

Australia's Terrorism Offences – A Case Against

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Many different arguments could be given against Australia's anti-terrorism laws. When one considers aspects of the preventative detention regime, for example, or the power of the Australian Security Intelligence Organisation (ASIO) to compulsorily question, and in some cases detain, non-suspects, or the period of time for which a person arrested for a terrorism offence may be held without being charged, it is tempting to offer a rule-of-law-based argument. And those who have argued against these laws from a human rights perspective have suggested criticism based on the concepts of necessity and proportionality. But this chapter will come at the matter from a slightly different angle. It is written not from the perspective of a policy maker or risk analyst, nor from that of a practicing lawyer. My perspective is that of an academic lawyer and political philosopher who, as a member of the Anti-Terrorism Laws Working Group of the Federation of Community Legal Centres, is also an activist; and the chapter's chief concern is with the consequences of these laws – particularly the offences established in Divisions 101 to 103 of the Commonwealth *Criminal Code* – on Australians' political freedoms.

The chapter begins with an anecdote, which I take to be illustrative of the potential consequences of these laws. That anecdote will then lead into a more legal and theoretical argument.

Talking to Australian Somalis about Australia's anti-terrorism laws

In May 2007 I spoke at a meeting organised by members of Melbourne's Somali community. The impetus for this meeting was the reported remark of a Somali community leader in Sydney, that 'young Somali refugees in Mel-

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ponse was made by Steven Ciobo, a government member of the House of Representatives:

I feel that the executive, and government in the executive sense of the word as well, have taken a decision about what we believe is appropriate ideology and what is inappropriate ideology and that the legislation reflects the decision that we have taken.²⁴

Let us put to one side the fact that the legislation is silent on these matters, and that it is the operation of official discretions that determines which ideologies are appropriate in Australia, and which are not. Having put that detail to one side, I have no reason to doubt that what Mr Ciobo said is true. I do not believe, however, that it refutes the argument made in this chapter.

Notes

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- 1 The remark is attributed to Herse Hilole, 'a Sydney community leader and Islamic scholar' in Barney Zwartz, 'Local Somalis "terror recruits"', *The Age*, 13 April 2007, 1.
- 2 The quote is from para (a) of the definition of 'terrorist organisation': *Criminal Code* (Cth) s 102.1. The offences in Div 102 include being a member of such an organisation, directing its activities, recruiting for it, training with it, getting funds to or from it, or providing it with support or resources that would help it to directly or indirectly engage in, prepare, plan, assist in or foster the doing of a terrorist act. It does not matter whether or not the organisation is based outside Australia or consists of persons who are not Australian citizens: *Criminal Code* (Cth) s 100.1(1).
- 3 In the case of the training offence, if an organisation is listed as a terrorist organisation the offence takes on a quasi-reverse onus character, whereby the prosecution need not prove any fault on the part of the accused unless the latter is able to adduce evidence as to the absence of recklessness on his or her part: *Criminal Code* (Cth) s 102.5.
- 4 *Criminal Code* ss 104.2(2)(b), 104.4(1)(c)(ii).
- 5 Stephanie McCrummen, 'Ethiopia Steps up Attacks on Somalia; Planes Strike Airport; Refugees Flee to Kenya', *The Washington Post*, 26 December 2006, A01.
- 6 [2006] HCATrans 661 (6 December 2006). In his judgment in the case, Kirby J appears to accept the broad scope of the legislative definition of terrorist acts: *Thomas v Mowbray* [2007] HCA 33, [263]-[266].
- 7 ASIO describes Al-Qa'ida as 'a loose-knit grouping of individuals and organisations that espouses a violent Islamic extremist ideology ... founded, and ... led at all times, by Usama Bin Laden': cited in Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *Review of the Listing of Six Terrorist Organisations* (2005) 24.
- 8 Tom Allard, 'No Evidence on Thomas, Police Admit', *The Age*, 22 September 2006, 3; Australian Federal Police, 'Two men charged with terrorism offences' (Press Release, 1 May 2007).
- 9 For a discussion of this matter drawing on the traditions of just war theory, see CAJ Coady, 'The Morality of Terrorism' (1985) 60 *Philosophy* 47.
- 10 As reported by the Parliamentary Joint Committee on ASIO, ASIS and DSD; for example, above n 7, 40 (pertaining to the Armed Islamic Group), 45 (pertaining to Jamiat ul-Ansar), 49 (pertaining to the Salafist Group for Call and Combat).
- 11 This point is noted in *Thomas v Mowbray* [2007] HCA 33, [482] (Hayne J).

- 12 The conviction was later quashed on appeal and Thomas is facing a retrial on the basis of new evidence: *R v Thomas* (2006) 14 VR 475; *R v Thomas (No 3)* (2006) 14 VR 512.
- 13 Some marginal cases of euthanasia might provide an exception to this general expectation.
- 14 Evidence to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 4 April 2007, 16.
- 15 The Kurdish Workers' Party is a listed terrorist organisation and in May 2007 two men were arrested in Melbourne, charged with involvement with the Liberation Tigers of Tamil Eelam.
- 16 John Stuart Mill, *On Liberty* (1859, Everyman's Library edition with *Utilitarianism* and *Representative Government*, 1910) 73.
- 17 Transcript of Hearings of the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 4 April 2007, 22, 44 (Senator Robert Ray), 45 (Duncan Kerr).
- 18 'Sri Lanka FM Tips More Arrests', *The Australian*, 2 May 2007 <<http://theaustralian.news.com.au/story/0,20867,21657994-421,00.html>> at 3 July 2007.
- 19 For recent reports of increased extra-judicial abductions and killings by agencies of the Sri Lankan government, see Mian Ridge, 'No middle way for Sri Lanka's militant monks', *The Age*, 16 June 2007; Dylan Welch, 'Dark Days in Paradise', *The Sydney Morning Herald*, 30 June 2007.
- 20 Ted Honderich, *Terrorism for Humanity: Inquiries in political philosophy* (2003) 191. John Rawls agrees that violence becomes permissible when other means of achieving justice will be ineffective: *A Theory of Justice* (1971) 366, 390-1.
- 21 Michael Walzer, 'The Moral Standing of States: A response to four critics' (1980) 9 *Philosophy and Public Affairs* 209, 221.
- 22 Nick McKenzie and Sarah Smiles, with Ed O'Loughlin 'Australians travel for terrorism, says Ruddock', *The Age*, 30 June 2007, 1. The phrase 'extremist activity' is used by the journalists, but not by the Attorney-General.
- 23 Emma Griffiths, 'Israel mulls wider offensive after soldiers' deaths', *ABC News Online*, 27 July 2006 <<http://www.abc.net.au/news/newsitems/200607/s1698921.htm>> at 3 July 2007.
- 24 Transcript of Hearings of the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 4 April 2007, 36.