, labelling them as different (Waldron, 2003:201). Creating further aggravation is the fact that the security measures in place promote the stereotyping of a person based on their religious, ethnic or national identity. This creates an even greater problem given that a person charged under the terrorism provisions is often perceived to be guilty until proven innocent (Joyner, 2004:244).
The stereotyping also has the ability to negatively construct public opinion. This is clearly demonstrated in an editorial published by a Northern Territory news outlet provocatively titled ‘We must protect society’. In this piece, the author claims the terrorist threat emanates from a significant amount of migrant Muslims in Australia who are unwilling to fully assimilate in Australian society, despite being provided with a secure and prosperous home.

The author continues by saying that “the more Muslims we take in (up to 28,000 a year now), the more trouble we may expect from them or their children.” The piece uses the 2010 Counter-Terrorism White Paper as justification for this comment, drawing attention to the Government’s reference of an increased threat to Australia by those who may be influenced by the violent jihadist message (NT News, 2010).

The issue of marginalisation was previously brought up in Parliament when the laws were being created. In 2003 the Islamic Council of Australia were concerned that with the passing of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2003(Cth), the legislation could be used to discriminate against members of the Islamic community. This was primarily because of the stereotypical link between Islam and terrorism that was in existence during the period when the legislation was introduced and the failure of the Government at the time to effectively reduce this stereotype (Brown, 2003:11680).

A 2004 study into discrimination against Arabs and Muslims after 9/11 has since revealed a number of points. Those surveyed claimed that dealings they had with organisations such as the AFP, ASIO and Customs and Immigration were invasive and driven by ethno-religious profiling. Some believed that key institutions of authority were the central source of racism, and the ability of these organisations to discriminate was unobstructed by the State. Others claimed that the media was the main culprit in their public vilification of the Arab and Muslim communities, leading to stereotypical targeting by sections of the wider population (Poynting & Noble, 2004:5-6, 12-13, 17).

Many participants in the study claimed to have experienced frequent racial taunts and physical attacks whilst on the street or at other public places such as shopping
centres, schools, work, parks, sporting grounds, government offices and on public transport. These negative experiences directly impacted the way that the affected parties lived their everyday lives, with many subsequently changing their names, changing the way they dressed, installing greater home security, leaving their homes less often and in extreme cases, emigration to another country (Poynting & Noble, 2004:6-7, 16).

This study tends to suggest that a certain sector of society has been adversely affected by marginalisation since the events of 9/11, with the ensuing security measures and public opinion seemingly contributing to an erosion of the quality of life and security as the affected previously knew it. One of the resounding aspects was that these people felt that they had no avenues to remedy their situation. Many were of the belief that they could not report incidents to police because firstly, the authorities would not care or alternatively, they felt that the authorities were part of the problem (Poynting & Noble, 2004:14, 17).

The Government has recognised that Australia faces an increased risk from homegrown terrorism and acknowledges that marginalisation is a security risk as it has the ability to affect community cohesiveness, economy prosperity and stability of society. As a result, the Government actively promotes measures to mitigate marginalisation and radicalisation (Australian Government, 2010: ii, 20, 65).

**Threat Levels**

As well as domestic threats, the Government also needs to contend with threats from abroad. It could be argued that providing security is further complicated by the increasingly globalised nature of terrorism, which serves to promote the need to provide adequate security to a higher level than if it were viewed merely as a localised threat (Bronitt, 2008:68).

So that people may remain appropriately vigilant, the Australian Government has in place a public notification system whereby the national terrorist threat level is assessed and assigned one of four categories; low, medium, high or extreme. Low
means that a terrorist act is not expected, medium means an attack could occur, a high rating means an attack is likely and extreme is used where a terrorist act has already happened or is imminent. Australia’s current threat level has been assessed as medium (Australian Government, 2011).

Although there have been no deaths on Australian soil as a result of terrorism, Australians have been the victims of attacks abroad. In 2002, eighty-eight Australians lost their lives in terrorist bomb blasts in Bali, Indonesia (Bachmann, 2010:147-148). In 2009 terrorists detonated two bombs in upmarket Jakarta hotels, killing nine people and injuring forty, including a number of Australians.

At the time Northern Territory Liberal leader, Terry Mills, put forth that this attack should be seen as warning that northern Australia was at risk from terrorism (The West Australian, 2009). His comments make the inference that when assessing risk and threat levels, Australia should take into consideration international incidents that occur in close geographical proximity to Australia.

A recent Lowy Institute Poll has identified that Australians do not believe that the terrorism threat faced by Australia has reduced since 2002 (Hanson, 2011:12). The survey found that 60% of participants thought the threat level was about the same as it was after the 9/11 attacks, with 19% even saying that it had increased. This was despite factors that were suggested in the poll to have decreased the actual threat level, such as a number of global terrorist arrests, increased security measures at facilities such as airports and the efforts undertaken during the Iraq and Afghanistan wars.

In fact, some have argued that Australia’s involvement in the Iraq and Afghanistan wars as a staunch US ally has potentially drawn Australia further into the crosshairs of those who oppose the ideals of the US and western values, making Australia more of a target and thus increasing the threat to the nation (Australian Government, 2004:66, Grono, 2004).

When ascertaining how members of the community arrive at their assessment of the national terrorist threat, one needs to look towards media publications as a potential
source. In a recent article, Foreign Affairs Minister, Kevin Rudd was quoted as saying that “September 11 could easily have happened in Sydney and it could still happen” (Probyn, 2011).

In justification of Australia’s security measures Former Prime Minister John Howard claimed “because of the efforts of our intelligence and security apparatus, and the inherent strength of the Australian way of life, we have prevented terrorists carrying out any attacks here” (Conway, 2011). However, he goes on to claim that the terrorist threat still exists and that Australians need to remain cautious and accept the fact that the security measures may cause inconveniences along the way.

In a recent media release Attorney-General Robert McClelland highlighted that the number of investigations ASIO conducted into terrorist-related activity had increased threefold since 2005, which indicated that Australia still faces serious threats (Attorney-General for Australia:2011).

This section has demonstrated that there is a perception in the community that the terrorist threat is real, a view which is reinforced by the Australian Government, by various political figureheads, by the media and by instances of terrorism itself.

**The Current Legislative Position**

On 12 August 2009 the Australian Government released a discussion paper on proposed reforms to Australian security legislation, inviting public comment. The purpose of the intended reforms was to try and ensure that the balance was maintained between providing an appropriate standard of national security against protecting the freedoms and civil rights of the Australian people.

The paper emphasised that the reforms would take into account the outcomes and recommendations of a range of independent and bipartisan reviews that had been conducted. These included inquiries into the Haneef case and into the security and counter-terrorism legislation that had been implemented after 9/11 (McClelland, 2009).
**Anti-Terrorism Laws Reform Bill 2010**

Introduced by Senator Ludlam of the Australian Greens on 29 September 2010, the intention of the *Anti-Terrorism Laws Reform Bill 2010* (Cth) is to reinstate democratic principles into Australian anti-terrorism legislation (Ludlam, 2010: 282-283).

In 2006 a review of the 2002 and 2003 security legislation was conducted by the Security Legislation Review Committee to ascertain if the laws were proportionately balanced in protecting the lives of Australians against the intrusion upon human rights. Otherwise known as the ‘Sheller Report’, the committee found that the current Criminal Code definition being used was inappropriate. It recommended that the ‘threat of action’ be removed from the wording as it causes uncertainty and subsequently suggested that threats be inserted elsewhere in the Act (Security Legislation Review Committee [SLRC], 2006:3,6).

The Australian definition as it currently stands also exceeds that of the UN Security Council’s as it includes acts not defined in international conventions and protocols. It is also claimed that the definition provides no clear demarcation between ordinary criminal behaviour and terrorist activity (Scheinin, 2006:8-9). This current Bill seeks to provide an alternative definition of a terrorist act, one that is more in line with the definition established by the Security Council (Ludlam, 2010: 282-283).

On the matter of proscription, the Bill is attempting to make the process more open and transparent and to give those who stand to be affected a greater opportunity to have their viewpoints considered as well as establishing an independent advisory committee to assist the Attorney-General’s deliberations. These inclusions were a result of the recommendations of the Sheller Report (Ludlam, 2010:284, SLRC, 2006:85, 91). As it stands, this Bill is still listed as being before the Senate.

**National Security Legislation Amendment Act 2010**

The *National Security Legislation Amendment Bill 2010 [2] (Cth)* was reintroduced by Attorney-General Robert McClelland on 30 September 2010, with the date of Assent being 24 November 2010. Amongst other things, it relied heavily on several
independent and bipartisan reviews of the security measures that were introduced in the years following 9/11, especially the review of the Haneef case. The Bill was intended to reflect the Australian Government’s ability to fulfil its obligation to protect Australia whilst at the same time protecting individual freedoms (McClelland, 2010:273-274).

It did this by including additional independent oversight mechanisms for Australia’s security agencies, whereby the Inspector-General of Intelligence and Security could effectively monitor the actions of the relevant agencies (McLucas, 2010:1209). The Bill also had the effect of separating the investigations of terrorism offences from non-terrorism offences and as earlier mentioned, putting a cap of seven days on detention for investigative purposes (Brandis, 2010:1144).

**Other Legislation**

A common theme that has been demonstrated throughout this paper is that the terrorism laws focus on tackling terrorism from a preventative approach, which has often led to instigating measures that impinge on personal liberties and violate the ethos of the presumption of innocence. Over the years concerns have been raised that the departure from traditional criminal justice mechanisms in relation to dealing with terrorism may set a precedent and begin to creep into other areas of criminal law (Williams, 2007:51).

An example of this may be found in the recent passing of the *Prohibited Behaviour Orders Act 2010* (WA) in Western Australia. Classified as civil proceedings, this legislation provides the courts with the power to restrict the activities of people who are deemed to be recidivist anti-social offenders in an attempt to stop them from reoffending. The term ‘anti-social behaviour’ is broad and refers to conduct likely to cause harassment, alarm, distress, fear or intimidation to others or alternatively, damage to property (*Prohibited Behaviour Orders Act 2010* (WA) s.3(1)). There is also a list of sixty-eight prescribed offences deemed to automatically fall under the category of anti-social, ranging from minor offences such as trespassing, graffiti, public consumption of alcohol and careless driving, to those considered more
serious, such as robberies, serious assaults and indecent acts (*Prohibited Behaviour Orders Regulations 2011* (WA) schedule 1).

Applicable to juveniles as well as adults, those issued with a Prohibited Behaviour Order (PBO) may be subject to restrictions that would otherwise be considered lawful, such as associating with certain individuals, attending specified places, possessing certain things and engaging in certain behaviour (*Prohibited Behaviour Orders Act 2010* (WA) s.10).

In addition to this, once granted, the details of the PBO are publically accessible along with the name, photograph, and residing suburb of the constrained person (*Prohibited Behaviour Orders Act 2010* (WA) s.34). This legislation has led to concerns regarding invasions of privacy, particularly in regards to the publication of juvenile’s details, which have historically been protected in Australian legal proceedings (Crofts and Witzleb, 2011:34).

Certain parallels can be drawn between the PBO’s and the anti-terror legislation. Firstly, PBO’s are a civil remedy used to curtail criminal behaviour with the burden of proof being on the balance of probabilities, as is the case with the control orders explored in Chapter One (*Prohibited Behaviour Orders Act 2010* (WA) s.28(4)). Secondly, as was also seen with the control orders, the constraints open to the court have the ability to restrict otherwise lawful actions, such as freedom of association and freedom of movement. Lastly, the purpose of PBO’s is to prevent future criminal behaviour, effectively castigating a person for something that they have yet to do, which aligns with elements of the preparatory offences discussed in previous chapters.

*International Influence*

This paper has made several references to the fact that Australia has been extensively influenced by international legislative framework and terrorist incidents that have occurred abroad. These have been a major contributing factor in devising Australia’s legislative counter-terrorism response. If there is a trend occurring whereby Australia seemingly follows in the footsteps of its likeminded counterparts, then perhaps it is
worth briefly noting the current state of the legislative responses of these countries, specifically the UK.

Based on an election promise made in 2010, the UK Coalition Government ordered a review of their anti-terrorism legislation, including control orders, with a view that they may be abolished or scaled back. This was amidst claims that control orders were illiberal and that there may be better alternatives (Bachmann, 2010:159).

According to the review, there was a widespread perception that the line between security and freedom was shifting in the wrong direction. This was a result of increased security measures coupled with the State’s desire to encroach upon the private lives of its citizens (Macdonald, 2011:2). The review found that some of the UK’s security and counter-terrorism powers were disproportionate and unnecessarily impinging on civil liberties (May, 2011:5).

Subsequently, the Terrorism Prevention and Investigation Measures Bill 2010–2011 (UK) was introduced in the House of Commons on 23 May 2011 and is now at the committee stage in the House of Lords. According to the Bill’s Explanatory Notes, the proposed legislation relies heavily upon recommendations made in the review and seeks to abolish the system of control orders, instead implementing a less intrusive system called the Terrorism Prevention and Investigation Measures.

**Analysis**

The purpose of this thesis is to highlight the implications that the introduced anti-terrorism legislation has had on Australia’s social contract and to assess where the balance lies at this point in time. Its intention is not to assess the effectiveness of the legislation in combating terrorism, nor is it to make recommendations regarding the current provisions. It is simply to gauge whether the Government is meeting its obligation to provide a level of security that is symbiotically compatible with the protection of an individual’s right to life, liberty and property and if not, to identify which side of the scale is tipped.

In order to provide a meaningful analysis it is important to extract and compare the pertinent points that have been raised in the preceding sections. This involves branching off into two sections; the security aspect and the civil liberties aspect.
Security

In order to maintain legitimacy, governments need to ensure they provide adequate security for the nation. The events of 9/11 and Australia’s alliance with the US, in particular its joint involvement in Iraq and Afghanistan, has meant that Australia faced an increased threat from international and domestic terrorism.

With Resolution 1373, the UN Security Council recognised that there was a need to legislate against terrorism on a global scale, sending out the message that this type of offending was of a serious enough nature to warrant its own set of laws. Australia, having had no specific counter-terrorism legislation at the time, was now obliged to legislatively focus on this area.

The legislation that has been brought in over the years served to ensure that security agencies have the ability to effectively detect, prevent, investigate and prosecute instances of terrorist-related activity. This was the intention of Parliament, as was seen in the debates discussed in Chapter Two. It was later realised and affirmed by the judiciary, where it has been recognised that the laws heavily focus on prevention in the first instance. As an attack is yet to occur on Australian soil, perhaps it can be inferred that to a certain extent, the laws are serving their purpose.

It has been shown that rightly or wrongly, sections of the Australian community feel threatened by terrorism, with some believing that the risk has increased during the last decade. Although the instances of terrorism that have claimed the lives of Australians have all occurred overseas, these incidents have impacted heavily on the Australian psyche. Part of the Government’s role in providing security is to ensure that the community is not only physically secure, but also that their followers have psychological confidence in the Government’s ability to protect.

Given that the operative functions of security agencies are largely secretive by nature, which is assisted by legislation that allows for covertness, it would be an impossible task to accurately comment on the actual threat level. However, as it stands, the Government has set the current national security threat level to medium, meaning that an attack could occur. This, coupled with the community perceptions
and Resolution 1373, should be enough to persuade even the most sceptical that Australia is not risk free and hence, there can be no doubt that Australia was justified, even duty-bound, to pass counter-terrorism laws.

**Civil Liberties**

On the other side of the spectrum is the Government’s obligation to provide an environment where individuals are free to prosper with limited intrusion on their civil rights. As has been demonstrated, provisions of Australia’s anti-terrorism legislation have the potential to impinge on these rights.

Specifically, this has included freedom of association, movement and expression and freedom from arbitrary detention. The laws potentially enable due process violations and breach the right to non-discrimination, privacy, seeking independent remedies for alleged unlawful detention, the informing of charges at the time of arrest, the right to silence against self incrimination and the reversal of the presumption of innocence.

The argument has been raised that in the process of making these laws, there were not enough safeguards to ensure that these rights were adequately protected. This was in part due to the fact that Australia, unlike its international counterparts, does not have a Charter of Rights that needs to be adhered to when drafting legislation. It was also because a great deal of the legislation was passed too quickly and without adequate consultation that may have softened the impact the provisions had on the erosion of liberties.

Whilst the legislation has the ability to impact upon the freedoms of all Australians, it was identified that in reality, the provisions may disproportionately affect specific sectors of the community, largely encompassing those of Arab descent and followers of the Muslim faith. By identifying that the main terrorist threat comes from Islamic extremism, the Government has effectively focused the attention of the public and law enforcement authorities on those that fall within this category, essentially labelling them as a greater threat.
By this reasoning, it can be argued that the majority of the population would be largely unaffected by the legislation’s provisions, whilst people within the target group may find themselves at a higher risk of having their rights infringed upon. As covered, the Government is aware of this disparity and has attempted to alleviate the situation by promoting measures to mitigate marginalisation and radicalisation.

What has also been raised as a cautionary note is that if proper care is not taken, elements of the legislation that breach civil rights may begin to seep into other areas of criminal law. We may already be seeing evidence of this with recently introduced PBO’s, which are a preventative measure that uses past behaviour as an indicator of future behaviour, allowing the courts to impose restrictions on activities that would otherwise be considered lawful.

*The Balance*

So where does the current balance lie? At the beginning of this paper it was put forth that an evaluation of the legislation and its impact on the social contract would result in one of three outcomes. Firstly, that the provisions were too onerous when measured against the perceived threat, leading to a government with overly excessive power at the cost of civil rights. Secondly, that the legislation was not powerful enough to ensure the required safety of the Australian public. Lastly, that the security measures proportionately reflected the threat level whilst at the same time ensuring that there were mechanisms in place to reduce the erosion of civil liberties.

Either of the first two outcomes would represent a failure by the Government to uphold its end of the social contract, effectively meaning that the balance between national security and civil rights is off kilter.

In Australia the security environment continues to undergo legislative changes. It has been demonstrated that these changes take into consideration the results and recommendations of reviews that have been conducted into the legislation and their impact on civil rights. It also takes into account inquiries into instances where the Government was seen to overstep the boundary, such as the case of Mohamed Haneef. Also playing a factor is deference towards the perspective of the UN
Security Council, with proposed amendments of the legislative definition of a terrorist act now seeking to fall into line with the Council’s view.

What this indicates is that there is recognition at a high level of the need to maintain the balance between security and liberty and there is willingness on behalf of those in power to debate and consider amendments that are brought before them.

At the end of the day the Government is faced with a fine balancing act. They have an obligation and an expectation by the public to provide a safe, yet liberal society. Failure to do so will result in their demise come election time. Hence, the balance must be measured not only by the intricacies of the systems in place, but also by how the public reacts to security provisions in an ongoing capacity. An upside of living in a liberal democracy means that people have the freedom to decide whether or not to condone certain rules and regulations. When not supported, in a truly democratic society, disgruntled populations have the luxury of expressing their viewpoints at the ballot box.

A decade has passed with these security measures in place and during that time many political decisions have been made. We have seen a change in political parties as well as a change in in-house leadership. The exiting of the Howard regime did not bring with it significant reductions to the legislation, however security reforms that take into consideration the balance between threats to security against human rights infringements have been present during the Gillard Government’s tenure. Despite minor amendments here and there, there has still been no radical alteration to the laws that were introduced after 9/11.

Viewing all of the abovementioned factors in combination makes a compelling case that the current balance of Australia’s social contract would fall within the third proposed outcome; namely that the balance has been struck. On the security front it is acknowledged that the terrorist threat exists, that there is a need for strong terrorism legislation and that it is needed not only to punish offenders, but also to prevent instances of terrorism. From a human rights point of view, it is acknowledged that the legislation has the potential to impinge upon civil rights and that some individuals may be more at risk of infringements than others.
What is apparent is that as yet, there has been no mass outcry calling for the drastic overhaul of the provisions, which indicates a public that is seemingly in support of the laws. On the contrary, many Australian’s still believe that there is a credible threat that the Government needs to provide protection against. However, what firmly places the Government in the third category is the ongoing readiness to revisit and debate aspects of the provisions as deficiencies are highlighted. This action helps to ensure that the balance of the social contract equilibrium is being met and maintained.
CONCLUSION

As the title suggests, the purpose of this thesis was to assess the current status of Australia’s social contract in a post 9/11 world. The key issue was whether the anti-terrorism legislation unjustifiably affected the balance needed to uphold individual civil rights and liberties of the Australian people.

In order to arrive at the final conclusion, various perspectives were explored. Firstly, a technical overview of the legislation was given, which outlined what changes were made to the security environment. This encompassed a description of the provisions available both before and after 9/11. Next, it was discovered how and why the changes were brought in. This involved an insight into parliamentary debates, which told of the different viewpoints and concerns that were held when the new measures were introduced. Also included in this section was the way the measures were justified to the Australian public.

The final chapter assessed the impact that the changes had on the social contract. Coming from a Lockean perspective, it explained how the social contract requires the Government to perform a balancing act that ensures they provide the nation with adequate security whilst still maintaining fundamental human rights. It also looked at observations made by the judiciary, a branch that is separate from the legislature and hence in a position to provide an unbiased view of the use of the legislation.

This was followed by a look at the marginalisation of groups within the community as a result of the legislation as well as an exploration of the perceived threat levels that Australia faces. An overview of recent legislation before Parliament served to provide an indication of the current frame of mind of those in power.

This has all led to an analysis of whether the Government currently is adhering to its obligations under the social contract. It came to the conclusion that despite the fact there is a potential for intrusion into civil liberties, there is also a need for strong legislation to protect Australia from the threat of terrorism. The fact that those in
power have demonstrated a willingness to publically look at past experiences in an attempt to assess the legislation and rectify subsequent deficiencies signifies efforts to maintain the required balance. This, coupled with the fact that the Australian public is seemingly supportive of the legislation signifies that the appropriate balance has been struck.

On a final note, it has been discussed in this thesis that the events and laws of other countries were heavily relied upon when devising Australia’s legislative response to terrorism. Currently, as a result of an election promise, security legislation in the UK is undergoing a transition, being scaled back in favour of greater protection of civil liberties. If there is truth in the assertion that Australia is influenced by the workings of its counterpart’s abroad, perhaps this might provide an insight into the direction that Australia is headed.
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