THE UNEXPECTED ENACTMENT OF NEW TREASON PROVISIONS: CAN IT POSSIBLY BE JUSTIFIABLE?

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For four decades, the offence of high treason in Australia remained unchanged. However, in 2002 the Commonwealth Parliament enacted new treason provisions as part of new counter-terrorism legislation. The new legislation has broadened the scope of the offence of treason in Australia. Thus far, the only reason given by the Government for legislating new treason provisions is that the offence of treason had to be modernized to reflect the nature of modern conflict. Any further elucidation of the rationale for the legislating of the new provisions cannot be found in the deliberations of the Senate Legal and Constitutional Legislation Committee or the parliamentary debates on the counter-terrorism legislation. Modernisation would appear to be an insufficient justification for the enactment of the new provisions, due to the nature of the offence. An examination of relevant jurisprudence and commentaries reveals the presence of four possible contentions which indicate that the enactment of the new treason provisions may not be justifiable. This paper will show that these contentions may be refuted.

I INTRODUCTION

For four decades until 2002, the offence of high treason in Australia remained unchanged.[1] The offence consisted of acts causing death or harm to the sovereign[2] and acts causing death to the sovereign's consort or heir apparent.[3] The offence also included acts amounting to the levying of war or preparatory to the levying of war against the Commonwealth,[4] the rendering of any form of assistance to enemies at war with the Commonwealth, regardless of whether a state of war was declared,[5] and the instigating of foreigners to make an armed attack on the Commonwealth.[6] The offence must also have been committed with the presence of both an intention to do any of these acts and a manifestation of the intention by an overt act.[7] This approach to treason remained unchanged until 2002 when the Commonwealth Parliament enacted new treason provisions as part of its 'package' of 'important counter-terrorism legislation'.[8]

The new legislation has broadened the scope of treason in Australia. From the first provision, the broadening is seen with acts causing death or harm being

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1 *Crimes Act 1914* (Cth) s 24, amended by *Crimes Act 1960* (Cth) s 24.

2 *Crimes Act 1914* (Cth) s 24(1)(a).

3 *Crimes Act 1914* (Cth) s 24(1)(b).

treason not only when the death or harm is done to the sovereign, the heir apparent of the sovereign or the consort of the sovereign, but to the Governor-General and the Prime Minister as well.[9] A significant addition to the scope of the offence is that any form of intended conduct which assists another country or organization that is engaged in armed hostilities against the Australian Defence Force would now be an act of treason.[10] Also included is a provision which explicitly states that there can be liability for treason regardless of whether the conduct or the result of the conduct constituting treason occurs in Australia.[11] The new legislation maintains that the offence of treason may be committed where there is conduct amounting to the levying of war or preparatory to the levying of war against the Commonwealth,[12] the rendering of any form of assistance to enemies at war with the Commonwealth regardless of whether a state of war has been declared,[13] and the instigating of foreigners to make an armed attack on the Commonwealth.[14] The new legislation also requires that the offence of treason be committed with an intention to do any of the acts mentioned and a manifestation of the intention by an overt act.[15]

Thus far, the only reason given by the Government for the legislating of the new treason provisions is that the offence of treason had to be modernised to reflect the nature of modern conflict.[16] Any further elucidation on the rationale for the legislating of the new provisions cannot be found in the deliberations of the Senate Legal and Constitutional Legislation Committee or the Parliamentary debates on the counter-terrorism legislation.[17] The offence of treason, historically, however, has been reputed to be a dangerous political 'weapon' which may be utilised by a government to the detriment of democracy.[18] As Chief Justice Latham of the High Court of Australia stated in *Australian Communist Party v Commonwealth*, '[a]ny Government which acts or asks Parliament to act

4 *Crimes Act 1914* (Cth) s 24(1)(c).
5 *Crimes Act 1914* (Cth) s 24(1)(d).
6 *Crimes Act 1914* (Cth) s 24(1)(e).
7 *Crimes Act 1914* (Cth) s 24(1)(f).
8 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1206 (Daryl Williams, Attorney-General). See *Security Legislation Amendment (Terrorism) Act 2002* (Cth) sch 1, amending *Criminal Code Act 1995* (Cth). The new treason provisions, along with provisions setting out a new set of terrorism offences, were included in the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), which stipulated that these provisions were to be inserted into the *Criminal Code 1995* (Cth).
9 *Criminal Code 1995* (Cth) s 80.1(1)(a)-(c).
10 *Criminal Code 1995* (Cth) s 80.1(1)(f).
11 *Criminal Code 1995* (Cth) s 80.1(7).
12 *Criminal Code 1995* (Cth) s 80.1(1)(d).
13 *Criminal Code 1995* (Cth) s 80.1(1)(e).
14 *Criminal Code 1995* (Cth) s 80.1(1)(g).
15 *Criminal Code 1995* (Cth) pt 5.1 div 80.1(1)(h).
16 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1140 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration), 1157 (Peter King), 1206 (Daryl Williams, Attorney-General).
17 See generally Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill [No 2] and Related Bills* (2002); Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002.
18 Alan Wharam, 'Treason' (1978) 128(5868) *New Law Journal* 851, 851. See also Michael Head, 'Counter-Terrorism Laws Threaten Fundamental Democratic Rights' (2002) 27 *Alternative Law Journal* 121, 123.

against treason ... has to meet the criticism that it is seeking not to protect government, but to protect *the Government,* and to keep itself in power'.[19]

The trial, conviction and execution of Sir Walter Raleigh in the 17th century for allegedly committing treason by conspiring against the King of England as a cover for purposes believed to include the consolidation of the throne of James I, is a historical illustration of the possible political misuse of the offence of treason.[20] Although the possibility of abuses of the new legislation, whether political, human rights related or otherwise, may be alleviated by the inclusion of a clause which makes treason prosecutable only with the consent of the Attorney-General,[21] this chequered history of the offence of treason, when coupled with the fact that the offence has, until now, been rarely used in Australia,[22] may indicate that modernisation as a sole justification for the increased scope of the offence is insufficient and may lead one to question whether the abrupt amendment of the offence can be truly justifiable.[23]

Commentaries on the new treason provisions indicate the possible presence of a contention, based on the criticisms of the provisions, which would undermine the possibility of there being any justification for the legislating of the provisions from the outset. This contention would be that the new treason provisions are not even truly treason provisions. An examination of the jurisprudence and commentaries on the offence of treason in general further reveals three additional broad contentions based on common criticisms of the offence of treason, which also indicate that the legislating of the new provisions may not be justifiable. These further contentions are that:

- the offence of treason is a defunct offence;
- the offence of treason reason has no relevance to terrorism; and
- the offence of treason is an inappropriate offence for addressing terrorism.

19 (1951) 83 CLR 1, 142 (emphasis in original).

20 See, eg, *The Trial of Sir Walter Raleigh for High Treason* (1603) 2 St CR 1, 30 (Lord Popham CJ); Alec Samuels, 'The Trial of Sir Walter Raleigh' (1990) 140(6482) *New Law Journal* 1698, 1698.

21 *Criminal Code 1995* (Cth) s 80.1(3). See also Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill [No 2] and Related Bills* (2002) [3.51]; Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1206 (Daryl Williams, Attorney-General); Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 8 April 2002, 17 (Karl Alderson, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department), 63 (George Williams, Professor). Cf Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 8 April 2002, 3-4 (Justice John Dowd, Commissioner and President, Australian Section and Member, International Executive Committee, International Commission of Jurists). The Senate Legal and Constitutional Legislation Committee noted that as the Commonwealth Director of Public Prosecutions would still need to be satisfied that prosecution for the offence would be appropriate, the requirement of the Attorney-General's consent would act as an additional safeguard for the use of the offence.

22 The only case in Australia from the end of the 19th century until present is *Ex parte Cousens; Re Blacket* (1946) 47 (SR) NSW 145. Thus far, the new legislation has not been utilised in any prosecutions.

23 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Melbourne, 18 April 2002, 184 (David Pargeter, Reverend of the Justice and International Mission Unit, Uniting Church in Australia). Reverend Pargeter noted that the rationale for including new treason provisions in counter-terrorism legislation was unclear.

This paper will address each of these four contentions and show that these contentions may be refuted. While the clarification of the actual rationale for the enactment of the new treason provisions remains the prerogative of the government, the addressing of these contentions will, at the very least, indicate that the enactment of the new treason provisions may be justifiable.

II CONTENTION 1: THE NEW TREASON PROVISIONS MAY NOT TRULY BE TREASON PROVISIONS

The contention that the new provisions are not truly treason provisions is supported by criticisms of the new legislation that, in general, allege that the modernisation of the offence of treason has resulted in an unacceptable broadening of the offence of treason.[24] Indeed, the broadening appears to have left the new provisions as being inaccurately described as treason provisions when they are contrasted with the narrowly defined treason provisions possessed by other nations. The *United States Constitution*, for example, merely states that treason against the United States would be present only if there is a levying of war against the country or an adhering to the enemies of the country by giving them aid and comfort.[25] The contemporary scope of the offence of treason in the *Treason Act 1351*, 25 Edw III St 5, c 2, which remains the oldest criminal statute still in force in the United Kingdom,[26] may be deemed to be limited to acts which bring about the death of either the King, the Queen, or the heir to the throne; acts which amount to levying war against the nation; and adhering to the enemies of the nation by giving them aid and comfort.[27] The *Treason Act 1702*, 1 Anne St 2, c 21 and the *Treason Act 1842*, 5 & 6 Vict, c 51, which are the only other relevant treason-related Acts of the United Kingdom that are still in force, do not extend the scope of the offence significantly further.[28] The fact that Australia is the only country with such a broadly defined set of treason provisions was acknowledged by Karl Alderson from the Attorney-General's Department, who informed the Senate Legal and Constitutional Legislation Committee that no other country has equivalent legislation relating to treason.[29]

24 Senate Legal and Constitutional Legislation Committee, Parliament of Commonwealth, *Inquiry into the Security Legislation Amendment (Terrorism) Bill [No 2] and Related Bills* (2002) [3.37]; Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 2002, 4659 (Peter Andren).

25 *United States Constitution* art 3, § 3.

26 Anthony Verduyn, 'Treason Past and Present' (1995) 145(6725) *New Law Journal* 1884, 1884; *R (Rusbridger) v A-G* [2003] 3 All ER 784, 788 (Lord Steyn).

27 *Treason Act 1351*, 25 Edw 3, st 5, c 2. See L H Leigh, 'Law Reform and the Law of Treason and Sedition' (1977) *Public Law* 128, 129.

28 *Treason Act 1702*, 1 Anne, st 2, c 21, s 3; *Treason Act 1842*, 5 & 6 Vict, c 51, s 2. These are the only relevant provisions of the Acts which remain unrepealed. The *Treason Act 1702* states that endeavouring to hinder the succession to the Crown is treasonous; while the *Treason Act 1842* states that it is a punishable offence to discharge or aim firearms at the sovereign, or throw or using any offensive matter or weapon with intent to injure or alarm the sovereign.

29 See Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 8 April 2002, 16 (Karl Alderson, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department).

The nature of the offence of treason, however, would indicate that the breadth of the scope of provisions would be of no significance in a determination of whether the provisions can be described as treason provisions. Support for this observation may be found in *Stephen's Commentaries on the Laws of England*, where it is stated that '[i]t is clear that a political offence of this gravity could not remain constant in character while the relations of the individual to the state suffered a complete revolution'.[30] A further indication that the breadth of the scope of provisions should not be of significance when ascertaining whether the provisions can be described as treason provisions can be seen from the fact that the *Treason Act 1351*, 25 Edw III St 5, c 2 continues to be regarded as a codification of the common law on treason,[31] despite the possibility that its scope may be considered to be far broader than the treason laws of any other jurisdiction, including Australia, in one aspect, in that it makes the violating of the consort of the King, the consort of the male heir of the sovereign, and the eldest daughter of the King a treasonable offence.[32] Hence, neither the criticisms alluding to the unacceptable broadening of the scope of the offence, nor the fact that all other jurisdictions have narrower treason provisions, should have any significance in a determination of whether the new provisions can be described as treason provisions. Indeed, the New South Wales Council for Civil Liberties, in its submissions to the Senate Legal and Constitutional Legislation Committee, argued that there should be a greater extension of the offence of treason and that the modernisation already carried out was insufficient as there would be 'the rather odd situation that killing the Duke of Edinburgh is an act of treason but conspiring to blow up the Federal Cabinet or the Federal Parliament is not an act of treason'.[33]

The nature of the offence of treason would, instead, indicate that a more fundamental prerequisite must be present in order for acts to be considered treason. This requirement would be the betrayal of an allegiance or duty. In the words of Sir William Blackstone, treason would require a 'betraying, treachery or breach of faith'.[34] Elizabeth I likewise remarked in 1586 that she had 'found treason in trust'.[35] However, the mere betrayal of an allegiance or duty would not suffice. The allegiance or duty must, in addition, be owed to a sovereign or state. This requirement of a betrayal of an allegiance or duty owed to a sovereign or state would be what distinguishes high treason from other criminal acts, including other historical categories of treason which have been described as petty or 'petit'

30 Geoffrey Chevalier Cheshire (ed), *Stephen's Commentaries on the Laws of England* (19th ed, 1928) vol 4, 122.

31 Wharam, above n 18, 851.

32 *Treason Act 1351*, 25 Edw 3, st 5, c 2.

33 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill [No 2] and Related Bills* (2002) [3.43]; Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 8 April 2002, 47 (David Bernie, Vice President, New South Wales Council for Civil Liberties).

34 Sir William Blackstone, *Commentaries on the Laws of England* (first published 1765-69, 1979 ed) vol 4, 75.

35 John Neale, *Elizabeth I and her Parliaments: 1584-1601* (1957) 118.

treason (in reference to breaches of an allegiance or duty owed to a commoner).[36]

Support for the presence of the requirement can be found in numerous commentaries.[37] In *Stephen's Commentaries on the Laws of England* for example, it was stated that '[t]reason imports generally treachery or [a] breach of faith ... [which] might be committed either by a breach of the faith or allegiance due to the King'. A common law requirement of a betrayal of an allegiance owed to a sovereign or state was also recognized in Broom's *Commentaries on the Common Law*.[38] Most cases do not explicitly acknowledge the requirement, especially when the allegiance owed is clear and unequivocal from the factual scenario, such as in *R v Casement*,[39] where the defendant, Sir Roger Casement, who was accused and convicted of assisting Germany in World War I, was a knight of the British Empire. However, the requirement is implicitly seen in the way treason is approached in the various cases the offence which have arisen throughout history. In *R v Lynch*,[40] for example, the Court, in deciding whether the defendant, who was an Australian-born British subject, had committed treason by taking up arms for South Africa, did not explicitly acknowledge the requirement but embarked on an extensive analysis on whether the defendant had owed his allegiance to the Crown. Similarly, in *De Jager v Attorney-General of Natal*,[41] the need for a betrayal of an allegiance owed to a state was implicit in the Court's discussion of the defendant's purported conflicting allegiance to the Crown and the government of South Africa.

The fundamental nature of the requirement was, in particular, emphasised in *Joyce v Director of Public Prosecutions* ('*Joyce*').[42] Joyce, the accused (also known as Lord Haw Haw to the British public) was tried for treason as he had broadcasted Nazi propaganda from Germany to Britain during World War II.[43] He was an American, born in the United States of Irish parentage but raised in the United Kingdom.[44] Shortly before the war, he moved from England to Germany and was granted German citizenship.[45] Although he had been impersonating the British aristocracy in the manner in which he spoke when he broadcasted his

36 Cheshire, above n 30, 122; John A Simpson and Edmund S C Weiner (eds) *Oxford English Dictionary* (2nd ed, 1989) vol 18, 459. See also *Crimes Act 1958* (Vic) s 8; Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 19 April 2002, 295 (Karl Alderson, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department). Such petty forms of treason would include the breach of the duties a servant owes to his or her master, or that of a spouse to his or her other spouse.

37 See, eg, G M Illingworth, 'Revolution and the Crown' [1987] *New Zealand Law Journal* 207, 207; Leigh, above n 27, 128.

38 Herbert Broom, *Commentaries on the Common Law* (8th ed, 1888), 891.

39 *R v Casement* [1917] 1 KB 98, 99; J H Phillips, 'Phillips' Brief' (1993) 17 *Criminal Law Journal* 185, 185. See also *R v Harding* (1690) 86 ER 461, where the status of the accused person who was tried for treason and the group of men whom he organized to join the French with, in waging war against the English, was clear and this was acknowledged by the Court, which declared them to be 'subjects of this kingdom'.

40 *R v Lynch* [1903] 1 KB 444, 458 (Lord Alberstone).

41 *De Jager v A-G of Natal* [1907] AC 326, 328-9 (Lord Loreburn LC).

42 [1945] 1 AC 347 ('*Joyce*').

43 Ibid 347.

44 Ibid 348.

45 Ibid.

messages, his real status was that of an 'alien outside the King's dominions', which indicated that he owed no allegiance to the Crown.[46] This potential lack of a betrayal of an allegiance to the Crown had to be overcome by the prosecution in order for a conviction to be achieved. Lord Jowitt underlined the fundamental importance of the requirement when he likened the question of whether a person was guilty of treason to the question of whether there was a betrayal of an allegiance owed to the King.[47] The crucial element which turned the case against Joyce was that before the war, Joyce had falsely claimed British nationality in order to get a British passport.[48] The Court deemed allegiance to be part of a reciprocal relationship between the Crown and a person, with the person owing allegiance to the Crown in return for protection given by the Crown.[49] As the passport entitled Joyce to the protection of the Crown, he was obligated to fulfil a duty of allegiance to the Crown. As he had betrayed the duty, he was guilty of treason.[50]

The presence of a betrayal of an allegiance or duty to the sovereign or state may thus be established as a fundamental requisite for conduct to be considered treason. Consequently, it may be expected that this requirement would be reflected in genuine treason provisions. However, an analysis of past Australian treason provisions and current treason provisions from other jurisdictions reveals that none of them contain any express references to the requirement.[51] Rather, the provisions appear to solely set out the scope of what would constitute the betrayal of a duty or allegiance to a sovereign or state. The lack of express reference to the requirement indicates that the requirement could be assumed to be present in the absence of any indication to the contrary. Notably, there is no express rejection of this requirement in the new legislation.[52] Thus, nothing appears to prevent a conclusion that the new provisions are truly treason provisions.

III CONTENTION 2: THE OFFENCE OF TREASON MAY BE A DEFUNCT OFFENCE

The claim that the offence of treason is defunct is generally supported by two common criticisms of treason. The first is that treason is largely irrelevant in today's context as it is essentially a mere wartime phenomenon.[53] The second is that the presence of treason as a criminal offence is not needed as other laws

46 Ibid; Selena Hastings, 'The Traitor who Loved England', *Sunday Telegraph* (London), 22 May 2005, 13.
47 *Joyce* [1946] AC 347, 365.
48 Ibid 348-9; Hastings, above n 46.
49 *Joyce* [1946] AC 347, 370-1.
50 Ibid 371.
51 See, eg, *United States Constitution* art 3 § 3; *Treason Act 1351*, 25 Edw 3, st 5, c 2; *Crimes Act 1914* (Cth) s 24; *Crimes Act 1958* (Vic) s 9A.
52 *Criminal Code 1995* (Cth) pt 5.1 div 80.
53 Adam Reynolds, 'Treason: Defunct or Dormant' (2000) 26 *Monash University Law Review* 195, 195; Victoria MacCullum, 'Treason – Warning Shot – British Muslims who join the Taliban may face jail, but there are many problems with the medieval law of treason' (2001) 98.45(18) *Law Society Gazette* 18-19.

could adequately deal with acts amounting to treason.[54]

The characterisation of treason as a wartime phenomenon may be evidenced by its application throughout the 20th century. Virtually all treason cases during this time in Australia and the United Kingdom resulted from the Boer War[55] and the First and Second World Wars.[56] The abovementioned inference that can be drawn from this cannot be refuted on the basis that treasonous conduct was lacking in times of peace, as there were offenders who may have committed treason, but who were prosecuted for other breaches of the law instead.[57] In addition, the characterisation of treason as a wartime phenomenon may be strengthened by the fact that treason-related legislative activities appeared to peak during times of war.[58] Many modern conflicts, however, are not properly characterised as wars, which traditionally are said to require the presence of inter-state conflict.[59] Instead, these modern conflicts involve terrorism, civil or internal conflicts between religious and ethnic groups, guerrilla warfare, suicide bombers, and various other non inter-state skirmishes.[60] With the prospect of war being a rarity in today's context, especially with the end of the Cold War and the establishment of the *jus cogens* nature of the prohibition of the use of force,[61] the offence of treason, it may be argued, thus has little applicability in contemporary society.

Although it may be difficult to disprove suggestions of a link between treason and war, indications that the offence of treason is obsolete due to its being a wartime phenomenon may yet be refuted, as war may still be a common feature in contemporary society. Recent events have shown that wars do continue to occur; for example, the Iran-Iraq War, and the invasions of Kuwait by Iraq and of Iraq by the 'Coalition of the Willing'.[62] Indeed, the conduct of the United States in the aftermath of the terrorist attacks of 11 September 2001 raises the spectre of the waging of war becoming a future common response of states to major terrorist attacks.[63] The presence of wars in contemporary society is also indicated by the

54 MacCullum, above n 53.

55 See, eg, *R v Lynch* [1903] 1 KB 444; *De Jager v A-G of Natal* [1907] AC 326.

56 See, eg, *R v Casement* [1917] 1 KB 98; *R v Ahlers* [1915] 1 KB 616 ('*Ahlers*'); *Joyce* [1945] 1 AC 347.

57 See, eg, MacCullum, above n 53; *R v Blake* [1962] 2 QB 377.

58 Reynolds, above n 53, 195. See also John Burke and Peter Allsop, 'Editorial' [1955] *Criminal Law Review* 269, 271; *Crimes Act 1960* (Cth) s 24; *Communist Party Dissolution Act 1950* (Cth). The *Communist Party Dissolution Act 1950* (Cth) was enacted during the Korean War. Its preamble gives an indication that one of the foundational reasons for the Act was the treasonable nature of the Communist Party's activities.

59 Hersch Lauterpacht (ed), *Oppenheim's International Law – A Treatise* (6th ed, 1940) vol 2, 166; Peter Rowe, 'Responses to Terror: The New War' (2002) 3 *Melbourne Journal of International Law* 301, 301; *Driefonstein Consolidated Gold Mines v Janson* [1900] 2 QB 339, 343-4. In *Driefonstein Consolidated Gold Mines v Janson*, Mathew J (in reference to William Edward Hall, *A Treatise on International Law* (4th ed, 1895) 63) stated that 'when differences between States reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up'. Shearer, in *Starke's International Law*, acknowledged this as a well-respected definition of war: I A Shearer, *Starke's International Law* (11th ed, 1994) 478-80.

60 Gillian Triggs, *International Law: Contemporary Principles and Practices* (2005) 2.

61 Ibid; *Charter of the United Nations* art 2(4); *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 89-90.

62 Triggs, above n 60, 2.

63 Ibid 22-3.

fact that the term 'war' in contemporary times is increasingly perceived to include non inter-state conflicts.[64] The international threat to peace and security which is posed by terrorists with loose or no links with states promotes this widened perception of what constitutes a war, as seen by the many recent references to the 'war on terrorism'.[65] The broadened perception of what constitutes war is also been promulgated by the writings of international jurists, including Lassa Oppenheim, who stated that it is universally recognised that war is merely 'a contention, i.e. *a violent struggle through the application of armed force*'.[66] Thus, even if treason was truly a wartime phenomenon, the offence of treason may continue to be relevant in contemporary society.

The contention that other laws could adequately deal with treasonous acts is demonstrated by the effectiveness of legislation such as the various incarnations of the United Kingdom's *Official Secrets Act 1911*, 1 & 2 Geo V, c 28 ('*Official Secrets Acts*').[67] This legislation has been used in several high profile cases, such as the prosecution of George Blake for espionage.[68] Blake, who was reputedly one of the most valuable British spies ever recruited by the Soviet Union,[69] was charged in 1961 under s 1(1)(c) of the *Official Secrets Act 1911*, 1 & 2 Geo V, c 28 with five counts of unlawfully supplying the Soviet Union with classified information.[70] He was convicted and sentenced by Lord Parker CJ to an 'unprecedented' term of 42 years imprisonment,[71] the longest term meted out by a British court in the last half-century.[72] Blake subsequently managed to escape from Wormwood Scrubs prison to the Soviet Union where he remains to this day.[73] Barring the faulty execution of the sentence, the potential effectiveness of other laws in dealing with treasonous acts can accordingly be seen. In Australia, the enactment of the *Criminal Code Amendment (Espionage and Related Offences) Act 2002* (Cth) has resulted in legislation which is similar to the *Official Secrets Acts* being introduced into Australian law.[74] Although no

64 See Triggs, above n 60, 2. See also *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3, art 8 (entered into force 1 July 2002) ('*Rome Statute*'). Article 8 of the *Rome Statute*, regarding what actions can be considered as war crimes, does not require the war to be between states.

65 See, eg, The National Commission on Terrorist Attacks upon the United States, *The 911-Commission Report – Final Report of the National Commission on Terrorist Attacks upon the United States* (2004) 29. In the report, United States President George Bush, on being informed about the 11 September 2001 terrorists attacks, is quoted as having told Vice-President Dick Cheny that '[w]e're at war ... somebody's going to pay'.

66 Lauterpacht, above n 59, 166 (emphasis in original).

67 *Official Secrets Act 1911*, 1 & 2 Geo 5, c 28; *Official Secrets Act 1920*, 10 & 11 Geo 5, c 75; *Official Secrets Act 1939*, 3 & 4 Geo 6, c 121; *Official Secrets Act 1989* (UK) c 6.

68 See *R v Blake* [1962] 2 QB 377.

69 Norman Polmar and Thomas B Allen, *Spybook – The Encyclopedia of Espionage* (2nd ed, 2004) 79.

70 *A-G v Blake* [2001] 1 AC 268, 275 (Lord Nicholls).

71 *R v Blake* [1962] 2 QB 377, 379 (Jeremy Hutchinson QC and W Howard during argument).

72 See Polmar and Allen, above n 69, 79; H Montgomery Hyde, *George Blake Superspy* (1987), 16.

73 *A-G v Blake* [2001] 1 AC 268, 275 (Lord Nicholls); Polmar and Allen, above n 69, 80.

74 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1110 (Daryl Williams, Attorney-General); See *Criminal Code Amendment (Espionage and Related Offences) Act 2002* (Cth) sch 1.

prosecution under this new legislation has arisen to date, similar effectiveness of the legislation may be expected.[75]

The tendency of the courts to relate treason-like breaches of alternate legislation to treason before meting out harsh punishments, however, may be an indication that the presence of treason as a crime is influential on the level of severity with which breaches of these laws are regarded and subsequently dealt with.[76] This was demonstrated in Blake's case where Lord Parker, in meting out the harsh sentence, acknowledged that his acts were 'akin to treason' and that this 'conduct in many countries would carry the death penalty'.[77] Lord Parker concluded by stating that for his 'traitorous conduct extending over so many years there must be a very heavy sentence'.[78] Likewise, when Blake appealed against the harsh sentence imposed on him,[79] the Court of Criminal Appeal noted the case of *R v Fuchs*, a case involving a similar breach of the *Official Secrets Act 1911*, 1 & 2 Geo V, c 28, where Lord Goddard in his judgment described the acts involved as being only 'thinly differentiated from high treason',[80] and subsequently dismissed Blake's appeal, stating that his 'conduct should not only stand condemned, [and] should not only be held by all ordinary men and women in utter abhorrence but also should receive when brought to justice the severest possible punishment'.[81] Thus, the presence of treason as a crime appears to affect, albeit indirectly, alternate laws in their dealings with treasonous offences. This would indicate that even if other laws can deal adequately with treasonous acts, treason as a criminal offence may still have an indirect role to play.[82] Thus, the criticisms may not be indicative of the offence of treason being defunct.

IV CONTENTION 3: THE OFFENCE OF TREASON MAY HAVE NO RELEVANCE TO TERRORISM

An examination of the commentary on the offence of treason, particularly that which discusses treason and its significance to the issue of terrorism, reveals two

75 See *R v Lappas* (2003) 152 ACTR 7, 26 (Cooper and Weinberg JJ). The case was one where the accused was convicted for espionage before the *Criminal Code Amendment (Espionage and Related Offences) Act 2002* (Cth) became applicable. The Court noted that the new sentencing regime created by the Act would have resulted in a far harsher sentence for espionage than what was handed down in that case.

76 Cf John Stevens, 'No other Choice?' (1996) 146(6744) *New Law Journal* 727, 727. See also Andrew Boyle, *The Climate of Treason* (1979). An analysis of commentaries on espionage indicates that not only are the courts prone to relating treason-like breaches of alternate laws to treason, but commentators appear to have the same habit as well. Commentators frequently refer to Blake's offences and the similar offences of other perpetrators as treason, rather than mere breaches of other legislation. In *The Climate of Treason* for example, Boyle describes the acts of the Cambridge Spy Ring, consisting of Harold Philby, Guy Burgess, Donald Maclean and Sir Anthony Blunt, who spied for Russia, as treason.

77 Hyde, above n 72, 15.

78 Ibid.

79 *R v Blake* [1962] 2 QB 377.

80 *R v Fuchs*, 'The Times', 2 Mar 1950, 2, cited in *R v Blake* [1961] 3 All ER 125, 127.

81 *R v Blake* [1962] 2 QB 377, 383.

82 See also MacCullum, above n 53.

general criticisms that support a contention that the offence of treason is not relevant to terrorism. The first is said to be that treason and terrorism are prima facie two distinct concepts, and the second is that the offence of treason does not deal with any aspect of terrorism.[83]

The first criticism may be dismissed with ease, as the possible overlap between treason and terrorism is illustrated by the stark resemblance of numerous historical acts of treason to terrorism. One example is the attempt by Guy Fawkes in 1605 to blow up James I and the British Houses of Parliament as part of a conspiracy now known as the 'Gunpowder Plot', the aim of which was to remove the Protestant government of England and to restore Roman Catholicism as the dominant religion in the land.[84] Another example would be seen in the case of *R v Deasy*,[85] where the smuggling of several pounds of dynamite into the country with the intent of blowing up government buildings was held to be a treasonable act under the *Treason Felony Act 1848*, 11 & 12 Vict, c 12, allowing the conspirators to be duly convicted of treason. Similar acts, should they be carried out today, may be considered terrorism.[86] Another case illustrating the resemblance between acts of treason and acts of terrorism would be the Eureka Stockade Rebellion, a case of treason which has recently been likened to a terrorist act.[87] In that case, a rebellion by diggers from the minefields at Ballarat against mining authorities in 1854 resulted in thirteen diggers being prosecuted for treason.[88] Of more contemporary significance, Chief Justice Latham in *Australian Communist Party v Commonwealth* discussed the bombing of public offices and the assassination of ministers and other civil servants, which are common forms of terrorism in today's context, and acknowledged that they were acts amounting to treason.[89]

The current Australian legislation indicates that the second criticism may be dismissed with equal ease, and further demonstrates the possible overlap between the offence of treason and terrorism. An analysis of terrorism as now defined in the *Criminal Code Act 1995* (Cth) and the new treason provisions suggest that acts of terrorism may be dealt with under the offence of treason as well. In the *Criminal Code Act 1995* (Cth), a terrorist act is defined as an act or threat made

83 Ibid.

84 *The Trials of Robert Winter, Thomas Winter, Guy Fawkes, John Grant, Ambrose Rookwood, Robert Keyes, Thomas Bates, and Sir Everard Digsby for High Treason, being Conspirators in the Gunpowder Plot* (1606) 2 St Cr 159, 175 (Sir Edward Coke, during argument); *The Trial of Henry Garnet for High Treason, being a Conspirator in the Gunpowder Plot* (1606) 2 St Cr 218, 219 (Sir John Croke, Sergeant, during argument); *The Encyclopaedia Britannica*, (first published 1768-71, 15th ed, 1983) vol 4, 70-1.

85 (1883) 15 Cox 334, 342-3 (Stephen J).

86 See Alexander Downer and John Howard, 'Joint Press Conference: the Prime Minister, John Howard, and the Foreign Minister, Sydney' (Press conference delivered in Sydney, 11 September 2004), <http://www.foreignminister.gov.au/transcripts/2004/040911_joint_pm.html> at 12 July 2006. In the interview, Prime Minister John Howard referred to the bombing of the Australian Embassy in Jakarta, Indonesia on 9 September 2004 as an act of terrorism.

87 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Melbourne, 17 April 2002, 117 (Julian Burnside QC, Committee Member, Liberty Victoria).

88 Graham Fricke, 'The Eureka Trials' (1997) 71 *Australian Law Journal* 59, 60-1.

89 (1951) 83 CLR 1, 142.

with the intention of 'advancing a political, religious or ideological cause' and 'coercing, or influencing by intimidation', the government of the Commonwealth, State or Territory.[90] In the absence of any case law which indicates otherwise, it is apparent that an act which may be described as a terrorist act may also be described as an act amounting to the levying of war or preparatory to the levying of war against the Commonwealth, or an act which assists an enemy at war with the Commonwealth.[91] It is also apparent that an act which may be described as a terrorist act may alternatively be described as conduct which assists another country or organization that is engaged in armed hostilities against the Australian Defence Force.[92] Thus, there is the possibility that acts of terrorism may be dealt with under the new treason provisions.

However, it would be erroneous to conclude that the new treason legislation would have the capability to deal with all aspects of terrorism. Besides the fact that the applicability of treason provisions to acts of terrorism may vary with each factual scenario, it is questionable whether all acts of terrorism may be considered acts of treason due to the need for the presence of a betrayal of an allegiance to a sovereign or state in order for acts to be considered acts of treason.[93] *Joyce* would indicate that this requirement would entail, at the very least, the presence of a betraying act and some nexus between the state or sovereign and the perpetrator, from which inferences of an allegiance or duty owed may be drawn.[94] Terrorism, as a crime with an international aspect,[95] may on the other hand, be committed by terrorists who have no connection with the victim state, and hence could attract no inference of allegiance. The terrorist attack on the World Trade Centre on 11 September 2001, where all of the terrorists involved merely held various forms of visiting visas to the United States, is a tragic example of this possibility.[96] Thus, the ability of the treason provisions to deal with acts of terrorism may not extend to all acts of terrorism. As Lord Jowitt stated in *Joyce*, '[a]n act that is in one man treasonable, may not be so in another.'[97]

Accordingly, a more accurate conclusion would be that under the current state of Australian law, treason provisions have the capacity to deal with aspects of terrorism, although a clearly defined limitation is its inability to deal with situations where a connection between the perpetrator and Australia, from which inferences of a duty or allegiance owed may be drawn, is lacking. Indeed, the

90 *Criminal Code Act 1995* (Cth) s 100.1(1).
91 See above n 12-13 and accompanying text.
92 See above n 10 and accompanying text.
93 See above n 34-6 and accompanying text.
94 [1946] AC 347, 363-4 (Lord Porter). See above n 42-50 and accompanying text.
95 Gilbert Guillaume, 'Terrorism and International Law' (2004) 53 *International and Comparative Law Quarterly* 537, 537-8; Tim Stephens, 'International Criminal Law and the Response to International Terrorism', 27 *University of New South Wales Law Journal* 454, 454-5. See also *Resolution on Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UN SCOR, 56th sess, 4385th mtg, [1], UN Doc S/Res/1373 (2001).
96 Tony Norman, 'They Might Be Terrorists, But They're Our Own', *Pittsburgh Post-Gazette* (Pittsburgh, United States of America), 9 January 2004, C1; Toni Locy and Mimi Hall, '9/11 Commission to Examine Visa Policies', *USA Today* (McLean, United States of America), 26 January 2004, 3A.
97 [1946] AC 347, 365.

Attorney-General's Department has acknowledged that in practice, the offence of treason would only be used when the offence involves an Australian or a person connected with Australia.[98]

The ability of treason legislation to deal with aspects of terrorism under Australian law and the possible overlap between the offence of treason and terrorism would thus indicate that treason should not be described as having no relevance to terrorism. From this analysis, it is even possible to surmise that treason provisions may have been included in the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) to deal with terrorist activities committed against Australia by people connected with Australia.

V CONTENTION 4: THE OFFENCE OF TREASON MAY BE AN INAPPROPRIATE OFFENCE FOR ADDRESSING TERRORISM

While the possibility of abuses of the new treason provisions may be, as mentioned earlier, alleviated,[99] there remain two other general criticisms of treason which may support a contention that the offence of treason is an inappropriate offence for addressing terrorism. The first criticism claims that the offence of treason is merely a glamorised offence, whose usage raises the unwanted prospect of the names of offenders being immortalized like that of fellow offenders such as Guy Fawkes, Sir Walter Raleigh and Sir Roger Casement.[100] The second contends that the prosecution of people charged with treason, and the obtaining of convictions for treason, is too difficult.[101]

The claim of inappropriateness from the first criticism may be quickly dismissed because, regardless of the glamour associated with the offence, the general perception of the offence of treason is that it is an offence of the utmost severity and one of the most heinous of all offences,[102] with some believing that it is more repulsive than even murder.[103] Blackstone describes treason as 'the highest civil crime, which ... any man can possibly commit'.[104] The magnitude of the severity in which the offence of treason is regarded is illustrated by the fact that duress, a

98 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill [No 2] and Related Bills* (2002) [3.41].

99 See above n 21 and accompanying text.

100 See Alan Wharam, 'Treason and the Terrorist' (1976) 126(5748) *New Law Journal* 428, 429; MacCullum, above n 53.

101 See Reynolds, above n 53, 201; MacCullum, above n 53.

102 *R v Gotts* [1992] 2 AC 412, 435 (Lord Lowry); Wharam, above n 18, 851; Head, above n 18, 123; Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1157 (Peter King).

103 *Airedale NHS Trust v Bland* [1993] AC 789, 808 (Walker LJ). See also Amnesty International United Kingdom, *Abolition in the UK* (2005) <http://www.amnesty.org.uk/action/camp/dp/uk.shtml> at 20 June 2005. Amnesty International is seen to distinguish treason from other serious crimes like murder by stating that it is an exceptional crime.

104 Blackstone, above n 34, 75.

valid defence for most offences, may not apply to treason.[105] It is further shown by the fact that the offence of treason was the last offence to have the death penalty abolished as a punishment in New Zealand and the United Kingdom.[106] Even in Australia, death as a punishment was only completely abolished when the *Crimes Amendment (Death Penalty Abolition) Act 1985* (NSW) was enacted to abolish the death penalty for treason and piracy.[107] Such perceptions of treason appear similar to the worldwide condemnation of terrorism,[108] and suggest that treason should not be considered an inappropriate offence for addressing terrorism.

Furthermore, the immortalisation of offenders may not result, as the criticism wishes to indicate, in a legendary status for all posterity. Conversely, the general perception of treason as a repulsive offence appears to spawn a similar revulsion for most people who have been regarded as having committed treason. For example, Benedict Arnold (who committed treason by defecting to the British during the American War of Independence) and Judas Iscariot, have both been remembered and reviled throughout history. Their names have become synonymous with the very concept of treason and treachery.[109] In a contemporary context, the contempt the British have shown towards George Blake further demonstrates the potential enduring sense of loathing society may have towards people perceived to have committed treason. Even after the more than forty years passed since Blake was convicted and sentenced, the British government attempted to thwart Blake's attempt to profit from his deeds by seeking to recover the revenue generated from the publishing of his memoirs.[110] Further demonstrations of the general continuing disdain for Blake appeared in the judgment of the majority of Law Lords, who, while turning down the

105 *R v Gotts* [1992] 2 AC 412, 418 (Lord Keith); *R v Shayler* [2001] 1 WLR 2206, 2231(Lord Woolf CJ); *R v Abdul-Hussain* [1999] Crim LR 570, 571 (Rose LJ); *R v Pommell* [1995] 2 Cr App R 607, 615 (Kennedy LJ). *Contra R v Steane* [1947] 1 KB 997, 1000. In general, the only other offence in which duress may not be a defence is murder; however, some leeway may be given in cases of extreme duress. In *R v Steane*, Gestapo officers beat the accused, tore off part of his ear, and threatened to put his wife and children into a concentration camp in order to force him to commit acts of treason.

106 See *Abolition of the Death Penalty Act 1989* (NZ) s 3; *Crime and Disorder Act 1998* (UK) c 37, s 36.

107 See *Crimes Amendment (Death Penalty Abolition) Act 1985* (NSW). See also *Miscellaneous Acts (Death Penalty Abolition) Amendment Act 1985* (NSW); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill [No 2] and Related Bills* (2002) [2.18]. The date of the complete abolishment of the death penalty in Australia may, in fact, be 2002, as the Senate Legal and Constitutional Legislation appeared to indicate that the *Death Penalty Abolition Act 1973* (Cth) did not expressly remove the death penalty for treason and that only on the enactment of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) would the death penalty for treason be replaced with life imprisonment.

108 See *Resolution on Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1566, UN SCOR, 59th sess, 5053rd mtg, [1], UN Doc S/Res/1566 (2004); *Resolution on Measures to Eliminate International Terrorism*, GA Res 59/46, UN GAOR, 59th Session 65th plen mtg, UN Doc A/Res/59/46 (2004).

109 See Laurence R Toczek, 'The Dreyfus Affair' (1995) 145(6678) *New Law Journal* 23, 23; *The Encyclopaedia Britannica*, above n 84, vol 1, 534.

110 *A-G v Blake* [2001] 1 AC 268, 275-6 (Lord Nicholls). The action was acknowledged by the Court as having the objective of ensuring that Blake should not enjoy further financial fruits from his treachery.

government's application as a matter of law, contrived a basis for the discretionary awarding of some remedy to the government,[111] and continued to revile the treasonous conduct of Blake, branding him an 'infamous', 'self-confessed traitor'.[112] The term 'traitor', of course, being a term generally reserved for those guilty of treason.[113] Thus, any truth in the assertion that treason is a glamorised offence, whose usage may leave the names of offenders immortalised, is not the case, and hence this claim should not result in treason being described as an inappropriate offence for addressing terrorism.

In support of the second criticism regarding the difficulty of prosecution, it has been contended that difficulties in prosecuting charges of treason in contemporary times may arise due to the high level of publicity and media coverage.[114] Some truth may be found in this as early as the 1850s: the difficulties caused by publicity could be seen with the Eureka treason trials being moved from Ballarat to Melbourne, owing to the wide publicity of the events raising the possibility of jury partiality.[115] Another possible difficulty which has been identified is the tendency of the facts of treason cases to reveal complex issues, such as the allegiance issues that had to be dealt by the prosecution in *Joyce*,[116] and the issue of the intentions of the accused that was faced in *Ahlers*.[117] Past cases also indicate that convictions for treason are difficult to obtain,[118] with some commentators being of the opinion that any competent advocate for a person accused of treason would have little difficulty in securing an acquittal.[119] A similar sentiment appears to be reflected in the dicta of Justice Murphy in *Jackson v The Queen*, where he stated that 'juries have often refused to convict where there was oppression in the law ... despite overwhelming evidence of guilt. A famous example is the consistent refusal of juries over many years to convict of treason, whatever the evidence'.[120]

The abolition of the death penalty for treason, however, may have the effect of making it easier to attain convictions by juries in contemporary times.[121]

111 Ibid 286-8.
112 Ibid 275.
113 Simpson and Weiner, above n 36, 374.
114 See Reynolds, above n 53, 201.
115 Fricke, above n 88, 61.
116 [1946] AC 347. See also above n 42-50 and accompanying text.
117 [1915] 1 KB 616. Ahlers was a naturalized British subject but was German Consul for Sunderland before the start of World War I. In his capacity as German Consul, he assisted men of military age to return back to Germany shortly before the start of the war. He was charged with treason as he had 'contrived with all his strength intending to aid and assist' the enemies of the country and had 'traitorously adhered to aiding and comforting the German Emperor' against England (at 625). The difficulty for the prosecution was that the defence argued that he was acting in his capacity of a Consul, and with the belief that he was carrying out his duty to assist German subjects to return to their own country, and that he did not believe that his actions were injurious to his country's interests. The Court of Criminal Appeal acquitted him. One reason was that, objectively, a finding that his intentions were hostile to the country could not be made as the evidence did not show this, although it might have been interpreted in such a fashion.
118 See Reynolds, above n 53, 201.
119 Wharam, above n 100, 429.
120 *Jackson v The Queen* (1976) 134 CLR 42, 54 (Murphy J).
121 See ibid; Reynolds, above n 53, 202.

Furthermore, a high level of publicity and media coverage has become a generally accepted aspect of modern legal life and should not be used as a justification for the non-prosecution of an offence committed.[122] Moreover, the broadened scope of the new treason legislation may be expected to ease the difficulty in prosecuting acts of treason. Thus, it may not be accurately concluded, on the basis of this criticism, that the offence of treason is an inappropriate offence for addressing terrorism.

VI CONCLUSION

This paper has addressed four possible contentions which indicate that the legislating of the new treason laws may not be justifiable. It has been shown that each of these contentions may be refuted. First, it was established that the new provisions can be regarded as treason provisions. It was then shown that the offence of treason may not be defunct. Subsequently, it was shown that it may be erroneous to conclude that the offence of treason has no relevance to terrorism. Lastly, it was shown that the offence of treason may not be an inappropriate offence for addressing terrorism. Thus, the possibility that the enactment of the new treason is justifiable still remains. Nonetheless, it remains for the government to reveal its reasons for the enactment of the provisions, as the declaration of the rationale by any other source would be nothing more than mere speculation.

122 See also Glenn Milne, 'Hotman Hinders Corby's Case', *The Sunday Mail* (Brisbane), 19 June 2005, 23. The fact that lawyers are capable of manipulating the media in modern times, as demonstrated by the tactics of Jakarta lawyer Hotman Parris Hutapea in the Schapelle Corby drug case, is further indication that the media should not be used as an excuse for a lack of action in a case.