

Contemporary Comments

Australia's Anti-Terrorism Legislation and the Jack Thomas Case

... the justice system still appears either unequipped or unwilling to deal with the threats of terrorists in our midst (*Australian* 22 August 2006).

The Attorney-General, despite the jury's verdict that Thomas has not planned any terrorist activity, will not allow the courts to thwart his will (*Walters Age* 30 August 2006).

Introduction

The Jack Thomas case starkly highlights the way anti-terrorism laws have altered Australia's legal landscape. On 26 February 2006, Thomas became the first person tried and convicted under the Commonwealth Government's new anti-terrorism laws. On 18 August 2006, the Victorian Court of Appeal quashed his conviction (*R v Thomas*). Shortly thereafter, on 27 August 2006, a Federal Magistrates Court, in another legal first issued an interim control order restricting his movements and communications (in the Federal Magistrates Court of Australia File no: (P)CAG47/2006).

The contours of the debate filling editorial and opinion pages and dominating electronic media in the days surrounding these legal events reflect the sharp division in opinion regarding Australia's anti-terrorism laws. For some the prosecution, conviction at trial, extended pre-trial incarceration in harsh conditions, and the issue of the interim control order stand as indictments of the laws. The Melbourne based *Age* newspaper's editorial argued that the Court of Appeal decision, quashing the original conviction, was a victory for the rule of law and democracy (*Age* 30 August 2006:14). A cartoon published in the *Age* newspaper on the subject of the control order neatly captures the tone of much of the opinion against the laws and their use against Thomas. The cartoon foregrounds two men dressed in dark suits and dark glasses, dragging a reluctant man off a beach. The background depicts a sunny day, sandy beach, people sun bathing and swimming; a quintessentially Australian scene that works to highlight a relaxed and carefree lifestyle. The juxtaposition of the two incongruous images appears to send the message that the laws and their use against Thomas (who was on a family holiday at the beach when the order was issued) are 'unAustralian' (*Age* 30 August 2006:15).

Contrary opinion sees actions taken against Thomas as necessary to protect Australia from terrorism and the Court of Appeal decision quashing the conviction as undermining national security. In line with this the *Australian* newspaper decried the Court of Appeal decision as the triumph of narrow legalism over common sense and a damaging blow in the fight against terror (*Australian* 21 August 2006:11; *Australian* 22 August 2006:13). In this context the issuing of the interim control order is seen as both necessary in terms of community protection and reasonable in its restriction on Thomas' activities. Outside of the parameters of the debate about the nature and implication of the laws and the legal process for both security and democracy some see the case as a reflection of the willingness of vested interests to use fear as a political tactic. The suggestion by one correspondent to the *Age* that Thomas, frequently referred to in the media as 'Jihad Jack' should be referred to as 'TAMPA Thomas', works to sum up the cynicism about the motives of key players,

including the Australian Federal Police, the Australian Security Intelligence Organisation ('ASIO') and the government, particularly Attorney-General, Phillip Ruddock (see *Age* 30 August 2006:14; see McCulloch 2004 and McDonald 2005, on the politics of fear and security).

This contemporary comment sets out the legal background to the case and reflects on its significance in terms of key themes in Australia's anti-terrorism legislative framework.

The charges, trial, verdict, appeal, interim control order and the depth and diversity of opinion highlight the significant impact anti-terrorism legislation is having on criminal justice. Since 2001 there have been more than 35 pieces of Federal anti-terrorism legislation passed. The quantity and pace of legislative change in this area has reduced the opportunity for informed public debate. In addition many of the most controversial aspects of the legislative package, such as ASIO's coercive questioning and detention powers and control orders have not been used or used only infrequently. The Federal Opposition's decision not to oppose security legislation has added to the lack of interest and informed debate. A recent national survey by Amnesty International reveals a low level of awareness and high level of concern about Australia's anti-terrorism laws (Amnesty International 2006). The Thomas case is significant in making clear some of the consequences of the legislative changes and providing an opportunity to reflect upon their impact.

Some key themes in Australia's anti-terrorism legislation

Key themes in anti-terrorism legislation highlighted by the Thomas case include:

- The breadth of the terrorism offences included in the Commonwealth *Crimes Act*;
- The preemptive nature of the anti-terrorism legislation;
- The focus on identity and association rather than behaviour;
- The blurring of the boundaries between evidence and intelligence;
- Increasing extraterritorial operation of police and intelligence services;
- Increased executive power.

Each of these themes and the way they are illustrated in the Thomas case are dealt with below.

The breadth of the terrorism offences

Terrorism offences under the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') travel well beyond the acts of outrageous politically, ideologically or religiously motivated violence, such as hijackings and bombings that are popularly associated with the terms terrorist and terrorism. A person can be convicted of a terrorist offence without engaging in conduct that is harmful or violent, or ever planning or intending to engage in harmful or violent conduct. At trial, Thomas was found guilty by a Supreme Court of Victoria jury of one count of receiving funds from a terrorist organisation (*Criminal Code*, s102.6), namely al-Qaeda, and one of possessing a falsified Australian passport (*Passports Act 1938* (Cth), s9A(1)(e)). He was acquitted of a further two counts of intentionally providing resources to a terrorist organisation (*Criminal Code*, s102.7(1)). His acquittal on those charges clearly meant that the jury found that Thomas did not have any intention to help al-Qaeda to commit a 'terrorist act'. This lack of intention did not, however, save Thomas from conviction on the

charge of receiving funds from a 'terrorist organisation'. This offence can be committed regardless of the use to which the funds are put. With his acquittal of the charge of supporting a 'terrorist organisation', the jury presumably found that Thomas *did not* intend to use the funds to engage in a 'terrorist act'. Nevertheless, mere receipt of such funds from al-Qaeda led to conviction. The conviction on a terrorist charge naturally creates the impression in the public imagination that Thomas is a terrorist, a label that connotes a sense of moral outrage and fear beyond that associated with even serious violent criminal conduct, such as murder, rape, serious assault and the like. However Thomas caused no physical harm to anybody and the jury rejected the idea that he intended to do so.

The breadth of the terrorist offences operates to create or manufacture the biography of a 'terrorist'. The biography is created not through the harmful actions or intentions of the person convicted but through anti-terrorism legislation. In effect the counter measures create the 'terrorist' who is seen to exist before and beyond any acts of violence. Thomas is understood to be a 'terrorist' not because he directly caused physical harm or damage for a political, ideological or religious cause *or because there was evidence that he intended to* but because he has been convicted of a 'terrorism' offence. Once a person is labeled a 'terrorist' the opportunity for due process is diminished because the label itself connotes extreme danger and intolerable risk. Supporting the use of the control order in lieu of criminal conviction and incarceration after the successful Court of Appeal decision a writer to the *Age* newspaper maintained, 'It seems perfectly reasonable to conclude that he is a terrorist, as yet inactive' (31 August 2006). The idea of 'terrorist' before action is tied to the preemptive framework that is another key theme in the Federal legislative regime.

The preemptive nature of the anti-terrorism legislation

With the enactment of the post-September 11 terrorism laws, preventing terrorism has underlined the rationale for anti-terrorism laws. The United States' Attorney General, John Ashcroft, labels this development a new 'paradigm in prevention' (quoted in Cole 2006). In a similar vein, Australia's Attorney-General, Philip Ruddock, justified the latest wave of anti-terrorism laws on the basis that it 'ensures we are in the strong position possible to *prevent new and emerging threats*' (Commonwealth 2005). With this new paradigm, the key concept is *pre-emption*. This model is pre-emptive in the sense that prevention of the perceived *risk* of terrorism is a driving rationale. Under this model it is legitimate to punish and coerce without evidence and before any terrorist act, even a 'terrorist act' under the legislation that involves no harm or plan to do harm. The *rationale of prevention* takes priority over other considerations including the rights of the accused and the need for reliable and convincing evidence of guilt prior to punishment. Anti-terrorism legislation is 'preemptive' in that it seeks to punish or apply coercive sanctions on the basis of what it is anticipated might happen in the future.

Anti-terrorism laws not only criminalise committing or attempting to commit a criminal act but also preparing to do so, even if such preparation is only in the beginning stages and there is no specific plan (*Criminal Code*, ss101.5, 101.6; *R v Lodhi*). They go even further however. Since mid-2003, the Australian Security Intelligence Organisation has had powers to compulsorily question and detain persons *suspected of having information* related to a 'terrorism' offence. Such persons can be detained for up to a week in largely incommunicado circumstances (Stary & Murphy 2003; McCulloch & Tham 2005). In addition, with the passage of the *Anti-Terrorism Act (No 2) 2005* (Cth), the Australian Federal Police can now issue a 24 hour preventative detention order when there are reasonable grounds to suspect the person is engaged in various 'terrorism' offences and the order will substantially assist in preventing a 'terrorist act' and is reasonably necessary for this purpose.

Control orders take the preemptive aspect of the anti-terrorism laws to the outer limits of the current framework. The orders impose coercive sanction on people not for what people have done or are preparing to do but what it is anticipated they might do in the future. There is no presumption of innocence, no fair trial, and no proper rules of evidence. Instead the prosecution case is likely to consist of 'intelligence' which may be kept secret from the defence. To obtain an order a judge, sitting alone, only needs to find on the balance of probabilities that the order would substantially assist in preventing terrorism or that the person has received terrorist training (*Criminal Code*, s104.4). A control order can regulate or control almost every aspect of a person's life. House arrest with no access to the outside world is a possibility under the orders.

Control orders are unprecedented in the extent to which they apply coercive sanctions before crime, without conviction, without evidence of planned future crime or possibly without even evidence of risk of such crime. It was reported that at the interim control order proceedings against Thomas the Federal Government's chief general counsel, Henry Burmester, QC, argued that the likelihood of Thomas committing a terrorist act was irrelevant to the application of the control order. The transcripts of the interim control order proceedings obtained by the *Age* newspaper, which were not made available to the media or Thomas' counsel, reportedly indicate that there is no evidence that Thomas planned a terrorist attack (*Age* 22 September 2006). Control orders bring into stark relief the central problematic of the preemptive framework. Risk is speculative and in the future while coercive consequences are real and immediate.

Some commentators compare control orders with family violence orders which likewise restrict or control someone's movements and who they have contact with (see Peter Faris QC, *ABC Lateline* 2006). There are a number of significant parallels between family violence orders and control orders. Both are civil or quasi civil processes in which there is an applicant and respondent rather than prosecution and defendant. The standard of proof in each case is the civil standard; that is, on the balance of probabilities, and each is specifically designed to address future events. However, control orders are different in that family violence orders rest on a finding, on the balance of probabilities, that a person has already engaged in family violence or repeatedly stalked someone (see for example, *Crimes (Family Violence) Act 1987* (Vic)). Control orders do not require that the respondent has engaged in any past threatening or harmful behavior. Family violence orders do restrict behavior but the breadth of that restriction is not as great as that of control orders. Control orders are directed at separating the respondent from the public whereas family violence orders are aimed at protecting a particular individual or individuals. Thus, under the former, 'house arrest', for example, may be contemplated, whereas in the latter case the defendant is likely only to be kept away from a particular residence or a specified workplace.

Control orders have also been compared to laws which place restrictions on some sexual offenders subsequent to the expiration of a criminal sentence or parole (see eg *Serious Sex Offenders Monitoring Act 2005* (Vic); see comments by Peter Faris QC *ABC Lateline* 2006). Although these measures are in part directed at preventing crimes they can be distinguished from the control order regime on the basis that the people they are directed at have been convicted of serious criminal offences in the past.

The focus on identity and association rather than behavior

Anti-terrorism laws move away from a focus on behavior, the traditional remit of criminal law, and focus instead on status — that is, membership of proscribed organisations and association with members of such organisations. The 'terrorism' offences provide for *status* crimes by making mere membership of a 'terrorist organisation' an offence, and associating

with members of terrorist organisations, (eg by receiving money), an offence. The laws collapse the distinction between guilty acts and suspect identity by breaching '(a)n important premise behind the rule of law ... that governments should punish criminal conduct, not criminal types'(McSherry 2004:364). In Australia and other comparable jurisdictions there have long been status offences that target and criminalise association or identity rather than behaviour (Bronitt 2004:48–49). Historically, however, status offences were summary offences only (McSherry 2004). The anti-terrorism status offences are, however, serious criminal offences within the *Criminal Code* that attract lengthy gaol sentences.

The blurring of the boundaries between evidence and intelligence

The distinction between law enforcement, security organisations, evidence and intelligence are important in a criminal justice system geared towards trial and punishment upon conviction. The distinction between intelligence and evidence, however, is blurring as policing is increasingly integrated into national security and the line between intelligence and policing functions and services becomes less clear (White 2004; McCulloch & Tham 2005). The lack of clear distinction between detention for the purposes of gathering intelligence, coercive questioning, security and police operations, and an interview by police designed to adduce evidence was a key element in the success of Thomas' appeal.

Central to Thomas' conviction was the admission at trial of confessional statements obtained during the course of an interview conducted by two Australian Federal Police (AFP) officers while Thomas was detained in Pakistan (*R v Thomas*, [1–4]). Thomas appealed against his conviction on the grounds that, inter alia, the trial judge had erred in not excluding the confessional statements on the basis that they were involuntary or, alternatively, that admission was unfair or contrary to public policy [1–7].

Thomas was detained at Karachi airport by Pakistani immigration officials as he attempted to return to Australia on 4 January 2003. He remained in the custody of Pakistani authorities until he was released and returned to Australia on 6 June 2003 [1–4]. Throughout this five month period he was held without charge, in solitary confinement and without consular or legal access [11–12; 19–22; 35]. Thomas was taken to several locations, hooded, handcuffed and shackled, for interrogation by representatives from Pakistani and American intelligence agencies [9–18; 35], as well as a joint Australian team comprising AFP and ASIO officers [19–24; 28; 53–55]. Evidence suggests that Thomas was subjected to coercion and ill treatment during the course of these intelligence-gathering interrogations. For example, while held in Lahore for three weeks, he was interrogated on a daily basis by Pakistani officials and an American called 'Joe' [31–33]. Thomas testified that Joe said 'I would be sent back to Afghanistan, where the latest technique to extract information was twisting testicles ... I broke down because of what he was saying, especially about my wife and sending agents to Australia to rape my wife' [33].

Throughout his detention, Thomas was told by interrogators that his fate was dependant upon the extent of his cooperation [23–32; 56–59]. He was repeatedly told by Pakistani agents, in the presence of Australian officers, that the possibility of returning to his family was dependant on his cooperation and that failure to cooperate would result in a very different outcome [24; 25; 69–76]. Crucially, the Australian officers present at these interrogations did nothing to refute these statements and therefore, according to the Court, impliedly endorsed them [73–76]. Importantly, these inducements were made in the presence of one AFP officer who was present at all six joint AFP/ASIO interviews and would later take part in the formal AFP interview that would form the basis for Thomas' conviction [73–76].

On 8 March 2003, the AFP conducted a formal interview with Thomas (para 36). Pakistani officials had granted permission for the AFP interview on the condition that he be denied access to legal assistance [36–41]. Unlike previous interrogations, this interview was not conducted for the purpose of gathering intelligence but rather for obtaining evidence for use in Australian criminal proceedings [36–40]. In order for evidence to be admissible in an Australian court, the interview needed to comply with Australian law, in particular, common law rules regarding the admissibility of confessions and provisions of the *Crimes Act 1914* (Cth).

At common law, ‘a confessional statement made out of court by an accused person may not be admitted in evidence ... unless it is shown to be voluntarily made’ [66]. The Court of Appeal acknowledged that, apart from the denial of access to legal assistance, the AFP interview was ‘conducted in what can reasonably be described as a conventional fashion’ [51]. Indeed, Thomas was informed of his right to silence and there was no suggestion that the interview was conducted in an ‘overbearing or offensive fashion’ [26]. At trial, Justice Cummins held that the various admissions made by Thomas during the course of this interview had been voluntary and should not be excluded by an exercise of discretion [62]. His Honour stated that, ‘I do not accept Mr Thomas’ evidence that he “had no choice” but to answer the AFP questions ... he knew he could decline to answer questions’ [63].

On appeal, counsel for Thomas submitted that, viewed within the broader context of his detention in Pakistan, Thomas did not ‘in any practical sense, have a free choice to speak or be silent’ [69]. In agreeing with this argument, the Court of Appeal outlined various aspects of Thomas’ detention and interrogation in Pakistan that served to render his confessional statements involuntary and therefore inadmissible [69–95]. Citing Brennan J in *Collins v R*, the Court stated that the ultimate question was:

whether the will of the person making the confession has been overborne ... If the will has been overborne by pressure or by inducement of the relevant kind, it does not matter that the police have not consciously sought to overbear the will ... *it requires a careful assessment of the effect of the actual circumstances of the case upon the particular accused* (emphasis in original) [68].

The Court held that the earlier threats and inducements made by Pakistani agents, in the presence of Australians, were still operational in the mind of Thomas at the time of the formal interview [84–86]. The Court stated ‘what is striking is the degree of continuity between the earlier interviews and the last: same place, same AFP personnel, same topics’ [84]. The Court found that, in all the circumstances, it did not require ‘any feat of imagination’ to appreciate that Thomas’ will may have been overborne, stating:

Put bluntly, there can be little doubt that it was apparent to the applicant, at the time of the AFP interview, as it would have been to any reasonable person so circumstanced, that, if he was to change his current situation of detention in Pakistan and reduce the risk of indeterminate detention there or in some unspecified location, co-operation was far more important than reliance on his rights under the law. Indeed, it is apparent that he believed — and we would add, on objectively reasonable grounds — that insistence on his legal rights might well antagonize those in control of his fate [85].

The Court held that the trial judge erred ‘by divorcing the interview from the context in which it occurred’ [91].

Increasing extraterritorial operation of police and intelligence services

Traditionally policing has been largely confined to ‘internal’ security within territorial borders (McCulloch 2001:Ch 1). In the contemporary period, however, police are increasingly operating outside Australia’s borders (see eg Maclellan 2004). Police are now

deployed in increasing numbers, and in an increasing number of locations outside of Australia, and engage in an extended range of cooperative policing and security activities with other countries. Many of these cooperative relationships have arisen or been extended in the context of the 'war on terror'. These extraterritorial operations and cooperative arrangements raise a host of issues particularly where the criminal justice procedures of the host country differ markedly from our own. For example, the cooperation of the AFP with the Indonesian police in relation to the interception of the 'Bali nine' has been the subject of some criticism and concern (Nguyen 2006). The AFP decision to interview Thomas in Pakistani custody raises issues as to the appropriate conduct of Australian police in circumstances where an Australian citizen is being detained in circumstances and conditions that would not be tolerated in Australia. On a policy level the decision to allow the inclusion of the interview with Thomas as evidence at trial in Australia may have encouraged Australian police to allow, encourage or facilitate the detention of Australian citizens in countries without similar due process protections in order to gain confessions or information. That such an outcome is a real possibility is underlined by the by the United States' use of rendition in the context of the 'war on terror' (Elsea & Kim 2006).

Having found that the admission was not voluntarily made and therefore inadmissible, the Court ordered Thomas' convictions quashed (*R v Thomas*, [120]). While it was not necessary to address the other grounds of appeal, the Court did briefly deal with the issue of whether the evidence should have been excluded in the exercise of discretion because it was unfair or against public policy [96–119]. At common law, a judge may exclude evidence 'against an accused of a confession obtained by improper or illegal means' [99]. According to Brennan CJ in *R v Swaffield*, the primary aim of the public policy discretion was 'the constraining of law enforcement authorities so as to prevent their engaging in illegal or improper conduct, although securing fairness to the accused is a relevant exercise in the exercise of the discretion' (cited in *R v Thomas*, [102]). The Court considered whether the decision to interview Thomas without affording him the opportunity to secure legal representation was unfair or against public policy. Under s23G of the *Crimes Act 1914* (Cth), a person under arrest has the right to attempt to communicate with a legal practitioner, save for certain exceptions outlined in s23L and not applicable to the present case [104]. At trial, Justice Cummins stated that the right to legal representation 'was not absolute, nor can it be' [49]. He said that to postpone the interviews until such time as Thomas could obtain legal advice 'would have been poor investigative practice. Trails go cold. Further police investigation could be obviated' [49].

The Court of Appeal rejected this reasoning, stating that 'in our view, it would be contrary to public policy for this Court to condone what was a knowing non-compliance with the legal protection afforded by Australian law' [109]. The Court stated that, in light of the Pakistani refusal to allow legal access, no formal record of interview should have been conducted [111]. Significantly perhaps the Court of Appeal found that there was no satisfactory reason given for the decision to interview Thomas in Pakistan rather than on his return to Australia [44]. On a public policy level the Court of Appeal decision mitigates against the possibility that Australia's participation in policing outside of territorial borders will result in a 'race to the bottom' in terms of due process protections for detainees and those suspected of engaging in criminal activities.

Increased executive power

A key controversy with regard to anti-terrorism legislation relates to the expansion of executive power and the diminishing role of the courts. The Thomas case demonstrates how control orders can be used to restrict a person's liberty in circumstances where they have been found not guilty or had their conviction quashed by the courts. Control orders are

being used in a similar manner in the United Kingdom. Only minutes after a man was found not guilty of terrorism offences by a London jury he was placed on an order restricting his movements (*Australian* 31 August 2006:8).

The constitutionality of the control order regime is under challenge before the High Court. The question for the High Court, according to Andrew Lynch, the director of the Terrorism and Law Project at the Gilbert and Tobin Centre of Public Law, University of New South Wales, is whether courts have the power to deprive someone of their liberty even when they have not been convicted of a crime. Another important issue for consideration, according to Lynch, is that, in Thomas' case, the control order was imposed without the person subject to it being represented in court (*Age* 3 October 2006). The constitution mandates a separation between the different arms of government. Part of the separation of powers is that Federal judges can only exercise judicial powers. There is a question whether the role of the Federal magistrate in issuing a control order can be regarded as a judicial function, given that the process is not one of a fair trial, with the usual rules of evidence and the presumption of innocence (Williams & MacDonald 2006).

Conclusion

It is clear that the legal processes and controversy in relation to Jack Thomas are not over. Apart from the High Court constitutional proceedings, the Court of Appeal is still to decide if there should be a retrial based on new evidence (*R v Thomas (No 2)*). No doubt the case will remain a lightning rod for public opinion on anti-terrorism laws for some time into the future.

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