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Haunted by Haneef

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SINCE his arrest in July 2007, the image of Mohamed Haneef in shackles and a brown boiler suit covering in the back of a police van has been an emblem of the troubling flaws in Australia's counter-terrorism regime, which the Rudd government is now setting out to reform.

In the five years following the September 11, 2001, attacks in New York and Washington, the Australian parliament under then prime minister John Howard passed 44 pieces of anti-terrorism legislation, creating a bewildering array of highly complicated new laws, whose enforcement has been fraught with problems and plagued by failed cases.

The 452-page discussion paper released by Attorney-General Robert McClelland last week is the Rudd government's ambitious foray into this vexed field, which aims to bolster and circumscribe the existing laws. Its target, in short, is to keep Australia safe from terrorism while removing some of the most glaring flaws in the hope of avoiding future debacles such as the Haneef case.

George Williams, who heads the Terrorism and Law Project at the University of NSW, says it's an enormous task, and the government's discussion paper is just the beginning.

"It's only a very incomplete remedy to a number of problems within Australia's anti-terrorism laws, and that simply reflects just how vast the body of anti-terrorism law now is," Williams says.

The complexity and hasty drafting of the terror laws has been reflected in a set of mixed results. Prior to the most recent arrests two weeks ago in Melbourne, by this reporter's reckoning, 32 people had been charged with terrorism offences. Of those, 19 have so far been dealt with by the courts. Ten were convicted, while the other nine were either acquitted or had their charges dismissed, a success rate of barely 50 per cent.

A 2007 study by Monash University in conjunction with Victoria Police reported that just over a third of police interviewed in that state who had worked with the laws found them "barely workable or unworkable".

The report went on: "Commonwealth counter-terrorism legislation was considered by some members as too political in nature and intent, with little benefit for state policing. It was seen as facilitating an often poorly experienced AFP at the expense of the time and support of Victoria Police members." However, many members of the Australian Federal Police are equally ambivalent about the laws. The chief executive of the Australian Federal Police Association, Jim Torr, has declined to comment on the proposals until he has had time to digest the government's voluminous discussion paper.

But he has pointed out that working police didn't ask for the laws, which he describes as "procedurally very complex" and thus conducive to mistakes.

The margin for error has been compounded by pressure to achieve convictions. In October 2007 a senior AFP counter-terrorism officer testified that police had been told to charge "as many suspects as possible" in order to test the laws. Federal agent Kemuel Lam Paktsun was giving evidence on the arrest of Sydney medical student Izhar Ul-Haque, charged in April 2004 with having trained with a terrorist organisation.

"At the time we were directed, we were informed, to lay as many charges under the new terrorist legislation against as many suspects as possible because we wanted to use the new legislation," he testified.

"So regardless of the assistance that Mr Ul-Haque could give, he was going to be prosecuted, charged, because we wanted to test the legislation and lay new charges, in our eagerness to use the legislation."

The result in that case was a disaster. The charges against Ul-Haque were dramatically dismissed in 2007 when a

NSW Supreme Court judge found the ASIO officers who interrogated him had acted in a grossly improper and unlawful way.

It was not the first such miscarriage of justice under the laws. In 2005, Sydney man Zak Mallah was acquitted on terrorism charges after a trial in which police were found to have acted illegally and improperly in obtaining evidence against him.

Mallah pleaded guilty to a lesser charge of threatening to kill commonwealth officers and served two years in jail. In 2006, the conviction of Melbourne man Jack Thomas was overturned in the Victorian Court of Appeal, which found the record of interview conducted with him by the AFP in Pakistan had been involuntary, unfair and contrary to public policy. Like the legislation itself, the changes canvassed in the McClelland paper are complex and wide-ranging. They are designed to strengthen the laws and provide police and security agencies with new tools against accused terrorists, while simultaneously ironing out some of the worst excesses.

Commentators have differed over whether they represent an overall softening or toughening of the laws. Nicola McGarrity of the Terrorism and Law Project says the main trend is to simplify and contain the laws, and tighten definitions such as the ones that govern terrorist acts.

"A lot of the changes work towards paring the laws back, clarifying them and making the offences a lot clearer," she says.

"Any change that works to tighten up the offences is in my view a good change." One example is proposed amendments to the charge of providing support to a terrorist organisation, the offence of which Haneef was accused. The wording would be amended from mere "support" to "material support", and it would have to be provided with the express intention of helping the organisation to engage in terrorist activity.

This subtle but important change would hopefully ensure that, in the event of a repeat of the Haneef case, Haneef's act of giving a telephone sim card to his cousin would not be deemed by investigating police to be a criminal offence. Another proposal welcomed by reformers would limit the amount of time a terrorism suspect can be detained without charge. The existing laws effectively allow indefinite detention by allowing police to repeatedly extend the "dead time" during the interrogation of a suspect.

As a result, Haneef was held for 13 days before he was charged. The discussion paper proposes capping this at eight days. While this has been broadly welcomed as a step in the right direction, McGarrity says most legal experts who have made submissions on the laws have argued for a maximum of 48 hours.

Susan Harris-Rimmer from Australian Lawyers for Human Rights argues that eight days is still excessive, as it far exceeds the time limit that applies to other criminal investigations.

"We've gone through 100 years of developing our laws so that no one, even a mass murderer such as Martin Bryant, can be held for more than 24 hours. Yet someone such as Mohamed Haneef, who hasn't done anything, can still be held for eight days."

The proposed eight-day cap typifies an overall cautious approach in the McClelland reforms that has disappointed those who had hoped for a comprehensive overhaul of the Howard-era laws.

"It's such a limp response," says Harris-Rimmer. "All this time and effort and energy, and it's just limp. And it's exactly the same approach as the previous government: it says we're going to strike a balance between individual rights and national security, but then when you see the detail, rights aren't even mentioned."

The paper proposes a series of new offences including inciting racial or religious violence and perpetrating a terrorist hoax. It also expands the definition of terrorist activity to include acts that cause psychological as well as physical harm.

The most controversial change would give the AFP the power to enter and search a property without a warrant if it suspects there is "a thing" on the premises that is relevant to a terrorism offence and which poses a "serious and imminent threat" to life, health or safety.

McClelland says use of this power would be confined to emergency situations where there is imminent danger, such as the presence of explosives or weapons. He says that state police already have powers to search without a warrant in similar circumstances, and the reform is needed to bring the AFP's powers up to speed. But legal analysts are sceptical.

"I'm not convinced in many respects that a powerful enough case has been made for strengthening the provisions," Williams says.

"The onus is on any government that seeks to enact laws that infringe civil liberties to demonstrate that it's

absolutely necessary."

He says allowing police to act without a warrant removes "one of the most fundamental checks and balances" in the law.

Harris-Rimmer argues that the recent terrorism arrests in Melbourne demonstrate the police and security agencies have all the powers they need: "I don't see the justification anywhere for why this stuff is so badly needed. ASIO and the AFP have just lined up with their wish lists of new powers they want and they've basically been given it."

However working police may not relish this proposed change. The AFP's Torr has said that his members prefer the transparency and accountability that the warrant system provides, describing the removal of the requirement for a warrant as "alien to 100years of policing".

The proposals will be vigorously debated in the discussion period that runs until September 25, and some advocates will no doubt be pushing for farther-reaching reform.

Williams, who was recently awarded a laureate fellowship by the Australian Research Council to study anti-terror laws and democracy, says there are many more issues that need to be opened up for discussion.

"Many of the most contentious issues have not been addressed. Like ASIO's power to have non-suspects detained for questioning, including journalists. Or the censorship of material that has seen books removed from university libraries in a way that frustrates the research into the causes of terrorism in the first place."

Analysts have applauded the proposal for a national security legislation monitor to review the laws on an annual basis.

Williams says that getting counter-terror law right is the greatest challenge facing lawmakers anywhere.

"I hope that by the end of the discussion period we'll get a set of laws that are more carefully calibrated to deal with the threat that Australia is facing while ensuring any infringement of civil liberties is the minimum necessary."

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