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The Rise and Rise of Australian Authoritarianism

By Brian Toohey

Australia is increasingly behaving like an authoritarian state in its national security legislation, instead of like a liberal democracy. New laws bank up and old rights are forgotten.

The major parties back the thrust of these changes. This process is also assisted by journalists who rely on unofficial briefings from the security agencies for their stories. These same journalists often fail to criticise the authoritarian nature of new powers, except when their colleagues face charges.

When questioned by the parliamentary joint committee on intelligence and security (PJCIS), the secretary of the Department of Home Affairs, Michael Pezzullo, said he has a "trusted confidential relationship" with about two dozen journalists but never reveals classified information.

Ever since the phoney intelligence on Iraq's weapons of mass destruction, intelligence often seems to be a mix of propaganda and zealotry. Secret intelligence also suffers from a lack of outside scrutiny. In 1995, then Australian Security Intelligence Organisation (ASIO) deputy head Gerard Walsh told journalists that leaked intelligence had resulted in murders in Australia. Labor's then attorney-general, Michael Lavarch, publicly rejected Walsh's claim as nonsense – something the journalists should've done. They didn't then and they are even less likely to now.

To get some idea of the scale of the changes, it's worth going back to when Robert Menzies was prime minister. Despite serious aberrations, Menzies usually governed as a traditional liberal, protecting individual liberty. In 1952, when his attorney-general drew up a tough espionage bill, Menzies threw it out entirely.

For the most part, the Whitlam, Fraser and Hawke governments were also restrained. ASIO intercepted an average of 85 phones a year from 1974 to 1983. ASIO's figures are secret for 2019-20, but likely to be in the thousands. Federal and state police and similar bodies received 3677 intercept warrants in that time.

Rules forcing phone companies to retain their customers' metadata began in 2006. Police and other authorities accessed this "digital fingerprint" information without warrants on 344,168 occasions in 2019-20.

Official figures show there were 154 acts of terrorism in Australia between June 1966 and September 2001, including bombings, stabbings and shootings, often involving a wide range of diplomatic premises and churches, synagogues and mosques. In every case, the existing murder and other laws were considered all that was needed.

In February 1978, a bomb killed two garbage collectors and a policeman and injured 11 people after exploding in a garbage truck compactor. The bomb had been in a rubbish bin at Sydney's Hilton hotel, where 12 foreign leaders and then prime minister Malcolm Fraser were meeting. Fraser did not introduce special terrorism legislation. Nor did he brand Labor as soft on terrorism.

In an earlier era, ASIO and the AFP would never tap phones in Parliament House, let alone raid an institution at the pinnacle of Australia's democratic system. The parliament's failure to find the AFP in contempt only emboldened the police.

Today, there are at least 83 terrorism laws, many containing harsh new offences and powers. Ignoring habeas corpus, the Howard government introduced a law in 2003 allowing ASIO to detain and compulsorily question people for a week. They didn't need to be suspected of any crime, but might have information about terrorism. Refusal to answer incurred a five-year jail sentence. In 2005, the Australian Federal Police was empowered to take people into "preventative detention" for up to two weeks and impose a form of house arrest, called a "control order", for up to 12 months without court approval. The states have since made greater use of "preventative detention" for longer periods.

In 2007, New South Wales Supreme Court judge Michael Adams found that two ASIO officers had kidnapped a young medical student who had been charged with terrorism offences in 2004. That implausible case was dropped, but no ASIO officials were charged with kidnapping.

A Coalition government introduced a new law in 2014 making it a serious criminal offence for whistleblowers to reveal anything about a botched "Special Intelligence Operation", although it allowed ASIO and its

“affiliates” to commit criminal acts other than murder and serious violent offences.

Authoritarian changes gathered pace after parliamentarians acquiesced in the Australian Federal Police’s raid on Parliament House in 2016. They accessed IT systems and seized thousands of non-classified documents to search for the source of leaks to a Labor opposition frontbencher. The leaks revealed problems with rising costs and delays in the national broadband network – information that should have been public. In an earlier era, ASIO and the AFP would never tap phones in Parliament House, let alone raid an institution at the pinnacle of Australia’s democratic system. The parliament’s failure to find the AFP in contempt only emboldened the police.

Secret trials are supposed to be a hallmark of authoritarian governments, not liberal democracies. But in 2018 then Coalition attorney-general Christian Porter authorised charging a former Australian Secret Intelligence Service officer, known only as Witness K, and his lawyer, Bernard Collaery, with allegedly conspiring to communicate secret information to Timor-Leste’s government. The substantive issues in their case have been heard in secret. The case involves the honourable role of the defendants in challenging the misuse of ASIS to bug Dili’s cabinet office in 2004 to give a multinational petroleum company, Woodside, an unfair share of Timor-Leste’s natural resources. Witness K, who was under tremendous stress, pleaded guilty. He received a three-month suspended sentence in the ACT Magistrates Court on June 18. Collaery is pleading not guilty. It appears the substance of his trial will be heard in secret.

This is not the only such secret case running in Australia. At some point in 2018, an ACT court sentenced a former intelligence officer given the pseudonym “Alan Johns” to two years and seven months in jail. Little is known about the case. As the Law Council of Australia’s president, Jacoba Brasch, said in June: “It is still unknown what offences Johns pleaded guilty to, why he was given a term of imprisonment, exactly why the proceedings were conducted entirely in camera, and why even the ACT attorney-general was never made aware that he was imprisoned in an ACT correctional facility.”

It is now known that Johns was released after serving 15 months. The sentence hardly suggests that he posed a major security threat.

Another authoritarian law was proclaimed on December 17 last year. It expands the scope of the 2003 questioning and detention act to include espionage and foreign interference, as well as terrorism, but removes the week-long detention provision. A person not suspected of any crime can be sent to jail for five years for refusing to answer ASIO's questions, which can be asked in eight-hour increments up to a total of 24 hours.

There is no justification to compel an innocent Australian, for example, to reveal the whereabouts of someone overseas who is suspected of being a terrorist. Given that Australian allies such as the United States engage in extrajudicial execution of suspected terrorists by drones and hit squads, no one should be forced to facilitate this outcome. Nor should they be compelled to answer ASIO questions about someone who could be charged under the new Espionage and Foreign Interference Act, where the normal legal defences in a liberal democracy don't apply. One vague section makes it a serious criminal offence to "harm" political, military or economic relations with another country.

In December last year, the Law Council's then president, Pauline Wright, told the PJCIS that "extraordinary powers require extraordinary safeguards". She noted the four other members of the Five Eyes intelligence group don't have compulsory questioning powers for security intelligence purposes, and all their surveillance warrants require judicial approval. In contrast, an Australian attorney-general could appoint a conveyancing solicitor or a banking lawyer to authorise ASIO questioning warrants, provided they had 10 years' experience in a law firm.

In June the prime minister, Scott Morrison, pushed for another big step down the authoritarian path. At a media conference to celebrate the use of special Australian surveillance powers in a joint operation with the FBI, he said he wanted parliament to pass three new bills. These would expand the unprecedented powers granted to Australia's law enforcement and intelligence agencies in December 2018. Those powers let these agencies force tech companies to build back doors into their systems, to decrypt messages on their behalf. No other liberal democracy had equivalent laws, let alone the new ones Morrison wants.

Unsurprisingly, Federal Police Commissioner Reece Kershaw told the media conference the new laws were necessary. He also acknowledged the AFP used its existing powers to provide a technical capability for the FBI to decrypt messages sent over a large online criminal network called An0m, spanning 16 countries.

Overseas agencies such as the FBI welcome how the AFP can let them avoid the tight legal constraints in their own countries. But this is no reason for Australia to adopt more authoritarian laws.

Morrison's latest proposed law – the Surveillance Legislation Amendment (Identify and Disrupt) Bill – is extraordinarily intrusive. It was introduced last December and the government gave the example of how it would help disrupt paedophilia and terrorism. The Law Council of Australia pointed out it covers any other federal crime with a potential sentence of three or more years. Magistrates don't even impose a jail sentence for some minor crimes in this category. If passed, the bill will allow the AFP and the Australian Criminal Intelligence Commission (ACIC) to "disrupt" even minor crime by covertly destroying computers and other systems in what is known as an "offensive cyber" operation. Despite these immense powers, the AFP and the ACIC will be allowed to issue their own warrants.

A report for the government on Australia's national security laws, written by former ASIO head Dennis Richardson, found there was no need for additional powers such as "data disruption". The government bluntly rejected Richardson's advice, although he had also headed the Foreign Affairs and Defence departments. In his report, belatedly released by the government in December 2020, Richardson said a poorly planned or executed offensive cyber operation "could impact negatively on innocent people and, in extreme cases, compromise computers that support the provision of essential services". He said, "All agencies, including the AFP, can and do make mistakes and this would be no exception".

Underlining Richardson's warning, the Law Council's Fiona Wade notes that a recent report from the Commonwealth ombudsman found the AFP made almost 140 significant breaches of the law when accessing records of mobile phones and other telecommunications devices "pinging" off mobile phone towers in the ACT.

On March 10, the council's president, Jacoba Brasch, told the PJCIS the new powers in the bill depart sharply from the traditional focus of investigative powers on collecting admissible evidence of specific offences. She said the bill rejected the Richardson review's conclusion that there was no justification for "effectively placing the AFP and the ACIC in the position of judge, jury and executioner".

Pezzullo was relaxed about the absence of judicial warrants in the initial encryption legislation, which allowed security agencies to issue a "notice" to tech companies to comply with what they were told to do. He told the PJCIS: "If we were to say to you that a notice is a warrant, and through an incantation and the sprinkling of some magic dust on it, all of a sudden greater oversight is achieved – it's the same person, the attorney-general, rigorously discharging their ministerial responsibilities."

This, however, is the problem. Attorneys-general are cabinet ministers, not politically independent judges. They should not be deciding warrants.

Much of the focus of the new espionage and influence laws is on people allegedly in contact with someone "linked" to the Communist Party of China, has which has a membership of 90 million. The British scholar Kerry Brown says only about 3000 of these people have any real power. In a liberal democracy, people should be free to talk to anyone they wish and make up their own mind about what they think.

After retiring as director-general of ASIO, Duncan Lewis pushed the influence threat to extremes. In November 2019 he told journalist Peter Hartcher that China is trying to "take over" Australia's political system through its "insidious" foreign interference operations. He said people "could wake up one day" and find China had taken over.

The article said China's United Front Work Department is one of the main organisations for extending Beijing's control. If so, it has been spectacularly unsuccessful in Hong Kong and Taiwan, where it has thousands of agents. Lewis ignored how people in higher levels of government have "agency". They can and will reject approaches from Chinese influence agents to support a surreptitious Chinese takeover of Australia.

Contrary to any Chinese influence, it is commonplace for journalists to simply refer to Chinese “aggression” or the China “threat” without explaining what they mean. China has not engaged in military aggression since the end of the Cold War, unlike Australia, which joined the US in the military invasion of Iraq in defiance of their obligations under the ANZUS treaty and the United Nations charter about the use of force.

A Nine media journalist, Nick McKenzie, gained extensive coverage for a false claim that an important Chinese spy had defected to Australia. He was an impostor, not a spy. Others claimed that a Chinese–Australian car dealer in Victoria was being groomed for a Liberal seat in federal parliament. The claim was absurd. Liberal parliamentarians made it plain he could never win preselection because he had been charged with serious financial offences, was deeply in debt and facing bankruptcy.

Similar stories run in NSW. In June last year, under ASIO supervision, the home of Labor MLC Shaoquett Moselmane was raided by 40 AFP officers, plus sniffer dogs and a helicopter. The AFP wouldn’t say, but the search reportedly took 18 hours. McKenzie and a Nine camera crew were also there. Later, the police raided Moselmane’s Parliament House office. They also raided someone who worked one day a week translating Moselmane’s speeches for Chinese Australians in NSW. Scott Morrison said at the time that “we won’t cop” Chinese attempts to influence Australian politics.

In an interview with Moselmane on the ABC’s *7.30* program in August 2020, Paul Farrell accused the MP of saying in a speech, “The obsolete scum of white Australia was re-emerging.” Moselmane said no MP would be “stupid enough to say such a thing”. Farrell said the ABC commissioned two independent translations. These flashed up quickly on the screen, showing Moselmane referred to “the obsolete White Australia policy” or “doctrine”. The ABC said the words “obsolete scum” were from a piece written by Nick McKenzie. The AFP announced last November that Moselmane was not a suspect.

Few care about how powerful and largely uncriticised Australia’s security powers are, fuelled once by terrorism and now by a reactive fear of China. They also show scant concern that we don’t protect our liberties with laws common in the US and much of Europe. For all the bipartisan

talk about how we must never “surrender our values”, authoritarian values continue to multiply in Australia’s security laws.

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