

Law, Liberty and Terrorism

Robert McDougall¹

Introduction

1. Terrorism: the word instantly calls to mind images of fear and uncertainty, death and destruction. But what is it that we mean when we talk about terrorism? “Acts against all freedom-loving people every where in the world”;² “not only an attack on our security, our rule of law and the safety of the state, but on civilized society as well”;³ “an offence against humanity ... akin to piracy, or war crime”;⁴ “not just someone with a gun or a bomb, but also someone who spreads ideas that are contrary to Western and Christian civilizations”.⁵ Each of these descriptions has in common ambiguity and subjectivity; and a divisive (and circular) core. ‘Terrorism’ can not be employed as a neutral or merely descriptive term. It possesses a political and polemic character, understood not just by reference to identifiable acts, but also by reference to the nature of those committing terrorist acts and against whom they are committed.

¹ A Judge of the Supreme Court of New South Wales. The views expressed in this paper are my own, not necessarily those of my colleagues or of the Court. I gratefully acknowledge the very substantial contribution of my tipstaff, Stephanie Huts, LLB, BA (Murdoch University), who undertook the original research and who prepared the draft on which this paper is based. The virtues of this paper are hers; its defects are mine.

² US President George W Bush, press release, 12 September 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html>

³ P Wilkinson, *Terrorism and the Liberal State*, Macmillan, London, 1977, p 66.

⁴ C Harmon, *Terrorism Today*, Frank Cass, London, 2000, p 234.

⁵ Former Argentinean President Videla in N Chomsky and E Herman, *The Washington Connection and Third-World Fascism*, Hale & Iremonger, Sydney, 1980, p 266-67.

2. Its use and application will change and evolve over time, allowing one-time “terrorists” such as Che Guevara, Nelson Mandela and Xanana Gusmao to become recognised leaders and venerated statesmen.⁶ The politicisation of the term ‘terrorism’, together with its evolving historical and moral categorisation, highlights the difficulty in producing a universally accepted definition. The term “has yet to be defined comprehensively and authoritatively at the international level.”⁷ Indeed, it is open to question whether a widely accepted definition will ever be achieved, given the likelihood that a comprehensive definition may well embrace the acts of governments (or their agencies) who claim to be part of “civilised society”, or among “the freedom-loving people...of the world”.

3. ‘Terrorism’ is not only an imprecise term, but its use is politically and culturally fuelled. The events of September 11, 2001 and afterwards, coupled with the polarisation of individuals and groups as ‘us’ and ‘them’, has further reduced the utility of the term. Use of the term ‘terrorism’ pre-determines the characterisation of those involved as good and bad; as ‘freedom-loving’ people versus ‘an axis of evil’.⁸ This is problematic, because, as seen in Australia, use of the language of ‘terrorism’ has facilitated the introduction of fundamental changes to our legal system, diminishing the rule of law and eroding civil liberties.

⁶ J Hocking, *Terror Laws: ASIO, Counter-terrorism and the Threat to Democracy*, UNSW Press, Sydney, 2004, p 2.

⁷ United Nations Economic and Social Council, *Report of the United Nations High Commissioner for Human Rights to the World Conference on Human Rights*, E/CN a/2002/18, 27 February 2002, p 3.

⁸ US President George W Bush, press release, 12 September 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html>

4. When founded on an imprecise and politicised idea, legislative responses to terrorism need careful examination. It is necessary to determine the appropriateness of adopting extreme measures that, in any other context, would be strongly resisted. The counter-terrorism measures introduced in Australia confer a power to compel submission to interrogation, a power to detain and interrogate without charge, and a power of preventative detention. In doing so these laws jeopardise the rule of law, expand executive power, diminish existing rights, endanger the separation of powers, and undermine judicial procedures.⁹ Further the legislative definition of 'terrorism' provides for the targeting of and discrimination against religious and cultural groups within society.
5. Despite the difficulties in expounding a neutral and useful definition, I suggest that it is possible to develop legal measures to protect society without offending the rights of citizens. Justice Kirby, of the High Court of Australia, in voicing his concerns about the potential erosion of civil liberties and established criminal justice structures, noted that:

[t]he Countries that have done their best against terrorism are those that have kept their cool, retained a sense of proportion, questioned and addressed the causes, and adhered steadfastly to constitutionalism.¹⁰

⁹ J Hocking, *Terror Laws: ASIO, Counter-terrorism and the Threat to Democracy*, UNSW Press, Sydney, 2004, p 11.

¹⁰ The Hon Justice Michael Kirby, 'Australian Law – After September 11', Speech to the Law Council of Australia, 32nd Australian Legal Convention, 11 October 2001, p 4.

6. In this context, it is notable that a nation such as Israel, which has been the subject of innumerable terrorist acts causing the deaths and maiming of thousands of its citizens, and the destruction of vast amounts of property, has not gone to the legislative extremes that we in Australia appear by default to have regarded as reasonable. Perhaps Israelis, taught by the dreadful lessons of the Holocaust, value their democratic liberties more highly than we do, and are prepared to pay a higher price to maintain them.

The rule of law

7. At its most basic, the rule of law can be seen as the law of rules.¹¹ Rules are important. They provide for an objective test of what is right and what is wrong, and as a result act as a bulwark against arbitrary decision making. By providing for a unitary source of legitimacy that can be applied equally to citizens regardless of their personal qualities, the very existence of rules is a protection in itself.¹² Lord Bingham of Cornhill, the former Lord Chief Justice and later Senior Law Lord of England and Wales, described the “core” of the concept of the rule of law as being:

that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.¹³

¹¹ The Hon Justice Antonin Scalia, “The Rule of Law as a Law of Rules” (1989) 56 *University Chicago Law Review* 1175, p 1187.

¹² Joo-Cheong Tham, “ASIO and the rule of law” (2002) 27 *Alternative Law Journal* 216, p 217.

¹³ “The rule of law” (2004) 15(3) *Commonwealth Law Journal* 22, p 23.

8. However, the rule of law is wider than this notion suggests. One problem with seeing the rule of law as merely a protection against arbitrariness, and therefore more procedural than substantive in nature, is that it says nothing about whether those rules that the courts enforce are fair and just in the first place. This problem has already beset the High Court of Australia in relation to a series of immigration detention rulings where, although noting that it was tragic to contemplate the internment of children¹⁴ or the permanent incarceration of a refugee who was unable to be repatriated to his homeland,¹⁵ the Court concluded that it was constrained by the terms of the *Migration Act 1958* (Cth) and thus powerless to prevent substantive injustice. It is because of this defect that the procedural approach has been referred to as an impoverished notion of the rule of law.¹⁶
9. The question may be asked: is there an “inner morality to law?”¹⁷: a series of principles which can commonly be agreed to represent the ideas and aspirations that Australians believe that democracy must embody if it is to be a democracy at all? It may be difficult to identify such principles in a country as pluralistic and diverse as Australia. Nonetheless, I suggest that these principles do exist.
10. The Honourable Aharon Barak, President of the Supreme Court of Israel, provides some useful guidance as to what these

¹⁴ *Re Woolley* (2004) 225 CLR 1.

¹⁵ *Al-Kateb v Godwin* (2004) 219 CLR 562.

¹⁶ The Hon President Aharon Barak, “A Judge on Judging: The Role of a Supreme Court in a Democracy” (2002) 116 *Harvard Law Review* 16, p124.

¹⁷ L Fuller, *The Morality of Law* (1941).

values may be when noting that all democracies share common characteristics.

These general principles include the principles of equality, justice and morality. They extend to the social goals of the separation of powers, the rule of law, freedom of speech, freedom of movement, worship, occupation and human dignity, the integrity of judging, public safety and security, the democratic values of the State and its very existence. These principles include good faith, natural justice, fairness and reasonableness.¹⁸

11. According to this view, the rule of law can be seen as a more robust substantive doctrine embodying the fundamental values that we consider to be essential to democracy. I acknowledge that the identification of those fundamental values is a process on which opinions differ widely, and reasonably.

The threat of terrorism

12. In times of stress, history has shown that it may be necessary to re-evaluate priorities in order to decide which values are more important. The reactive “war against terror” has been a catalyst for the realignment of society’s values. It raises for consideration the extent to which we are willing to tolerate the diminution of personal

¹⁸ *Borochoy v Yefet* (1983) 39(3) P.D. 205 at 218.

liberties in favour of collective security.¹⁹ To my mind, a crucial defect in Australia's legislative response is that this question was never debated. Indeed, there was not even debate as to why the existing provisions of the criminal law were inadequate to deal with the threat. Some jurists find the idea of a balancing exercise to be inherently dangerous and intrinsically wrong. Benjamin Franklin, in his historical review of Pennsylvania (1759), cautioned that "[a]ny society that would give up a little liberty to gain a little security will deserve neither and lose both."²⁰ Similarly, Jenny Hocking, an Australian legal scholar, derided the idea of balancing rights, arguing that the preservation of rights and liberties is the *sine qua non* of democracies precisely because of their non-negotiability. Since it is these rights and responsibilities that define us as a democracy, their diminution is the diminution of democracy itself.²¹

13. The contrary view has been put with equal clarity. The 18th century English judge and jurist Sir William Blackstone noted, in relation to the power of Parliament to suspend an applicant's right to habeas corpus, that "sometimes it may be necessary for a nation to part with its liberty for a while, in order to preserve it forever."²² This is because the right to life, and in particular a life bereft of the fear of anarchy and violence, cannot exist without the protection of the state whose primary role is to maintain law and order.

¹⁹ A Dershowitz, *Why Terrorism Works: Understanding the Threat and Responding to the Challenge* Scribe Publications, Melbourne, 2002, p 10.

²⁰ Cited in M Head, 'Counter-Terrorism' Laws: A threat to Political Freedom, Civil Liberties and Constitutional Rights (2002) 26 (3) *Melbourne University Law Review*, p 682.

²¹ J Hocking, "Protecting Democracy by Preserving Justice: 'Even for the feared and Hated'" (2004) 27 (2) *University of New South Wales Law Journal* 319, p 336.

²² Cited with approval by Scalia J in *Hamdi v Rumsfeld, Secretary of Defense* 542 U.S. 507, 561-562 (2004).

14. Thus we live in a contradiction. The violent destruction of life and property, the fear and alarm consequent on a perceived state of continual danger, may cause us to resort for repose and security to institutions that have a tendency to depreciate our lives or our civil and political rights. To be more safe, we at length become more willing to run the risk of being less free.²³

15. It is widely acknowledged that terrorism has emerged as a serious global threat. Although critics point out that more people are killed every year in automobile accidents (or, in America, from food poisoning) than terrorist attacks, this does nothing to diminish the impact of these attacks, nor the responsibility of governments to protect us. Attacks upon the World Trade Centre and the Pentagon on September 11 2001,²⁴ the bombing of busy transport networks in Madrid²⁵ and London,²⁶ the destruction of nightclubs and restaurants in Bali²⁷ and the attacks on hotels and popular tourist spots in Mumbai²⁸ killed or injured many thousands of innocent people, and devastated the lives of many more. Such attacks are qualitatively different to the forms of terror that have emerged in the past.

16. However, the loss of life and property are only two consequences of acts of terror. Scenes like the twin towers falling in New York have become images that resonate deeply in our collective

²³ W Banks, "United States responses to September 11" in V Ramraj, M Hor and K Roach (eds), *Global Anti-Terrorism Law and Policy*, Cambridge University Press, Cambridge, 2005, p 491.

²⁴ Approximately 3000 people were killed.

²⁵ 11 March 2003. 191 people were killed, and at least 1,800 injured.

²⁶ The attack on 7 July 2005 and attempted bombings on 21 July 2005. 52 people were killed, 770 injured.

²⁷ 12 October 2002 and 1 October 2005 killed 222 civilians.

²⁸ 26 November 2008. 164 and 9 gunmen were killed.

subconsciousness which, when combined with the randomness of attacks, leave society feeling unsafe. This is indeed one of the aims of terrorism - to create insecurity and uncertainty in daily life.

17. Nevertheless, the fear and destruction caused by terrorism should not of themselves lead us to abandon our values. There are other more dangerous and tangible risks to our lives that are tolerated without questioning our rights to liberty. What sets terrorism apart is not its probability of occurring (which in reality is relatively low), but rather the way in which terrorists aim to disrupt and coerce peaceful political process and interrupt society through acts of indiscriminate violence, often with disregard for their own lives. The uncertainty created by the indiscriminate nature of terrorism should lead us to ask in a most immediate way how much we need, and how much we are willing, to sacrifice in the interests of security. It thus goes to the centre of what I have been talking about- that is the functioning of a democracy and in particular the rule of law - because it is in times like this where democracy is most under strain.

The absence of real debate

18. I accept that there is a real risk that Australia may be subjected to terrorist attacks. The extent of that risk is perhaps something that is very difficult to quantify; and I accept that it may not be in the public interest for detailed information, which might enable some assessment of the extent of the risk, to be made public.

19. Nonetheless, I am concerned at the lack of real debate before the measures, to which I later turn, were enacted. In particular, there has been no real public justification of the need to expand further the powers of the police and intelligence agencies. In effect, the Australian public has been asked to accept extraordinary and substantial inroads into its liberties and traditional rights, on the basis that the new and extensive powers are necessary, and will be exercised carefully in good faith.

20. Another aspect of the very limited and superficial way in which the debate has been conducted in Australia is the focus on the Islamic character of terrorism. There does not appear to be any real attempt to understand why it is that some of those who follow the Muslim faith have chosen to pursue a course of violence against western democracies. Such an understanding may be important: if we can understand the reasons why people take up terrorism, it may be possible to react not only by seeking to deal with those who have become terrorists, but also by minimising the risk that others will decide to pursue terror in the first place. Unfortunately, in Australia (according to anecdotal evidence in the newspapers) there appears to have been a backlash against people of the Muslim faith. That is a disgraceful state of affairs in a country that has gained so much from successive waves of immigration; and, at the most brutally practical level, it is likely to marginalise those who are the objects of hatred and thus turn them against the country in which they live. That does not seem to me to be productive.

Community Consensus

21. Rather than marginalising, Australian should be engaging those of the Muslim faith. Effective protection must depend upon community consensus. We need a community consensus that terrorist activity is to be condemned, that it is right to expose and deplore anything that tends to give assistance to such an activity, that the intelligence agencies are to be assisted with whatever information is available to prevent terrorist activity and to apprehend those who engage or assist in engaging in such activity. Such a consensus, shared by all sections of the community, is essential to combating terrorism.²⁹
22. To create and maintain such a consensus, it is not enough to rely on community fear. Fear can lead a society in the wrong direction, destroying the freedoms which mark our way of life and which terrorists might hope to destroy. The Council of Europe, in a preface to its Guidelines on Human Rights and the Fight Against Terrorism, warned:

[t]he temptation for governments and parliaments in countries suffering from terrorist action is to fight fire with fire, setting aside the legal safeguards that exist in a democratic state. But let us be clear about this: while the State has the right to employ to the full its arsenal of legal

²⁹ The Hon. Sir Gerard Brennan, AC KBE, Speech delivered at the *Clarke Inquiry Public Forum*, Sydney, 22 September 2008, pp 2-3.

weapons to repress and prevent terrorist activities, it may not use indiscriminate measures which would only undermine the fundamental values they seek to protect. For a State to react in such a way would be to fall into the trap set by terrorism for democracy and the rule of law.³⁰

23. To ensure that the community is firmly in support of the measures taken to combat the possibility of terrorist activity, the special laws and practices that are put in place must be both necessary and effective, whilst not trespassing on the human rights of citizens except to the extent that it is absolutely necessary to do so.

24. At the outbreak of the Second World War, the then Australian Prime Minister, Mr RG (later Sir Robert) Menzies said:

[w]hatever may be the extent of the power that may be taken to govern, to direct and to control by regulation there must be as little interference with individual rights as is consistent with concerted national effort ... the greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and to lose its own liberty in the process.³¹

³⁰ Adopted by the Committee of Ministers, 11 July 2002, at the 804th Meeting of the Ministers' Deputies at p 5, cited by Hon Arthur Chaskalson, sometime Chief Justice of South Africa and President of the Constitutional Court in his Seventh Sir David Williamson Lecture: *The Widening Gyre: Counter-terrorism, human rights and the rule of law*.

³¹ Sir Robert Menzies described fear in the dark days of July 1942 as a "potent instrument of domestic policy", reported at –
<http://www.menziesvirtualmuseum.org.au/transcripts/ForgottenPeople/Forgotten7.html>

This statement reflects the traditional values of the common law which underpin a free society.³²

25. Concerns about our physical safety should not allow us to digress from these values. Our concerns should not allow us to compromise our civil liberties in the belief that only in doing so can governments protect us. These propositions have particular force where (as in Australia) the concerns arise out of an uninformed “debate”, fuelled by demagoguery, talk-back prejudice and extremist web-site postings. We should not be prepared to compromise the rights of others, believing that the counter-terrorism laws will not impact on ourselves. Laws that ignore existing rights necessarily isolate some sections of society. When this happens, dissent and disillusionment may replace consensus, subsequently prejudicing the functions of government.³³
26. With this in mind, I believe that there are provisions in our laws which warrant consideration to determine whether too great an erosion of our fundamental rights has occurred.

How has Australia responded?

27. Australian governments responded robustly to the perceived threat of terrorism. In a somewhat ironic way, although the attacks on September 11 were the result primarily of human errors –

³² Hansard, House of Representatives, 7 September 1939, p 164.

³³ The Hon. Sir Gerard Brennan, AC KBE, S Speech delivered at the *Clarke Inquiry Public Forum*, Sydney, 22 September 2008, ppg2-3.

intelligence and security failures – rather than inadequate laws,³⁴ the first reaction of the Australian government was to implement a massive overhaul of our legal system.

28. This overhaul began with the introduction of a number of new criminal offences. Part 5.3 was inserted into the Commonwealth *Criminal Code*.³⁵ That part provides for a variety of offences including being involved in a terrorist act,³⁶ participating in the planning of a terrorist act,³⁷ being a member of a proscribed terrorist organisation,³⁸ associating with a proscribed terrorist organisation³⁹ and financing organisations that commit terrorist acts.⁴⁰
29. Further, new legislative provisions have been introduced providing for control orders⁴¹ and preventative detention⁴². A control order allows a court to impose restrictions on a person's movements or activities for the purpose of protecting the public from a terrorist act, even if that person has not been convicted of any offence. Preventative detention allows a judge, magistrate or senior member of the Administrative Appeals Tribunal, acting as a designated person (i.e., because he or she holds one of the identified offices) rather than in a judicial capacity, to order a

³⁴ A Dershowitz, *Why Terrorism Works: Understanding the Threat and Responding to the Challenge* Scribe Publications, Melbourne, 2002, p 191.

³⁵ The Criminal Code is a schedule to the *Criminal Code Act 1995* (Cth).

³⁶ *Criminal Code 1995* (Cth), s 101.1-101.2.

³⁷ *Criminal Code 1995* (Cth), s 101.4-101.6.

³⁸ *Criminal Code 1995* (Cth), s 102.2-102.7.

³⁹ *Criminal Code 1995* (Cth), s 102.8.

⁴⁰ *Criminal Code 1995* (Cth), s 103.1.

⁴¹ *Criminal Code 1995* (Cth), Division 104.

⁴² *Criminal Code 1995* (Cth), Division 105.

person to be detained for the same reason for up to 14 days, without having committed a criminal offence.

30. These laws are reinforced by Part III, Division 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth)⁴³ and the *Terrorism (Police Powers) Act 2002* (NSW),⁴⁴ which give ASIO and the police special powers in relation to alleged terrorist operations.

31. Taken together, these Acts represent the evolution of a whole new era of criminal law and law enforcement procedure.

The Legislative Definition of Terrorism

32. Section 100.1 of the *Criminal Code* defines terrorism as certain violent acts⁴⁵ that are accompanied by an intention to advance “a political, religious or ideological cause” coupled with the intention of “coercing, or influencing by intimidation, the government” or “intimidating the public or a section of the public”.⁴⁶ Thus, in determining criminal responsibility, such a definition requires the consideration not just of the intention of the accused but also of his or her motive.

⁴³ Enacted through the *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth).

⁴⁴ Especially after the changes introduced by the *Crimes Legislation Amendment (Terrorism) Act 2004* (NSW); *Terrorism (Police Powers) Amendment (Preventive Detention) Act 2005* (NSW); *Terrorism Legislation (Warrants) Amendment Act 2005* (NSW).

⁴⁵ *Criminal Code 1995* (Cth), s 100.1(2).

⁴⁶ *Criminal Code 1995* (Cth), s 100.1(1).

33. For convenience, I set out the relevant definitions, and s101, which creates offences by reference to the concept of “terrorist act”.

100.1 Definitions

- (1) **terrorist act** means an action or threat of action where:
- (a) the action falls within subsection (2) and does not fall within subsection (3); and
 - (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
 - (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.
- (2) Action falls within this subsection if it:
- (a) causes serious harm that is physical harm to a person; or
 - (b) causes serious damage to property; or
 - (c) causes a person’s death; or
 - (d) endangers a person’s life, other than the life of the person taking the action; or
 - (e) creates a serious risk to the health or safety of the public or a section of the public; or
 - (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system; or
 - (iii) a financial system; or
 - (iv) a system used for the delivery of essential government services; or
 - (v) a system used for, or by, an essential public utility; or
 - (vi) a system used for, or by, a transport system.

(3) Action falls within this subsection if it:

- (a) is advocacy, protest, dissent or industrial action; and
- (b) is not intended:
 - (i) to cause serious harm that is physical harm to a person; or
 - (ii) to cause a person's death; or
 - (iii) to endanger the life of a person, other than the person taking the action; or
 - (iv) to create a serious risk to the health or safety of the public or a section of the public.

(4) In this Division:

- (a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and
- (b) a reference to the public includes a reference to the public of a country other than Australia.

Division 10 —Terrorism

101.1 Terrorist acts

(1) A person commits an offence if the person engages in a terrorist act.

Penalty: Imprisonment for life.

(2) Section 15.4 (extended geographical jurisdiction – category D) applies to an offence against subsection (1).

101.2 Providing or receiving training connected with terrorist acts

(1) A person commits an offence if:

- (a) the person provides or receives training; and
- (b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
- (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

Penalty: Imprisonment for 25 years.

- (2) A person commits an offence if:
- (a) the person provides or receives training; and
 - (b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
 - (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).

Penalty: Imprisonment for 15 years.

- (3) A person commits an offence under this section even if:
- (a) a terrorist act does not occur; or
 - (b) the training is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or
 - (c) the training is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.
- (4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.
- (5) If, in a prosecution for an offence (the **prosecuted offence**) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the **alternative offence**) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

101.4 Possessing things connected with terrorist acts

- (1) A person commits an offence if:
- (a) the person possesses a thing; and
 - (b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
 - (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

Penalty: Imprisonment for 15 years.

- (2) A person commits an offence if:
- (a) the person possesses a thing; and
 - (b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
 - (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).

Penalty: Imprisonment for 10 years.

- (3) A person commits an offence under subsection (1) or (2) even if:
- (a) a terrorist act does not occur; or
 - (b) the thing is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or
 - (c) the thing is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.

- (4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.

- (5) Subsections (1) and (2) do not apply if the possession of the thing was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).

- (6) If, in a prosecution for an offence (the **prosecuted offence**) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the **alternative offence**) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative

offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

101.5 Collecting or making documents likely to facilitate terrorist acts

(1) A person commits an offence if:

- (a) the person collects or makes a document; and
- (b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
- (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

Penalty: Imprisonment for 15 years.

(2) A person commits an offence if:

- (a) the person collects or makes a document; and
- (b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
- (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).

Penalty: Imprisonment for 10 years.

(3) A person commits an offence under subsection (1) or (2) even if:

- (a) a terrorist act does not occur; or
- (b) the document is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or
- (c) the document is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.

(4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.

- (5) Subsections (1) and (2) do not apply if the collection or making of the document was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3)).

- (6) If, in a prosecution for an offence (the **prosecuted offence**) against a subsection of this section, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the **alternative offence**) against another subsection of this section, the trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

101.6 Other acts done in preparation for, or planning, terrorist acts

- (1) A person commits an offence if the person does any act in preparation for, or planning, a terrorist act.

Penalty: Imprisonment for life.

- (2) A person commits an offence under subsection (1) even if:
- (a) a terrorist act does not occur; or
 - (b) the person's act is not done in preparation for, or planning, a specific terrorist act; or
 - (c) the person's act is done in preparation for, or planning, more than one terrorist act.
- (3) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1).

34. Proponents for the inclusion of a motive element in the definition of terrorism argue that to do so allows the law to identify, stigmatise and deter that which society considers to be especially

abhorrent about terrorism.⁴⁷ For opponents, of whom I am one, the inclusion of motive as a definitional requirement invites an unnecessary focus on (or creation or development of) racial and religious divisions in society, encourages discrimination and suspicion, politicises investigations and trials and encumbers freedom of expression, association and religion.⁴⁸

35. My first objection to including motive as an element in terrorism definitions is a jurisprudential one. The requirement that the prosecution has to prove the motive behind the act in order to distinguish a terrorist offence from other existing crimes seems to be at odds with common law principles. Traditionally, motive has been considered a distinct and largely irrelevant consideration to the criminality of an act. In determining criminal responsibility, it is usually the accused's intention to commit the prohibited act that forms an essential element of the crime, whilst motive is relevant only to determining questions of fact, or as a consideration in sentencing.

36. In *Hymn v DPP (Cth)*, the Lord Chancellor, Lord Hailsham of St Marylebone, referred to motive as an emotion prompting an act that is quite separate from an intention. His Lordship stated:

[t]he motive for murder may be jealousy, fear, hatred, desire for money, perverted lust, even, as in so-called 'mercy killings', compassion or love. In this sense, motive is entirely

⁴⁷ B Saul, *Defining Terrorism in International Law* (2006).

⁴⁸ B Saul, "The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?" in A Lynch, et al (ed) *Law and Liberty in the War on Terror*, Federation Press, Sydney, 2007, p 29.

distinct from intention or purpose. It is the emotion that gives rise to an intention and it is the latter and not the former which converts an *actus reus* into a criminal act.⁴⁹

37. The legal suppression of the notion of 'motive' in the formulation of offences has largely kept political, social and cultural explanations for the commission of offences away from the trial process. It is not in the public interest for such explanations to provide for a politicisation of the criminal investigatory and trial process. Nor is it in the public interest for a person to avoid criminal liability by showing that their acts were motivated by something other than politics, religion or ideology.⁵⁰ Motive should neither excuse nor create a crime.
38. Secondly, a significant practical disadvantage in requiring motive as a mental element of a criminal offence is that it may be difficult to prove. An intention to advance a political, religious or ideological cause is an inherently vague criterion. It may be difficult to know in a particular case what evidence the prosecution would need to lead in order to prove such an intention beyond reasonable doubt. Further, what will be considered a political, religious or ideological cause may change over time.
39. It is necessary for the prosecution to prove an intention to advance a political, religious or ideological cause in contrast to a purely personal one. In *R v Mallah*⁵¹ there was evidence that the accused

⁴⁹ *Hymn v DPP (Cth)* [1975] AC 55.

⁵⁰ Submission to the Security legislation Review Committee, House of Representatives, 31 January 2006, p 9 (Commonwealth Department of Public Prosecutions).

⁵¹ *R v Mallah* (2005) 154 A Crim R 150.

was motivated by a religious or ideological cause. However, there was also evidence that he may have been motivated by a desire for revenge or because of a grievance against a Government agency. Subsequently the accused was acquitted of two counts of preparing for or planning a terrorist act. Thus it seems that tactically, it may be easier for the Office of Public Prosecutions to charge individuals with pre-existing offences rather than make use of the terrorism legislation. If this is so, the inclusion of the motive element in the definition diminishes the effectiveness and value of the terrorism laws.

40. If the prosecution is able to establish that an act is undertaken with the intention of coercing, or influencing by intimidation, the government or intimidating the public or a section of the public, then the motive for the act should be irrelevant.⁵² The requirement to prove the reason behind this conduct adds a level of complication that appears to be unwarranted. Where an act of a terrorist nature is committed, such as destroying a building or indiscriminate violence, with an intention to intimidate or coerce, there seems little sense in specifically dealing with the case as a terrorist offence where there is an ideological or religious cause but not if there is only a desire for personal revenge. That which is considered conceptually and morally distinctive about terrorism – that it aims to disrupt and coerce peaceful political process and interrupt society through violence – should form the focus of the law, not the underlying motive of the perpetrator.

⁵² In this context I take 'intention' to mean: "a thing intended – an aim or purpose", and 'motive' to mean: "a fact or circumstance that influences a person to act in a particular way": Shorter Australian Oxford English Dictionary, 2004 Edition.

41. My third and principal objection to including a religious and political motive requirement in terrorism definitions is the discriminatory and divisive nature of its inclusion. It is widely known that many acts of terror have been committed by Islamic extremists. We have been told that those who commit such acts believe that their death will ensure eternal salvation. In many instances, it is clear that such acts were committed “with an intention of advancing a political, religious or ideological cause”. However the recognition of such a motive does not of itself increase the disturbing nature of such crimes. Engaging in the use of indiscriminate violence or causing serious damage to property in order to advance for example, the interests of organised crime or industrial espionage, or international policy aims (such as occurred in the bombing of the Rainbow Warrior) is equally objectionable. The motive of the individual or group adds nothing to the criminality of acts of terrorism, nor to their consequences.⁵³

42. The definition in section 100.1 identifies the advancing of a religious cause as an element of an offence. Identifying a religious and political motive may very well entrench substantive inequality in the application of the law. In *R v Khawaja*, Rutherford J, a trial judge in Canada, said that the requirement for proof of a political or religious motive “will promote fear and suspicion of targeted political or religious groups, and will result in racial or ethnic profiling by government authorities at many levels”.⁵⁴ Similarly, Canada’s O’Connor J in the first Arar Report noted that “anti-terrorism investigations at present focus largely on members of the

⁵³ The Hon. Sir Gerard Brennan, AC KBE, Speech to the *Clarke Inquiry Public Forum*, 22 September 2008, p 5.

⁵⁴ *R v Khawaja* [2006] OJ 4245, at 73.

Muslim and Arab communities” leading to an “increased risk of racial [or] religious profiling”.⁵⁵ A former Chief Justice of the Australian High Court, Sir Gerard Brennan, has warned that such a focus on motive “may easily be misunderstood as targeting the entire group who wish to advance the religious cause of Islam”.⁵⁶ Including motivation in the definition promotes the impression that the State is punishing the accuseds’ politics or religion as opposed to their having committed or planned to commit acts of violence.⁵⁷

43. The vast majority of Muslim Australians and Australians of Arab birth or descent are peaceful citizens, who deplore acts of terrorism. It is the Muslim community who, sharing this general view, are likely to be most effective in exposing any potential dangerous Islamic terrorists. Such contributions to the protection of society and the prevention of terrorist acts should be promoted and recognized. A law that allows itself to be interpreted as targeted and discriminatory fosters disillusionment and dissent. A community that feels targeted and isolated is not one that will readily seek to assist those who discriminate against them.

Conclusion

44. The term ‘terrorism’ is not employed as a neutral or purely descriptive term. ‘Terrorism’, whilst certainly ambiguous, is

⁵⁵ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar Analysis and Recommendations* (2006) p 356.

⁵⁶ The Hon. Sir Gerard Brennan, AC KBE, ‘Liberty’s threat from executive power’, *Sydney Morning Herald*, 6 July 2007, p 11.

⁵⁷ K Roach, “The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive” in Lynch A, et al (ed) *Law and Liberty in the War on Terror*, Federation Press, Sydney, 2007, p 41.

inherently a politicised concept, carrying with it implicit political presumptions and ensuring societal focus on particular groups and individuals. Thus in employing the language of terrorism the Australian government has been able to enact a legislative regime which, without any real public consultation and debate, has eroded established civil liberties and legal protections. The definition of 'terrorism' enacted in the new laws has allowed for the categorisation and targeting of Muslim and Arab groups within Australian society. The definitional elements relating to motivation should be removed. The political or religious motivation of an individual should not create nor excuse a criminal act.

45. It has been disturbing to witness the ease with which political and legal rights, central to any notion of the rule of law, have been eroded in attempts to counter 'terrorism', undermining the very democratic structures we are supposedly seeking to protect. Australia needs to re-evaluate its response to the threat of terrorism. In doing so, it should consider the approach taken by countries, such as Israel, who in the face of much greater and immediate threats and acts of violence have maintained a balance between conflicting values and principles.

46. Australia's response must maintain proportion, adhere to the ways of democracy and uphold constitutionalism and the rule of law.⁵⁸ The rights of individuals should be preserved. That applies as much to the rights of suspected individuals as it does to the rights of law abiding citizens. Balance and compromise are the price of

⁵⁸ The Hon. Justice Michael Kirby, 'Australian Law – After 11 September 2001' (2001) 21 *Australian Bar Review* 253, p 263.

democracy. It is necessary to maintain a balance between the rights of individuals and ensuring the security of the State and its citizens. It is necessary to ensure community consensus in creating this balance. “Only a strong, safe and stable democracy may afford and protect human rights, and only a democracy built on the foundations of human rights can have security.”⁵⁹

⁵⁹ The Hon President Aharon Barak, “The Supreme Court and the Problem of Terrorism” in *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law*, Jerusalem, 2005, p 17.