Counter-Terrorism Offences: A Comparison of the Australian and US Approaches

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Since September 11, 2001, there have been substantive differences in the approaches taken by Australia and the United States with respect to the legislation of new terrorism-related offences. These new offences are informed by their respective legislative approaches to terrorism prior to 9/11. While this had been an on-going issue for the US, Australia had little direct experience with terrorism prior to this incident. This new perceived threat of terrorism has challenged the efficacy of traditional criminal law principles where, rather than bringing perpetrators to justice, the trend is towards preventing the occurrence of harm altogether. Thus, while Australia sought to implement a comprehensive counter-terrorism legislative framework, the US broadened existing measures and, in doing so, sent law and power in new directions. While these differences are subject to jurisdictional constraints, they also emerge owing to practical implications arising from the separation of powers under the respective constitutions. Where the Australian approach can be characterised as hyper-legislation, the US response is highlighted by a tendency to rely on executive power which is less burdened by rights concerns whereas a greater legislative response would be restrained by their constitutionally entrenched bill of rights. These differences are illustrated through the use of a war paradigm, particularly through the notion of a 'war on terror'. While both the US and Australia have unique national security concerns, the pervasive US approach to combating terrorism is highlighted by the notion of American exceptionalism.

Legislative Approach

Before 9/11

The legislative approach to terrorism has differed drastically between Australia and the US, both following and prior to 9/11. Australia, aside from isolated incidents such as the 1978 Hilton Hotel

bombing, had little direct experience with terrorism.[1] This is reflected in pre-9/11 legislation where, with the exception of the Northern Territory, the criminal law was utilised to deal with politically motivated violence.[2] Although some specific acts that could amount to terrorism were criminalised,[3] the lack of legislation at either State or Commonwealth level broadly targeting terrorism reflects a sense of complacency with the national security landscape and the criminal law framework at that time. This lack of counter-terrorism legislation prior to 9/11 helps to explain the legislative response after the fact, a response which has been described as 'hyper-legislation'.[4]

The US, by contrast, had experienced numerous terrorist incidents prior to 9/11 since the early 1960s with the hijacking of American planes. These incidents mostly occurred outside US borders, and while there were also domestic incidents orchestrated by US citizens,[5] these were far less common; often such events were merely perceived as law enforcement issues.[6] Although Congress had criminalised the provision of material support to terrorists in 1994,[7] the US response to terrorism before 1996 mostly focused on international, rather than domestic, security.[8] This is highlighted by the inclusion of a definition of 'international terrorism' as 'violent acts … intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by assassination or kidnapping; and occur primarily outside the territorial jurisdiction of the United

[1] George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) *35(3) Melbourne University Law Review 1136*, 1161.

[2] George Williams, 'Anti-Terror Legislation in Australia and New Zealand' in Victor V. Ramraj, Michael Hor and Gerge Williams (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 541, 546.

[3] E.g. the hijacking of aircraft under the *Crimes (Aviation) Act 1991* (Cth).

[4] Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 309-60.

[5] See, e.g., Laura Donohue, 'In the Name of National Security: US Counterterrorist Measures, 1960-2000' (2001) *13(3) Terrorism and Political Violence 15*.

[6] Ibid 15.

[7] *Violent Crime Control and Law Enforcement Act of 1994*, Pub L No 103-322, 108 Stat 1796 (1994).

[8] Roach (n 4) 167.

States…'.[9] Consistent with this international focus, the US does not have a domestic security intelligence agency.[10] Part of the US intelligence framework included the *Foreign Intelligence Surveillance Act of 1978* (*FISA*),[11] which allowed for court-ordered domestic security surveillance against suspected agents of foreign powers; where an 'agent of a foreign power' was defined to capture those engaging in international terrorism.[12]

These initial offences for providing material support were defined narrowly to include: among others, offences for providing training, weapons, explosives or lethal substances.[13] Under these definitions, an offence was construed where these requisite acts were committed with the fault elements of intent and knowledge, carrying a fine and/or imprisonment for a maximum of 10 years.[14] The 1993 World Trade Centre and 1995 Oklahoma City bombings led to the enactment of the *Anti-Terrorism and Effective Death Penalty Act of 1996*[15] which, inter alia, listed specific foreign terrorist organisations and criminalised the provision of material support to listed groups. The introduction of this Act was met with concerns that it was enacted as a response to these two events where the perceived need to respond overwhelmed all rational discussion;[16] similar concerns were raised in relation to other post 9/11 responses including the enactment of the *PATRIOT Act* which allowed for new wide-ranging powers for the purposes of strengthening national security.[17]

Prior to 9/11, the US had reason to believe that their criminal justice system could effectively respond to terrorism. After all, the World Trade Centre and Oklahoma City bombings had led to

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[9] *Federal Courts Administration Act of 1992*, Pub L No 102-572, 106 Stat 4521 (1992), s 1003 §2331.

[10] Roach (n 4) 172.

[11] Pub L No 95-511, 92 Stat 1783 (1978).

[12] Ibid s 101.

[13] *Violent Crime Control and Law Enforcement Act of 1994*, s 120005.

[14] Ibid.

[15] Pub L No 104-132, 110 Stat 1214 (1996).

[16] See Roach (n 4) 172.

[17] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* ('*Patriot Act*'), Pub L No 107-56, 115 Stat 272 (2001).

successful convictions.[18] Obtaining successful convictions for the Hilton Hotel bombing in Australia had been more problematic: charges had been laid, then dropped and the accused pardoned, and even where there was a conviction, doubts were cast as to the accused's confession and credibility.[19] While the 1994 US criminalisation of material support and resources to terrorists expanded the scope of inchoate offences applicable to domestic terrorism, any confidence in the efficacy of both Australian and US criminal law systems were shaken by 9/11.

Post 9/11

The hyper-legislative approach to 9/11 by the Australian government is characterised by the sheer volume of new laws targeting terrorism.[20] Although the electoral cycle had slowed Australia's response, the Howard government alone had enacted 48 separate anti-terrorism statutes,[21] a significant amount by any measure. In 2002 alone, approximately 100 new offences were introduced which 'do not readily fit the traditional mould of domestic crimes, many punishable by life imprisonment'.[22] Although the scale of such legislation is, to some extent, a result of differences in the style of legislative drafting, there are also significant substantive differences.

The *Security Legislation Amendment (Terrorism) Act 2002* (Cth), amending the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'), provided that a 'terrorist act' is any conduct or threat made with the intention of advancing a political, religious or ideological cause, and with the intention of coercing or intimidating a government or intimidating a section of the public, where such an act causes any of several listed harms including death.[23] This Act also introduced offences for

[18] David Cole and James Dempsey, *Terrorism and the Constitution* (First Amendment Foundation, 2002) 108, cited in Roach (n 4) 172.

[19] See Ibid 314-5.

[20] Ibid 309-60.

[21] Williams (n 2) 547.

[22] Bernadette McSherry, 'Terrorism Offences in the *Criminal Code*: Broadening the Boundaries of Australian Criminal Laws' (2004) *27 University of New South Wales Law Journal 354*, 354.

[23] S 100.1.

committing a terrorist act and preparatory offences, the latter expanding the scope of inchoate offences ('attempts', 'conspiracy' and 'incitement') under the criminal law. Preparatory offences under the amended *Criminal Code* include: providing or receiving training connected with terrorist acts (s 101.2), possessing things connected with terrorist acts (s 101.4), collecting or making documents likely to facilitate terrorist acts (s 101.5), and other acts done in preparation for, or planning, terrorist acts (s 101.6). More recent offences include declared area offences which prescribe a penalty of 10 years imprisonment for entering or remaining in certain declared areas of foreign countries.[24]

The Australian legislative response went much further than simply creating new offences; part of the controversy involves the content and breadth of the new provisions. Other counter-terrorism measures include, but are not limited to, control orders, preventative detention orders, and ASIO warrants. Control order provisions are contained within division 104 of the *Criminal Code* which allow certain obligations, prohibitions and restrictions to be imposed on persons for counter-terrorism purposes.[25] For instance, an interim control order issued against 'Jihad Jack' Thomas included a home curfew between midnight and 5am, an obligation to report to police thrice weekly, and bans on communicating with members of terrorist organisations and certain people including Osama Bin Laden.[26] Preventative detention orders allow for persons to be taken into custody and detained in order to prevent terrorist acts or to preserve evidence.[27] The legislation also empowered ASIO to seek questioning or questioning and detention warrants for the purposes of collecting intelligence 'that is important in relation to a terrorist offence'.[28] The introduction of all these measures shows that the Australian Legislature was concerned with the

[24] Ibid s 119.2.

[25] Ibid s 104.1.

[26] Bronwen Jaggers, 'Anti-terrorism control orders in Australia and the United Kingdom: a comparison' (Research Paper no 28, Parliamentary Library, Parliament of Australia, 29 April 2008) 7.

[27] *Criminal Code* s 105.1.

[28] *Australian Security Intelligence Organisation Act 1979* (Cth) 34E, 34G

creation of a comprehensive counter-terrorism framework, and in doing so, was willing to introduce controversial new provisions in order to combat terrorism domestically.

In contrast, the US legislative response was more restrained. The *Patriot Act* redefined an 'act of terrorism' to capture 'domestic terrorism' in addition to 'international terrorism'.[29] The Act also included mass destruction as a means to affect the conduct of government under these definitions.[30] The Act also, inter alia, amended the offences for providing material support to terrorists by adding 'expert advice or assistance' as a substantive offence,[31] and by increasing maximum penalties.[32] The *Patriot Act* was still, however, largely directed at international terrorism, with parts of the Act expanding the scope of intelligence and surveillance operations through amendments to the 1978 *FISA* legislation.[33] Other parts of the Act continued prior efforts at targeting terrorist financing.[34] While some new offences were introduced such as for attacks on mass transportation systems,[35] the fundamental structure of the US criminal justice system was relatively unchanged.[36]

Criminal Law Restraints

Australia's primary basis for implementing new counter-terrorism laws was that the criminal law framework in place in 2001 was inadequately positioned to combat the threat of terrorism. The traditional criminal law is premised around bringing a perpetrator to justice, albeit after the fact. The devastating events of 9/11 have raised questions about the efficacy of this fundamental criminal justice principle, suggesting instead that pre-emptive action should be taken to prevent

[29] *Patriot Act* s 802.
[30] Ibid.
[31] Ibid s 805.
[32] Ibid s 810.
[33] See Roach (n 4) 176-9.
[34] Ibid 179-80.
[35] *Patriot Act* s 801.
[36] Roach (n 4) 182.

the materialisation of such threats. Existing criminal laws were viewed as ineffective simply for the reason that terrorist acts had been committed.[37]

Criminal justice principles, such as proof of harm and fault, are thus perceived to be ineffective deterrents. Although inchoate offences are criminalised under the *Criminal Code* and treated as substantive crimes in themselves, the introduction of preparatory offences broadens the scope of this preventative logic. Preparatory offences also eliminate the requirement of proving a defendant had planned to commit a specific terrorist act,[38] as reflected by the enactment of the *Anti-Terrorism Act [No 1] 2005* (Cth). In a case involving preparatory offences, Spigelman CJ observed that:

> Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgement has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, e.g. well before an agreement has been reached for a conspiracy charge.[39]

While this logic is also prevalent in other counter-terrorism measures such as control orders and preventative detention, and indeed with US military detention, it was aptly summarised by former Prime Minister John Howard, who said that 'when you are dealing with terrorism, it's better to be safe than sorry'.[40]

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[37] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017) 1069.

[38] Williams (n 1) 1161.

[39] *Lodhi v The Queen* (2006) 199 FLR 303, 318 [66].

[40] Sarah Smiles, 'PM defiant: no visa and no apology' *The Age* (Melbourne), 31 July 2007. Quoted in relation to the preventative detention of Dr. Mohamed Haneef. See *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40 and *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.

The necessity of this preventative logic was not without its critics. In fact, there was a successful conviction of conspiracy for a pre-9/11 plan to bomb the Israeli embassy in Canberra.[41] Indeed, it was argued in 2002 that new laws are unnecessary as elements of the criminal law such as conspiracy, murder and aiding and abetting could be relied upon to prosecute terrorism offences.[42] However, there have been numerous convictions for conspiracy-based terrorism offences to-date.[43]

Legislative Differences

While the *Patriot Act* has been heavily criticised,[44] in comparison to the Australian and other responses, Roach suggests that it was a relatively mild legislative response.[45] The US definition of domestic terrorism is much narrower than the Australian definition because it is limited to 'acts dangerous to human life',[46] while the Australian definition is extended to include damage to property and electronic systems.[47] US legislation is also subject to jurisdictional hurdles such as First Amendment restraints concerning freedom of assembly and expression.[48] Where Australia has implemented membership and association offences in relation to terrorist organisations including support and financing,[49] the US has not, and similar pre-9/11 attempts to do so were unsuccessful.[50] US legislation for such offences could be subject to constitutional challenge due to their constitutionally entrenched bill of rights whereas Australia has no substantive protection of fundamental rights other than scattered and implied rights arising under the Australian Constitution. This has resulted in the enactment laws which are arguably draconian in Australia

[41] See *R v Roche* (2005) 188 FLR 336.
[42] Senator Bob Brown, cited in Williams (n 1) 1161.
[43] See, e.g., *R v Al-Kutobi* [2016] NSWSC 1760.
[44] See Roach (n 4) 175-84.
[45] Ibid 161-2.
[46] *Patriot Act* s 802(5).
[47] *Criminal Code* s 100.1(2)
[48] See *United States Constitution* amend I.
[49] See *Security Legislation Amendment (Terrorism) Act 2002* (Cth), Division 102 for Australian offences.
[50] Roberta Smith, 'America Tries to Come to Grips with Terrorism' (1997) 5 *Cardozo Journal of International and Comparative* Law 249, cited in Roach (n 4) 170.

where Parliament 'can usually depart from fundamental rights so long as their law is clear in its expressed intent and operates within the structural limits set out in the Australian Constitution'.[51] Moreover, the *Patriot Act* did not attempt to introduce new controversial measures such as preventative detention and control orders.

While it is difficult to meaningfully compare these legislative responses mainly due to, as will be seen, the emphasis on a US response not expressly authorised by legislation, it is worth noting that the *Patriot Act* was enacted exceptionally quickly in the immediate aftermath of 9/11 due to the ensuing shock and horror. By broadening the US definition of terrorism and the scope and penalties applicable to inchoate offences for providing material support, the US response contemplated *some* use of criminal law as a response to terrorism. The Australian response, by contrast, went much further in introducing a comprehensive legislative framework. This was also provided for in the United Nations *Security Council Resolution 1373*, which under s 2(e): '*decides also* that all States shall … ensure that … terrorist acts are established as serious criminal offences in domestic laws and regulations…'.[52] This resolution was, ironically, drafted mainly by the US even though 'the *Patriot Act* did not attempt to change the criminal justice system to better prevent terrorism'.[53] Indeed, it has been widely argued that a greater role should be played by the legislature in structuring US counter-terrorism policy.[54]

A Difference in Approach

This relative US legislative mildness insofar as prescribing new terrorism related offences can be explained by their reliance on executive power and the use of a war model, where 'rather than seeking legal reform, the United States has used the inadequacy of the currently prevailing law as

[51] Williams (n 2) 544.

[52] UN DOC S/RES/1373 (28 September 2001), emphasis in original.

[53] Roach (n 4) 182.

[54] Benjamin Wittes, *Legislating the War on Terror: An Agenda for Reform* (Brookings Institution Press, 2009), cited in ibid 166.

a basis for avoiding legal restrictions on government entirely'.[55] This use of executive power is due to, inter alia, constitutional differences with a stricter separation of legislative and executive powers under the US Constitution as well as broader executive authority and the 'Commander in Chief' power vested in the president. By contrast, Australia adheres to the Westminster model and doctrine of responsible government where the Executive are chosen by, accountable to, and owes its continued existence and power to the legislature. Although Australia has made some use of executive power, Australia has used the inadequacy of the criminal law framework as a justification for its aggressive legislative response. While attracted to the notion of a 'war on terror',[56] the introduction of many new terrorism offences is thus explained by Australia's legislative-based war as opposed to one rooted in executive power.

Executive Power, Extra-legalism and the War Paradigm

The most aggressive US responses to terrorism were not expressly authorised by legislation, but done unilaterally by the Executive using extra-legal approaches.[57] Roach defines this as the use of 'legalistic and dubious claims of legality and/or lack of judicial jurisdiction to support illegal conduct'.[58] This is highlighted by the use of a war, as opposed to a crime, paradigm to respond to terrorism threats. The *Authorization for Use of Military Force* ('*AUMF*'),[59] for instance, provides that 'the president is authorised to use all necessary and appropriate force against those [involved in 9/11] in order to prevent any future acts of international terrorism …'.[60] The *AUMF* thus imposes 'few, if any, restrictions on the state in its war against terrorism'.[61] This approach relies upon the notion that the executive is the most capable of taking swift action, whereas a

[55] Philip Bobbit, *Terror and Consent* (Anchor, 2009) cited in ibid, 165.
[56] See Roach (n 4) 312.
[57] Ibid 236.
[58] Ibid.
[59] Pub L No 107-40, 115 Stat 224 (2002).
[60] Ibid s 2(a).
[61] See Roach (n 4) 165.

more-cumbersome legislature is ill-suited to making such responses.[62] Also relevant is the fact that the US had already been involved in this 'war on terror' prior to 9/11, and that the US involvement in an armed conflict with Al Qaeda was a key component in their response to 9/11.[63] This assertion of aggressive executive power was not unprecedented either:

> The *AUMF* did not represent a sharp break from the recent past in US counter-terrorism policies. Indeed, the war paradigm had been emerging as the leading policy option in countering terrorism throughout most of the Clinton terms as President, and to some degree even earlier.[64]

What was unprecedented, however, was the broad scope of discretion given to the President. This is highlighted by the use of potentially indefinite military detention as an alternative to criminal prosecution including use of the infamous Guantánamo Bay detention camp. Jose Padilla, who was initially detained on a material witness warrant, was one such example. Padilla was detained as an enemy combatant by executive order, subjected to extreme interrogation techniques and held incommunicado. After much litigation, Padilla's detention was held as a military matter and justified by the *AUMF*, stressing that 'the criminal justice system was inadequate because it would not prevent Padilla's return to the battlefield…'.[65] This approach, as Kent Roach suggests, shows a 'profound lack of confidence in the American criminal justice system, despite its heavy use of imprisonment and pre-9/11 track record of obtaining convictions and long prison sentences, and even the death penalty in terrorism cases'.[66]

Although such use of executive power was controversial, it could also be justified in retrospect by the limits of a legislative approach to counter-terrorism such as Australia's. In January 2003, a

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[62] John E. Owens and R Pelizzo 'Introduction: The Impact of the 'War on Terror' on Executive-Legislative Relations: A Global Perspective' (2009) *15 The Journal of Legislative Studies 119*, 120.

[63] Roach (n 4) 51.

[64] William C. Banks, 'The United States a Decade after 9/11' in Victor V. Ramraj, Michael Hor and George Williams (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 452.

[65] *Hanft v Padilla*, 423 F.3d 388 (4th Cir., 2005), in Roach (n 4) 193.

[66] Roach (n 4) 193.

leaked draft of the *Domestic Security Enhancement Act* (AKA Patriot II) proposed an array of new legislative offences, including an amendment to broaden the scope of offences for providing material support to terrorists.[67] While this Act showed some similarities to the Australian approach insofar as providing new powers for counter-terrorism purposes, it also highlights jurisdictional differences especially where the Act would have raised privacy concerns with the proposed formation of a DNA database of terrorists and terrorist suspects.[68] Whereas Australia has no substantive protection of rights, the US has been 'less willing to limit the privacy rights of citizens after 9/11 than other democracies'.[69]

Although there is a significant emphasis on an Australian legislative approach to counter-terrorism policy, as opposed to a US executive approach, the Australian executive have also played a significant role in determining terrorism policy and responses. For instance, control orders can ordinarily only be requested of a court with the consent of the relevant AFP Minister,[70] with the exception of 'urgent circumstances'[71] where the minister's consent must still be obtained within 8 hours of making the request.[72] Similarly, the proscription of declared areas for the purposes of declared area offences may be done by the Foreign Affairs Minister.[73]

It must be stressed that a direct jurisdictional comparison between Australia and the US is made difficult by the doctrine of responsible government which blurs the distinction between executive and legislative power. Under this doctrine, ministers are members of both the executive and legislative branches of government. Where the majority of proposed laws are introduced by ministers, executive government therefore plays a significant role in determining these laws. By

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[67] Draft *Domestic Security Enhancement Act*. This Act never made it to Congress. See s 401 Terrorism Hoaxes and s 402 Providing Material Support to Terrorism.

[68] Roach (n 4) 197.

[69] David Cole, 'English Lessons: A Comparative Analysis of UK and US Responses to Terrorism' (2009) 62 *Current Legal Problems* 136, 165, cited in Roach (n 4) 197.

[70] AFP Minister is defined in s 100.1 of the *Criminal Code* as the 'Minister administering the *Australian Federal Police Act 1979*'.

[71] *Criminal Code* s 104.6.

[72] Ibid s 104.6(2).

[73] Ibid s 119.3(1).

contrast, the US Constitution contemplates a strict separation between the legislative and executive branches of government.[74] While the role played by the Australian executive pales in comparison to the US, it is not insignificant. As noted by Justice Dixon in the *Communist Party Case*: the responsibility in all matters relating to defence lies with the Executive Government, and thus ultimately with Parliament.[75]

American Exceptionalism?

These legislative differences in prescribing terrorism related offences are underpinned by fundamental differences in the approaches to national security policy. Perhaps most pertinent is the notion of American exceptionalism and their status as a global 'superpower', whereas Australia is a regional middle power. This is highlighted by former President George W. Bush, who stated that 'America is now threatened less by conquering states than we are by failing ones … We must defeat these threats to our nation, allies, and friends'.[76] While American national security policy, at least regarding terrorism, operates transnationally, Australia, due to its own unique security challenges, is more concerned with regional security.[77]

This notion of American exceptionalism is prevalent in its global efforts to combat terrorism, particularly in relation to its role as a permanent member of the UN Security Council. This is illustrated by *Security Council Resolution 1368* which, enacted only 1 day after 9/11, referred to those events as an act of international terrorism.[78] While this has been 'interpreted by some as recognising the right of the United States to use self-defence against the Taliban regime in Afghanistan',[79] this emphasis on international terrorism was also evident in the US definition of

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[74] See *United Stations Constitution* art I and II.

[75] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 198 (Dixon J).

[76] President Bush, quoted in United States, *The National Security Strategy of the United States of America* (Washington, 2002), 1.

[77] See Jeffrey S Lantis and Andrew A Charlton, 'Continuity or Change? The Strategic Culture of Australia' (2011) *30(4) Comparative Strategy 291*.

[78] UN DOC S/RES/1368 (12 September 2001).

[79] See Roach (n 4) 29.

terrorism prior to 9/11,[80] and in US proposals for a draft convention on international terrorism in the 1970s. There is also a distinct correlation between UN Security Council Resolutions and US counter-terrorism priorities, such as *Resolution 1267* which listed Osama Bin Laden as a terrorist,[81] and the subsequent increase in the US domestic list of terrorists.[82] *Resolution 1373*,[83] with its initial focus on terrorism financing, is also consistent with Executive Order 13224 enacted in the wake of 9/11 in order to target terrorist funding.[84]

While the US had led global counter-terrorism efforts both prior to and following 9/11, Australia's legislative efforts have conformed to international pressures.[85] This is highlighted by the politicisation of the terrorism debate, where 'tough antiterrorism legislation can be used as a form of political theatre'.[86] Indeed, plans to delay initial legislation in 2002 were denounced as 'anti-Australian … not patriotic, not committed, not antiterrorist'.[87] This hyper-legislative Australian response is aptly summarised by Jenny Hocking who observed that 'the massive security developments in the name of countering terrorism found no real opposition from any quarter. To appear 'soft on terrorism' was simply 'politically impossible''.[88]

Conclusion

These differences in legislating new terrorism related offences, although shaped by the respective pre 9-11 counter-terrorism frameworks, illustrate a significant underlying difference in approach towards counter-terrorism policy between Australia and the United States. Framed by

[80] See *Federal Courts Administration Act of 1992*, s 1003 §2331.

[81] UN DOC S/RES/1267 (15 October 2001).

[82] See Roach (n 4) 26-7.

[83] UN DOC S/RES/1373 (28 September 2001).

[84] Roach (n 4) 26-7.

[85] See, e.g., Roach (n 4) 358-60. Australia has generally followed UK lead in introducing counter-terrorism responses, however, there are aspects of Australia's approach that are unique arguably due to the lack of a constitutional bill of rights.

[86] Roach (n 4) 330.

[87] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1148 (Alan Caldman).

[88] Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (University of NSW Press, 2004), 103.

constitutional differences, particularly with a strict separation of powers and a constitutionally entrenched bill of rights under the US constitution, the hyper-legislative Australian approach is enabled by the lack of any substantive protection of fundamental rights. The relative mildness of US legislation, with narrower definitions of terrorism and terrorism related offences, is reflective of their stronger protection of fundamental rights. The aggressive US use of an executive model seeks to avoid these constraints altogether with the notion of a war on terror. This approach has justified otherwise illegal conduct such as potentially indefinite military detention with dubious claims of legality supported by the wide scope of discretion allowed under the *AUMF*. These differences are underscored by the respective approaches to national security policy where, while the US has made pervasive international efforts as a global leader for reform, Australia has merely conformed to these pressures.

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