

CLARKE ENQUIRY PUBLIC FORUM

'Too Safe or Too Sorry'

Submission by Nicholas O'Brien

Associate Professor Counter Terrorism

Charles Sturt University

Our duty – which we have undertaken – is to motivate our umma to jihad for the sake of God against America and Israel and their allies.

(Osama Bin Laden, 1998)

Introduction

This paper will consider the 'too safe or too sorry' issue from a policing perspective. It will examine, albeit briefly, how terrorism has changed over the past few years. Although there are others much better qualified to comment on whether Australia is at risk from terrorism, that issue will be discussed with particular reference to recent comments made by the Deputy-Director General of the Australian Security Intelligence Organisation (ASIO). Perhaps most importantly, the police operating environment will be examined because, it too has changed. Comment will be made on the powers of detention without charge in another country - the UK. Comment will also be made on powers of arrest for terrorism offences. Finally, due regard will be placed in the importance of human rights and the issue of how to achieve the delicate balance between protecting the public and protecting civil liberties.

Background

It used to be said that terrorists wanted a lot of people watching and listening and not a lot dead (Jenkins, 1975, p.15). At the time that comment was made, in 1975, it was true. However the situation we are facing today is different. On 7th August 1998, Al Qaeda (AQ) bombed the US Embassies in Dar es Salaam, Tanzania and Nairobi, Kenya, and killed over 300 people and wounded more than 5000 others (Hoffman, 2006, p.87). This attack could be considered the beginning of AQ's assault on the 'west'. Attacks or attempted attacks by either Al Qaeda or similar groups with connections to AQ have included:

- the 9/11 attacks in the US in 2001,
- an attempt in 2001 to destroy American Airlines flight 63 from Charles de Gaulle International airport, Paris to Miami International airport, Florida by Briton Richard Reid (Gunaratna, 2002, p.13),
- bombings in several Middle Eastern countries, also Turkey, the Philippines, Spain, Indonesia, Britain and Morocco.
- in the UK in 2006 police thwarted a terrorist attack and a Scotland Yard spokesman commented that "mass murder on an unimaginable scale" had been disrupted (BBC, 2006). The trial has just been completed and on 8th September 2008 three men were convicted of a "massive terrorist conspiracy to murder involving home-made bombs" (BBC, 2008).
- here in Australia on 15th September 2008 six people were convicted of "being part of a home-grown terrorist cell plotting to wage violent jihad on Australian soil" (Hughes, 2008).

Worse may be to come.

In 2002 it was reported that AQ spokesman, Suleiman Abu Gheith, stated on a website that the “Islamic Nation” had the right to kill 4 million Americans, including 2 million children. The following words were used, "We have not reached parity with them. We have the right to kill 4 million Americans - 2 million of them children - and to exile twice as many and wound and cripple hundreds of thousands. Furthermore, it is our right to fight them with chemical and biological weapons, so as to afflict them with the fatal maladies that have afflicted the Muslims because of the [Americans'] chemical and biological weapons" (Middle East Media Research Institute, 2002).

In 2003, Sheikh Nasir Bin Hamd Al-Fahd published a treatise entitled, ‘The Legal Status of Using Weapons of Mass Destruction Against Infidels.’ Al-Fahd stated, “If a bomb that killed ten million of them and burned as much of their land as they have burned Muslims’ land were dropped on them, it would be permissible, with no need to mention any other argument. We might need other arguments if we wanted to annihilate more than this number of them” (Uphoff, 2004). Al-Fahd subsequently retracted the treatise but it is currently available on the internet. Michael Scheuer, a former head of the CIA’s Bin Laden Unit and author of a number of books on terrorism takes little regard of the retraction believing instead that Arab regimes use such recantations to, “deceive Western governments and publics.” He says, “Few Muslims, radical or otherwise, put stock in such reversals because their prevailing and probably accurate assumption is that the individual’s reversal of view was prompted by threats or physical punishment directed at him or his family” (Scheuer, 2008, p.74).

Is Australia at Risk from Terrorism?

What of the future for Australia? On 16th September 2008 at the Security in Government Conference, The Deputy Director-General of ASIO made the following comments about Al Qaeda: “In 2008, this movement, which is essentially a loose network of groups and networks spanning many countries, remains just as committed to perpetrating acts of terrorist violence, including mass casualty attacks.” The Deputy Director-General also made the following comments about terrorism and the threat to Australia: “Terrorism is a visible and immediate threat to Australia and other countries around the globe. Globally, there have been at least 185 significant terrorist attacks in 29 countries since the beginning of the year, resulting in the deaths of more than 1,600 people, and the injury of almost 3,000 others”...and “the main source of terrorist threat to Australia and its interests continues to come from violent jihadists”. He also stated, “...if undetected and unchecked, extremists have the potential to threaten vital national infrastructure and the safety of Australians in Australia as we go about our every day lives....we continue to assess that without preventative measures taken by ASIO and other Australian authorities, attacks would have occurred here” (Security in Government Conference, 2008).

It is in these circumstances that legislators have to frame laws to protect citizens from terrorist attacks. These laws will inevitably impact on human rights so the laws need to be considered and above all proportionate to the threat. However legislators need to be aware of the environment in which the police have to operate. In the author’s experience, the police operating environment is vastly more complex today than it was before AQ’s attack on the embassies in East Africa in 1998.

Police Operating Environment

The operating environment has changed in five key areas:

- Searching of premises
- Information and Communication technology
- Foreign Languages
- International dimension
- When to intervene

Each of these areas impacts on the ability of the police to successfully arrest and prosecute people suspected of terrorism offences.

Searching of Premises

Because information can be stored in electronic form on devices that are similar in size to a fingernail, searches of premises will often need to be undertaken in the most minute forensic detail. The author is aware of a case in the UK where the search of a dwelling took almost three months. This operation consisted of a conventional search which took almost one month. This was followed by a deep search then a fingerprint search. It should be mentioned that when using chemical fingerprint technology it can take two weeks to obtain fingerprints. After the treatment is applied it takes one week for the marks to develop and then a second week to allow the marks to settle before they can be photographed and the prints lifted.

The author is aware of another search which took some ten weeks to complete. This particular address was used to construct explosive devices. Five weeks were used to search the premises and a further five were needed to complete chemical fingerprint treatment. This particular search yielded exceptional results.

The author is aware of another search which took eight weeks to complete consisting of a three week conventional search followed by a five week chemical fingerprint search. The hours worked in this particular search were 7am until 10pm (15 hour days).

It is not just premises that are searched. In one particular operation that the author is aware of a search of a wood took five months to search. Significant evidence was obtained during this particular search.

The author is aware that the average time to conventionally search a three bedroom house in the UK is three days, however if the premises were deemed to be worthy of a full forensic search the search could take between two and four weeks.

The importance of a thorough and professional searching regime cannot be over-emphasised. The author is aware of one case when the garage of a dwelling was searched and completed. Chemical fingerprinting was applied to the wall of the garage and a set of hand prints was found. Because of the unusual location of the fingerprints it was decided to examine the rafters of the garage roof. Hidden in the rafters was a computer memory stick which proved to be important evidence. This evidence was found three weeks after the commencement of the search.

Information and Communication Technology (ICT)

In the opinion of the author, the advances in ICT have been one of the major factors which has complicated counter terrorism (CT) investigations. These range from the myriad of uses that terrorists have for the internet, to the complications involved when a large amount of electronic data is seized. The author is aware of one operation in which over 800 computer exhibits were seized, not including CDs or DVDs. The computer memory amounted to over 8 terabytes (8000 gigabytes) of imaged files which were compressed. In this particular operation over 8000 CDs and DVDs were also seized. Whilst it is unlikely that the computer memory was full in this particular case the potential amount of information that could be stored is considerable. One gigabyte can store 64,782 pages in Microsoft Word and 677,963 pages in text files (How Many Pages in a Gigabyte?). Thus 8000 gigabytes could potentially store 518,256,000 pages in Word and 5423,704,000 pages in text format. If the average length of a book is 200 pages, this equates to 2,591,280 books in Word and 27,118,520 books in text format. To put this in context, the National Library of Australia stores some 2,700,000 books (What We Collect). No attempt has been made to analyse how much data could be contained in the 8000 CDs or DVDs seized in this investigation as the author is unaware of the proportion of CDs to DVDs seized. As the capacity on computer hard drives increases the issue of data analysis will become an increasing problem for law enforcement agencies worldwide.

The author is aware of some CT investigations in which computers that have been seized have contained encrypted information. This data can be extremely difficult, if not impossible, to decrypt. The author is aware of one case where the data had not been decrypted after three months although it is not known whether the encryption was eventually broken.

Foreign Languages

Most major cities of the world have become more cosmopolitan and have welcomed people from other countries. This has resulted in a need for police translation and interpreting services. The Metropolitan Police in London currently provides interpreters for one hundred and two different languages (999 Interpreting Services). Some people arrested for terrorism offences will speak the native tongue of the host country but others may not. Terrorists who are bi or multi-lingual may be in possession of documents which are in a foreign language and which will need to be translated. An example of this was the so called 'Al Qaeda Manual' which was found in Manchester, England and which was translated into English and used as evidence in a subsequent trial (Al Qaeda Training Manual). This manual was used in the trial of the alleged perpetrators of the US East African Embassy bombings (Ashcroft, 2001).

International Dimension

Whilst modern international terrorism began in 1968 when terrorists from the Popular Front for the Liberation of Palestine (PFLP) hijacked an El Al flight from Rome to Tel Aviv (Hoffman, 2006, p.63), in most countries terrorism was more of a domestic problem than an international issue. Following the 9/11 attacks that situation has been reversed. Whilst domestic terrorism does still exist, in 2003 the International Institute for Strategic Studies (IISS) estimated that AQ may have access to some 18,000 jihadists and representatives in 60 countries (Transnational Terrorism after the Iraq War). It is the author's experience that the majority of terrorist operations will have international dimensions that need to be investigated. These can include the requirement for fast time enquiries to be made in other countries. With this requirement comes the complicating factors of different legal systems,

some of which may require complex paperwork, translation into different languages and involve global time differences.

It is not uncommon for multiple countries to be involved in an operation and these investigations are complicated by the factors mentioned above. An example of this was Operation Crevice which was a joint UK, US, Pakistan and Canadian investigation (Mueller, 2005). This case led to the conviction of five people for terrorism offences (Specialist Operations Management Information).

When to Intervene

The decision by police to intervene in any criminal case is often determined by the weight of evidence collected. Police will want to intervene at a time that provides the best prospect of a conviction. This is not the case in terrorism investigations where the decision to intervene is often decided by the potential risk to public safety. The case of the Millennium Dome attempted robbery in London is an example of police intervening when the evidence would provide best prospect of obtaining convictions. The police were aware that a gang was going to attempt to steal some 200 million pounds worth of jewels from the Millennium Dome. Surveillance was established around the gems and they were substituted for crystals. Police only intervened when the gang crashed into the Dome with a bulldozer, donned gas masks, set off smoke bombs and attempted “to remove the diamonds with sledgehammers and a nail gun” (Dome robbery: How it happened).

In terrorism cases, police intervention cannot be allowed to take place at such a late stage in the commission of a terrorist act unless police are certain that there is no danger to either the public, the police or the terrorist. The reason for the early intervention is because of the potential for catastrophic consequences. The author is aware of and has participated in

decisions to intervene at an early stage in a terrorism investigation because of the potential risk to public safety. Following such interventions police need time to gather and analyse evidence and make recommendations as to prosecutions. It was for this reason and the increasing complexity of dealing with terrorist investigations which led to UK police requesting powers which would allow detention of terrorism suspects without charge for up to 90 days with appropriate judicial oversight.

Detention without Charge in Terrorism Cases in the UK

In the UK, section 41 of the Terrorism Act 2000 states that “a constable may arrest without a warrant a person whom he reasonably suspects to be a terrorist” (Counter Terrorist Powers).

A person can be held for a period of 48 hours. After this time police can apply for further detention time. Application is made to a ‘judicial authority’. For the purpose of this Act, a ‘judicial authority’ is the Chief Magistrate or deputy, or a District Judge.

Schedule 8 of the same Act deals with further detention. The maximum period of detention is 28 days and detention can only be authorised for maximum periods of seven days at any one hearing. Applications for detention after 14 days have elapsed must be made to a High Court Judge. Section 32 of Schedule 8 states that a judicial authority may issue a warrant of further detention only if satisfied that –

“ (a) there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary to obtain relevant evidence whether by questioning him or otherwise or to preserve relevant evidence, and

(b) the investigation in connection with which the person is detained is being conducted diligently and expeditiously.”

In 2005 the UK government attempted to extend the period (then 14 days) to 90 days. This move was supported by the then Prime Minister, Tony Blair, who described the case for holding terrorism suspects without charge as “absolutely compelling” (Government Publishes Anti-Terror Bill). The attempt to extend the detention period to 90 days was not accepted by parliament. At the time of writing the government in the UK is attempting to increase the detention time from 28 days to 42 days.

Human Rights Issues

Geoffrey Robertson QC commenting on terrorism believes that the lessons of history have illustrated that it is important not to overreact and that abandoning basic human rights is a form of surrender which serves to give terrorists what they desire (Robertson, 2006, p.553). Similarly Paul Wilkinson, when discussing terrorism and the rule of law comments, “Overreaction and general repression, which could destroy democracy far more rapidly than any campaign by a terrorist group, should be avoided” (2006, p.61). He further comments that there is “abundant” evidence to show that an overreaction actually serves the cause of the terrorist (2006, p.82). However Wilkinson also argues against under-reaction (2006, p.61). The issue of human rights is fundamental when considering anti-terrorism legislation. Draconian legislation will serve as a recruiter to terrorist organisations, yet police need the powers to protect the most important human right: the right to life. Human rights can be safeguarded with appropriate judicial oversight of anti-terrorism legislation.

There are a number of provisions in the current legislation which could be amended to strengthen safeguards afforded to detained persons in Australia. Currently police can apply to a Justice of the Peace (JP) for an extension of the investigation period or ‘dead’ time (time when the clock stops for the purpose of the time limits on the investigation period). Currently there is no limit on the amount of dead time that can be specified. In these

circumstances greater judicial oversight would be provided if the judicial officer examining requests for detention was a magistrate or judge. Even if a person was arrested in a remote location it should be possible, given today's communication technology, for a magistrate or judge to hear such applications. Consideration should also be given to having a cap on the amount of time that police can hold terrorism suspects without charge. Given the complexities of modern terrorist investigations, a 28 day period may be appropriate. Further safeguards could be in-built into the process by requiring that detention of over 14 days could only be authorised by a senior judge, as in the UK.

Parliament may also consider the introduction of 'sunset clauses' for terrorism legislation to ensure that the need for them is reviewed perhaps every three years.

Further oversight of Counter Terrorism Powers

It has been proposed to establish a post of an 'Independent Reviewer of Anti-Terrorist Laws' similar to a system that operates in the UK. The post-holder could be a senior judge with a record of independence and should be vetted to ensure that he/she can have access to all classified information. The Reviewer should be given unfettered access to all agencies that have anti-terrorist remits and should present an annual report to parliament on both the laws and how agencies have used those laws.

All aspects of the use of counter terrorism legislation should be scrutinised to ensure that proper use is being made of anti-terrorism powers.

In the UK the current Reviewer is Alex Carlile, a member of the House of Lords and a barrister. Carlile, who used to be a member of parliament for the Liberal Democrats, has an impressive CV and is President of the Howard League for Penal Reform. Carlile's reports are published on the internet and he is not averse to criticising police when he considers it

necessary, for example, in his annual review of the UK's Terrorism Act 2000, published in June 2007, he stated that police were using stop and search powers too much and in his opinion, "its use could be halved from present levels without risk to national security or to the public. (Carlile, 2007)"

Such scrutiny would serve to increase the professionalism of both police and intelligence agencies as they will know that their paperwork will be reviewed by an independent person who is an expert on the legislation. It would also reassure the Australian public to know that there is independent reviewer of the operation of terrorism legislation by a person who has access to the complete picture. Parliament would have an annual report on how counter-terrorism legislation is being used in Australia. Supervision of police and security services' use of counter-terrorism legislation is healthy in a democracy. The powers granted to these agencies are exceptional in their intrusiveness, but they are also necessary to protect us from those who would indiscriminately kill us. An independent reviewer would ensure that the use of the powers was proportional and appropriate and highlight any deficiencies.

Comment on Powers of Arrest for Terrorism Offences

Currently AFP officers have to have reasonable belief prior to arresting a person for a terrorism offence (Commonwealth Consolidated Acts). Conversely a New South Wales (NSW) police officer has a lesser requirement before making a decision to arrest, one of reasonable suspicion (Clarke Enquiry Public Forum). Two standards for arrest in terrorism cases could lead to confusion and possibly an AFP officer asking a NSW officer to make an arrest under the 'reasonable suspicion' standard. It is the author's belief that the powers of arrest should be standardised across the country to one of 'reasonable suspicion'.

Conclusion

There is no doubt that investigating terrorism offences is both difficult and lengthy. The complexities of these investigations have increased in recent years with the internationalisation of terrorism, the advancement of information and communication technologies and the desire to commit mass murder which has meant that police must intervene early in terrorism investigations. Human rights and civil liberties have been fought for over centuries and should be jealously guarded. Achieving the right balance between protection of the public and protecting civil liberties is a delicate balance and one about which there will never be universal agreement. However the right to life is the most precious of human rights and police must be given the necessary tools to protect the public. One way to reassure the public that police and other agencies are using these powers appropriately is to ensure that there is rigorous scrutiny of the use of legislation by all agencies and to make sure that appropriate judicial authorities approve such powers as pre-charge extension of detention. Also the use of 'sunset clauses' for terrorism laws would ensure that the need for the legislation is reviewed on a regular basis.

Give police the power to protect but ensure that the power is scrutinised.

References

- 999 *Interpreting Services - Supported Languages*. (n.d.). Retrieved September 17th, 2008, from Metropolitan Police: http://www.met.police.uk/c3i/files/supported_langs.pdf
- Al Qaeda Training Manual*. (n.d.). Retrieved September 17th, 2008, from copied from US Department of Justice: http://www.au.af.mil/au/awc/awcgate/terrorism/alqaida_manual/
- Ashcroft, J. (2001, December 6th). *Testimony of the Attorney General John Ashcroft*. Retrieved September 17th, 2008, from US Department of Justice: <http://www.usdoj.gov/archive/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm>
- BBC. (2006, August 10). *'Airlines terror plot' disrupted*. Retrieved June 18, 2008, from BBC News: http://news.bbc.co.uk/2/hi/uk_news/4778575.stm
- BBC. (2008, September 8th). *Three Guilty of Bomb Conspiracy*. Retrieved September 17th, 2008, from BBC News: http://news.bbc.co.uk/2/hi/uk_news/7528483.stm
- Carlile, L. (2007, June). *Report of the Operation in 2006 of the Terrorism Act 2000*. Retrieved September 19th, 2008, from Home Office: <http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/TA2000-review061.pdf?view=Binary>
- Clarke Enquiry Public Forum*. (n.d.). Retrieved September 19th, 2008, from Haneef Case Enquiry: [http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/\(C7C220BBE2D77410637AB17935C2BD2E\)~PublicForumIssuesPaper.pdf/\\$file/PublicForumIssuesPaper.pdf](http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/(C7C220BBE2D77410637AB17935C2BD2E)~PublicForumIssuesPaper.pdf/$file/PublicForumIssuesPaper.pdf)
- Commonwealth Consolidated Acts*. (n.d.). Retrieved September 19th, 2008, from http://www.austlii.edu.au/au/legis/cth/consol_act/ca191482/s3w.html
- Counter Terrorist Powers*. (n.d.). Retrieved September 18th, 2008, from Office of Public Sector Information: http://www.opsi.gov.uk/acts/acts2000/ukpga_20000011_en_5#pt5-pb1-l1g41
- Dome robbery: How it happened*. (2002, February 18th). Retrieved September 18th, 2008, from The Guardian: <http://www.guardian.co.uk/uk/2002/feb/18/dome1>
- Government Publishes Anti-Terror Bill*. (2005, October 12th). Retrieved September 18th, 2008, from The Guardian: <http://www.guardian.co.uk/world/2005/oct/12/terrorism.politics>
- Gunaratna, R. (2002). *Inside Al Qaeda: Global Network of Terror*. Carlton North: Scribe Publications.
- Hoffman, B. (2006). *Inside Terrorism*. New York: Columbia University Press.
- How Many pages in a Gigabyte?* (n.d.). Retrieved September 18th, 2008, from LexisNexis: http://www.lexisnexis.com/AppliedDiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf
- Hughes, G. (2008, September 16th). *Abdul Nacer Benbrika and Five Followers Guilty of Terror Plot*. Retrieved September 17th, 2008, from The Australian: <http://www.theaustralian.news.com.au/story/0,,24352375-2702,00.html>

Jenkins, B. (1975). International Terrorism: A New Mode of Conflict. *International Terrorism and World Security*, 15.

Middle East Media Research Institute. (2002, June 12). *Why we fight America*. Retrieved June 20, 2008, from Middle East Media Research Institute:
<http://www.memri.org/bin/articles.cgi?ID=SP38802>

Mueller, R. (2005, September 14th). *Statement of Robert S Mueller III, Director of FBI*. Retrieved September 17th, 2008, from FBI: <http://www.fbi.gov/congress/congress05/mueller091405.htm>

Robertson, G. (2006). *Crimes Against Humanity*. Camberwell: Penguin Group.

Scheuer, M. (2008). *Marching Towards Hell*. New York: Free Press.

Security in Government Conference 2008: 'Australia's Security Outlook'. (2008, September 16th). Retrieved September 17th, 2008, from ASIO:
http://www.asio.gov.au/Media/Contents/sig_speech_2008.aspx

Specialist Operations Management Information. (2007, May 17th). Retrieved September 17th, 2008, from Metropolitan Police Authority: <http://www.mpa.gov.uk/committees/ppr/2007/070712/06.htm>

Transnational Terrorism after the Iraq War. (2003, June). Retrieved September 17th, 2008, from International Institute for Strategic Studies: <http://www.iiss.org/publications/strategic-comments/past-issues/volume-9---2003/volume-9---issue-4/transnational-terrorism-after-the-iraq-war/>

Uphoff, K. (2006, December 10). *Osama Bin Laden's Mandate for Nuclear Terror*. Retrieved June 20, 2008, from The Jewish Institute for National Security Affairs:
<http://www.jinsa.org/articles/index.html/function/view/categoryid/1701/documentid/2762/history/3,2360,655,1701,2762>

What We Collect. (n.d.). Retrieved September 18th, 2008, from National Library of Australia:
<http://www.nla.gov.au/collect/books.html>

Wilkinson, P. (2006). *Terrorism versus Democracy*. Abingdon: Routledge.