There is a strong case for tempering our terror laws

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IN response to the atrocity of the September 11 attacks in New York and Washington, Australia introduced an array of laws to guard against, and to punish, acts of terrorism.

Last month the National Security Legislation Monitor, Bret Walker SC, issued his first annual report, asking himself 63 questions about the operation of Australia's counter-terrorism laws. Ten years on, it is sensible to consider whether these laws are appropriate and proportional to the existing risk of terrorist attacks.

When the laws were first considered, the events of September 11, 2001, created a special environment. It was a time of international emergency.

Our prime minister, John Howard, was actually in Washington when the four hijacked planes shattered US airspace.

This was soon after the Tampa incident and just before the children overboard crisis. In early October, Howard called an election for November 10.

Conservative politicians falsely accused asylum-seekers of throwing their children overboard. Politicians suggested asylum-seekers arriving by boat could harbour terrorists.

The prime minister told us: "We will decide who comes into this country and the circumstances in which they come."

The terrorism crisis morphed seamlessly with border protection in the public consciousness. Politicians saw advantage in maintaining a degree of fear.

In this background of real and manipulated fears about national security, Australia created its terror laws. We also invaded Afghanistan and Iraq.

Just as Australia and the US rethought their commitment to troops in Afghanistan and Iraq, so too it is time to rethink the scope of our counter-terrorism laws.

There have been some notable successes in prosecuting Australians for terrorist offences. The Pendennis prosecutions in Victoria and other cases in NSW led to some significant convictions.

But the laws must be appropriate and necessary for the long haul, not just for an extraordinary emergency. Walker must carefully balance state powers with individual rights. International human rights instruments are a good guide to our laws' appropriateness. Some of our terror laws are excessively baroque. I suggest four areas for review.

First, there are too many terrorist crimes. As well as the obvious ones such as engaging in a terrorist act and detonating an explosive device, there are many offences that criminalise acts falling far short of the commission of a terrorist act.

Consequently, we have seen people charged with terror offences whose connection to terrorism is actually very remote — even on the prosecution's say so.

The best example is Mohamed Haneef, who was charged with possession of a SIM card allegedly connected with a terrorist act. The charge was withdrawn in inglorious circumstances.

Terrorist offences ought to be maintained but the scope of the laws ought to catch actions that truly do look and sound like terrorism.

Second, there is a need to review ASIO's power to detain people without charge. ASIO can detain and question people suspected of having information about terrorist acts, even if they are not suspected of participating in terrorist acts.

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The questioning power is rarely used. The detention power has never been used. All the people questioned have been able to go home at the end of each questioning session, as is the case with the Independent Commission Against Corruption and the Crime Commissions.

ASIO should not have the power to imprison people. The fact the power has never been used casts doubt on its utility.

But we should be very wary of a law that gives a secret intelligence organisation the power to lock

people up for interrogations.

The third area for review is the commonwealth's power to obtain control orders and preventative detention orders that can relate to people who have not been charged with any offence.

So far there has never been an application for a preventative detention order.

Its lack of use, too, suggests it may not be needed. Control orders have been made. Jack Thomas copped one after he was acquitted. David Hicks had to wear one after he cut a deal with the US and escaped Guantanamo Bay. Both cases were highly politicised.

Walker seems set to put these measures on his radar.

Finally, there is the use of ASIO security assessments as a means of driving counter-terrorism policy.

This is the area where there is now the greatest disproportion between the threat posed by potential terrorist activity and the measures used to guard against it.

Adverse ASIO security assessments do not just sound the death knell for asylum-seekers' hopes for permanent residence, they result in genuine refugees being locked in detention indefinitely.

There are nearly 50 people in this category, who cannot be returned to their own countries but who cannot be released here. Some of them have children with them in detention. Some have been there for nearly four years.

Recently, the joint parliamentary committee investigating Australia's immigration detention system recommended that the ASIO Act be amended to allow the security appeals division of the Administrative Appeals Tribunal to review ASIO's security assessments of refugees and asylum-seekers.

The AAT review is a safe way of balancing the claims of the asylum-seekers with the need to maintain national security.

The proceedings are in camera and all evidence affecting national security is kept secret from the applicant and their lawyers. Yet the tribunal provides an independent merits review.

There is scope to add to this process the use of British-style special counsel who, although able to see and hear the sensitive material and who can make submissions on behalf of the applicant, cannot reveal the secret evidence to the applicant. But even without full participation in an AAT merits review, some protection would be better than none.

Australia is not where it was in late 2001. The politics of fear have eased. Iraq is a mess and we are following the US in withdrawing our military presence from Afghanistan. It is time to calmly review the other big plank of public policy that was developed at that time — not to abolish the terror laws but to adapt them to the continuing needs of the nation in times of less extreme urgency.

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