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Principles to strike a difficult balance

A former attorney-general of the UK has some advice for Australia's legislatures, writes **James Eyers**.

Peter Goldsmith, who was attorney-general of the United Kingdom in the government of Tony Blair, says the balancing of liberty and security is one of the most difficult issues for modern democracies that believe in the rule of law.

"Governments do have a dual responsibility: of course they have to protect the lives of their citizens and their property; but they also have to protect the values on which our society is built, which our ancestors fought very hard for and the terrorists would take away," he says. "Getting that balance right is ferociously difficult, but hugely important."

Goldsmith was appointed attorney-general in June 2001, just months before the September 11 terrorist attacks. His resignation took effect in June 2007, when prime minister Tony Blair relinquished power.

Now head of European litigation at Debevoise & Plimpton, and an independent non-executive director of Westfield Group, where he sits on a board with Frank Lowy, David Gonkski and Fred Hiltner among others, Goldsmith says governments must try to strike the liberty versus security balance on a principled basis.

During his time as AG, he used three principles: respect for the rule of law, ensuring domestic and international law obligations are complied with and the judiciary remains free to scrutinise decisions; not over compromising core principles such as the right to a fair trial; and employing a test where liberties are only transgressed when "you can show what you are doing is necessary by an actual threat and it is proportionate to that threat".

The principles led Goldsmith to take a very different approach to former Australian attorney-general Philip Ruddock in standing up to the United States over Guantanamo Bay. In 2006, Goldsmith called for its closure, describing it as a "symbol of injustice". He refused to agree to British nationals being subjected to military commissions there, taking an



Peter Goldsmith stands by his Iraq advice to Tony Blair's government. Photo: AP

unpopular position in the government that the right to a fair trial can never be compromised.

"And that is why we ended up getting back our nationals, because, frankly, I insisted on it," he says.

"Ultimately it was not a popular thing for me to do within the government, no one else really shared my

is a stronger position to be in than saying 'I don't think you should do this'." Australia's present Attorney-General, Robert McClelland, argued for a federal bill of rights, but it was never publicly supported by former prime minister Kevin Rudd and ultimately scuppered by the government last year.

Many governments around the world have a tendency to introduce additional laws unnecessarily.

Former UK attorney-general Peter Goldsmith

view. But I used a position which ultimately an attorney has, which is to say 'If you don't do this I am off'. That was for me an issue of resignation."

Goldsmith, who was a leading silk in London specialising in international arbitration and commercial litigation before he joined government, says that the introduction of the UK's Human Rights Act in 1998 made his job as attorney-general easier.

Even though the act preserves parliamentary sovereignty, "it gave me more levers to say to political colleagues 'You can't do this because it will not be upheld in the courts', which

something more that might make a difference?" you are not asking yourself the right question. You should be asking yourself, 'Is there something else I ought to do that is necessary to do because of the threat, and which is proportionate to that threat? That is a different test.'

With the federal government still searching for an appropriate candidate to take up the role of independent reviewer of terrorism laws, a position modelled on that in the UK, Goldsmith says "ultimately an independent reviewer of terrorism can only be an aid to parliament for parliament to do its job of looking after the interests of the people".

One of the biggest controversies Goldsmith faced in office was over the advice he provided to the government justifying the invasion of Iraq.

But Goldsmith says he stands by his analysis, despite significant criticism, including from the late Tom Bingham, who said in 2008 that Goldsmith had given Mr Blair "no hard evidence" that Iraq had defied UN resolutions "in a manner justifying resort to force" and therefore the invasion was "a serious violation of international law and of the rule of law".

Goldsmith says that he did the same thing he has done on every occasion when he has been asked to give legal advice. He conducted his research, thought hard about the matter and came to a conclusion that military action could be supported. (His analysis was based on the UN Security Council's previous authorisation of force, which had been suspended on the terms of a ceasefire, the conditions of which were not met by Iraq.) "My conclusion was, and remains, that it was lawful."

Goldsmith will be in Sydney next month where he will address the Rule of Law Institute of Australia's conference, held in conjunction with the NSW Bar Association, on November 6. High Court judge Dyson Heydon and NSW Director of Public Prosecutions Nicholas Cowdery will also address the conference.

"I am pleased I am able to attend the meeting of the Rule of Law Institute," he says. "Associations like that are the watchdogs of liberty in a mature and responsible way and that is a very important mechanism to try to get the difficult balance right."