

ARTICLES

Freedom of Association or Guilt by Association: Australia's new Anti-Terrorism Laws and the Retreat of Political Liberty *

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Introduction

In March 2002, the Commonwealth government introduced a package of Bills in response to perceived security concerns following the September 11 terrorist attacks in the United States.¹ Despite extensive public criticism of the Bills², three of the four Bills have now been

* This article examines continuing legislative developments in Australia with respect to the creation of a new category of 'terrorism' offences. The discussion of existing legislation and of earlier Bills in the 'anti-terrorism' package includes some material previously published in Rogers N and Ricketts A, "Fear of Freedom: Anti-Terrorism Laws and the Challenge to Australian Democracy" [2002] *Singapore Journal of Legal Studies* 1-13. In that article, the authors examined the initial proposals by the Australian Government, together with an analysis of constitutional issues raised by the 'anti-terrorism package'.

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¹ The Package of Bills referred to here includes The Security legislation Amendment (Terrorism) Bill 2002 [no 2]; Suppression of the Financing of Terrorism Bill 2002, Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 and the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002.

² The Senate Legal and Constitutional Committee invited public submissions on 23 March 2002 as part of its inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [no 2]; the Suppression of the Financing of Terrorism Bill 2002, and the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002. Despite only allowing two weeks for public submissions to be completed, the Senate Committee received over 430 submissions. The legislative package was criticised by a large number of individuals and organisations including the NSW Council for Civil Liberties, the Ethnic Communities Council of Victoria, the Australian Council of Trade Unions, Liberty Victoria, the Islamic Council of Victoria, the Law Council of Australia, Amnesty International, the Uniting Church in Australia, the Victorian Council of Social Services, People Against Repressive Legislation and the Federation of Community Legal Centres (Victoria) Inc. According to media reports, those making submissions referred to the Bills as

passed into law and the Government remains committed to the enactment of the remaining Bill, the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002, during the current Parliamentary session.

An analysis of the combined effects of the new and proposed laws highlights the vulnerability of democratic values and rights of political participation in the face of heightened anxiety over issues of national security. These new anti-terrorism laws constitute a substantial threat to existing rights of political association in Australia. They do so by creating a new range of serious criminal offences based upon a broadly constructed definition of ‘an act of terrorism’ together with secondary offences for providing assistance to ‘terrorist organisations’ and proposals for increased powers of surveillance, detention and interrogation of those suspected of terrorism related offences.

The erosion of civil liberties during times of international or domestic instability is not, of course, without precedent. The proposed anti-terrorism laws are symptomatic of the steady decline in civil liberties which has taken place in Australia over the past thirty years. Popular resistance to the Vietnam War in the early 1970’s triggered a legislative response from both Commonwealth and State governments under which general rights of assembly and protest became increasingly restricted.³ More recently, the successful use of non-violent direct action in the battle over the logging of native forests has resulted in the introduction of increasingly draconian laws in the Australian states.⁴ Regulations which were introduced to outlaw

“panic-stricken”, “extraordinarily bad” and “the worst legislation ever seen”. Similarly, the Parliamentary Joint Committee on ASIO, ASIS and DSD, which conducted an inquiry into the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002, received over 140 submissions.

³ The Commonwealth government enacted its first comprehensive legislation dealing with public assemblies with the passage of the *Public Order (Protection of Persons and Property) Act 1971*, following the introduction of similar legislation in a number of Australian State jurisdictions during the same period. See, for instance, the *Summary Offences Act 1970* (NSW). See also the discussion of governmental responses to anti-Vietnam war activism in Brown D, *et al*, *Criminal Laws, Materials and Commentary on Criminal Law and Process in NSW*, 3rd ed, Federation Press, Sydney, 2001, at 945.

⁴ See, for example, the *Forestry Regulations 1999* (NSW), regulation 11, which empowers an authorized officer to remove any person who causes an “annoyance or inconvenience”. This regulation specifically enables political activists to be removed from a site regardless of whether they have committed any other offence.

protests in New South Wales forests became a template for similar laws which were designed to prevent protests at the site of the Olympic Games in Sydney in 2000.⁵ The staging of the Olympic Games in Sydney also provided an opportunity for the Commonwealth Government to introduce legislation which specifically empowers the government to utilise the military to quell civil disturbance.⁶ Michael Head argues that the nature of the legislation “makes it apparent that the authorities are preparing not simply for terrorism, but for wider civil unrest that the police forces may prove unable to quell.”⁷

The anti- terrorism package

The package of Bills, as first presented by the Government, was extensively criticised by the Senate Legal and Constitutional Committee, and also by the Parliamentary Joint Committee on the Australian Security Intelligence Organisation (ASIO), the Australian Security Intelligence Service (ASIS) and the Defence Services Directorate (DSD).⁸ These criticisms, and the numerous public submissions which the proposals generated, have been reflected in part in amendments introduced by the Senate before passing the Bills which significantly reduced the overall impact of the Bills upon

⁵ See the *Homebush Bay Operations Act 1999* (NSW) which enacted regulations almost identical to the Forestry Regulations mentioned above for the control of political activists at the Olympic site. See also the *Olympic Arrangements Act 2000* (NSW). For a discussion of these pieces of legislation, see M Head, “Olympic Security” (2000) 3 *Alternative Law Journal* 131.

⁶ *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* (Cth).

⁷ M Head, “The Military Call-Out Legislation – Some Legal and Constitutional Questions” (2001) 29 *Federal Law Review* 273 at 284.

⁸ All of the anti-terrorism Bills, with the exception of the Australian Security Intelligence Organisation Amendment (Terrorism) Bill, were referred to the Senate Legal and Constitutional Committee which delivered its report on 8th May 2002. The Australian Security Intelligence Organisation Amendment (Terrorism) Bill was referred to the Parliamentary Joint Committee on ASIO, ASIS and DSD, which delivered its report in early June, 2002. The reports can be found at http://www.aph.gov.au/senate/committee/legcon_ctte/terrorism/report/Security.pdf and at <http://www.aph.gov.au/house/committee/pjcaad/reports.htm>. The transcript of the hearings of the Senate Legal and Constitutional Committee is available at <http://www.aph.gov.au/hansard/senate/committee/s-lc.htm> and the transcript of the hearings of the Parliamentary Joint Committee at <http://www.aph.gov.au/hansard/joint/committee.htm>.

domestic political activity. Nonetheless, it is vital to place the ‘anti terrorism package’ in the context of the continuing historical decline of political rights and general civil liberties in Australia. In particular, the new laws will severely restrict the rights of Australians to support political organisations in other parts of the world.

The proposed ‘anti-terrorism’ legislation was presented as a package of interrelated Bills rather than as a single statute. The package now includes the following specific Acts and Bill.

(i) Security Legislation Amendment (Terrorism) Act 2002

This Act contains the overarching definition of a “terrorist act”⁹, which is applied uniformly across the different Acts in the package and in the ASIO Bill. In addition, this Act provides for the making of regulations which identify “terrorist organisations”,¹⁰ and also creates a range of secondary offences for persons associated directly or indirectly with such identified terrorist organisations.¹¹ It is these secondary offences which constitute the most significant threat to rights of political association for Australians.

(ii) Criminal Code (Suppression of Terrorist Bombings) Act 2002

This Act is strictly limited in its operation, containing only one offence-creating provision. Under this Act, an offence is committed where a person delivers or places an explosive or other lethal device in a public place (or other listed place) with the intention of causing death or serious harm or extensive destruction.¹² This Act does not represent a significant challenge to existing civil liberties in Australia, as the offence-creating provision is limited to the actual use of explosive and lethal devices. Furthermore, the section requires an

⁹ *Security Legislation Amendment (Terrorism) Act 2002* s3. This definition has been inserted into the *Criminal Code* (Cth) div 100.1

¹⁰ *Security Legislation Amendment (Terrorism) Act 2002* s 4 (*Criminal Code* (Cth) div 102.1)

¹¹ *Security Legislation Amendment (Terrorism) Act 2002* s4 (*Criminal Code* (Cth) div 101, div 102)

¹² *Criminal Code (Suppression of Terrorist Bombings) Act 2002* s 1 (*Criminal Code* (Cth) 72.3)

element of intention or at least criminal recklessness to be successfully prosecuted.

(iii) Suppression of Financing of Terrorism Act 2002

Under this Act, it is an offence to provide or collect funds in circumstances in which a person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act.¹³ On its face the provision is wide enough to impose a legal duty upon members of the public who may provide funding to foreign aid organisations to ascertain exactly how the funds will be expended.¹⁴ The offence creating provisions in this Act are in addition to the more extensive set of offences relating to the provision of assistance to ‘terrorist organisations’ contained in the *Security Legislation Amendment (Terrorism) Act 2002*.

(iv) Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002

This Bill was introduced after the other Bills and has been the subject of a separate inquiry by the Parliamentary Joint Committee on the Australian Security Intelligence Organisation (ASIO), the Australian Security Intelligence Service (ASIS) and the Defence Services Directorate (DSD). The Bill is primarily concerned with increasing the powers currently available to police and other security personnel to detain and interrogate ‘terrorist’ suspects. The controversial aspects of the Bill include powers for extended periods of detention of suspects¹⁵, removal of the common law right to silence¹⁶ and denial of access to legal representation during interrogation.¹⁷

¹³ *Suppression of Financing of Terrorism Act 2002* s 3 (*Criminal Code* (Cth) 103.1)

¹⁴ This specific concern also arises in relation to Security Legislation Amendment (Terrorism) Bill 2002 s4 (Proposed: *Criminal Code* (Cth) div 102.4) see supra XXX although in the context of Suppression of Financing of Terrorism Bill 2002 s 3 (Proposed: *Criminal Code* (Cth) 103.1) the issue of providing funds is more directly addressed.

¹⁵ Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 s24 (Proposed: s 34D *Australian Security Intelligence Organisation Act 1979*)

¹⁶ Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 s 24 , (Proposed: s 34G *Australian Security Intelligence Organisation Act 1979*)

¹⁷ Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 s24 , (Proposed: s 34G *Australian Security Intelligence Organisation Act 1979*)

The definition of an ‘act of terrorism’

The definition of an act of terrorism, contained within s 3 of the *Security Legislation Amendment (Terrorism) Act 2002*, establishes the foundation for the array of new terrorism related offences throughout several Acts in the package, and for the proposed increased powers of security forces under the ASIO Bill.

In the original Bills passed by the House of Representatives the definition effectively constituted terrorism as a strict liability offence due to the absence of any requirement for a defendant to exhibit specific intent in relation to the physical consequences of a terrorist attack. The Senate amended the definition to introduce an element of specific intent. The definition which has now been inserted into Division 100.1 *Criminal Code 1995* (Cth) is as follows:

terrorist act means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (2A); 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
 - (ba) causes a person’s death; or
 - (c) endangers a person’s life, other than the life of the person taking the action; or

- (d) creates a serious risk to the health or safety of the public or a section of the public; or
 - (e) 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.
- (2A) 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.
- (3) 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.

The substantive changes introduced by the Senate which now require an element of specific intent are contained in the Div 100.1 (c) (which requires a specific intention to influence by way of intimidation) and in Div 100.1(2A) (which exempts advocacy, protest, dissent or

industrial action from the definition of a terrorist act provided it is not intended to cause serious physical harm to persons or create a serious risk to the health and safety of the public).

Impact upon rights of political association

Whilst subsection 2A represents a substantial protection for individuals engaged in domestic protests which may have unintended violent outcomes, the net cast by the anti-terrorism package extends well beyond direct personal actions. In particular, the array of offences now contained in Div 102 of the *Criminal Code* relating to the membership of,¹⁸ recruiting for,¹⁹ provision of training for,²⁰ provision of funds to,²¹ or provision of support to²² terrorist organisations imposes liability upon persons who intentionally do any of those things in circumstances where the organisation can be characterised as a terrorist organisation and the person is reckless to whether the organisation is a terrorist organisation. For example, Div 102.6(2) of the *Criminal Code* (which is similar to each of the other offence-creating provisions in Div 102.3 through to Div 102.7) provides as follows:

- (2) A person commits an offence if:
- (a) the person intentionally receives funds from, or makes funds available to an organisation (whether directly or indirectly);and
 - (b) the organisation is a terrorist organisation; and
 - (c) the person is reckless as to whether the organisation is a terrorist organisation

Penalty: Imprisonment for 15 years.

It is significant that subsection (c) refers only to recklessness concerning the nature of the organisation, rather than linking liability

¹⁸ 102.3 *Criminal Code Act 1995* (Cth)

¹⁹ 102.4 *Criminal Code Act 1995* (Cth)

²⁰ 102.5 *Criminal Code Act 1995* (Cth)

²¹ 102.6 *Criminal Code Act 1995* (Cth)

²² 102.7 *Criminal Code Act 1995* (Cth)

to an awareness that the actual contribution may be used to facilitate an act of terrorism. The secondary offences contained in Div 102 of the Criminal Code cast a very wide net and seriously infringe the right which Australians previously had to support international causes such as independence movements, separatist movements or movements opposing oppressive dictatorships which may be involved in armed or otherwise violent struggles in other parts of the world. A terrorist organisation is defined by Div 102.1 of the *Criminal Code* to include “an organisation that is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act.”

Given the very broad definition extracted earlier, a terrorist act includes any act intended to influence a foreign country which involves serious physical harm to a person. The definition of ‘terrorist organisation’ will cover almost any political movement in the world which employs any form of violent resistance, ranging from stone throwing youths to the use of guns and explosives. From the relative peace and security of life in Australia, it is easy to forget that political resistance to oppressive regimes is usually conducted in an already violent context. However desirable it may be to define domestic terrorism to include any act which could cause serious physical harm to a person, and however inappropriate armed struggle may be within the Australian context, to apply this same criterion across the board to foreign organisations displays a profound misunderstanding of history.

The practical effect of the legislation is to deny Australians the right to politically associate with any political movements which may be involved in violent struggles anywhere in the world . In past terms this would have included volunteer brigades fighting the fascism of General Franco in Spain in the 1920’s, support for underground resistance against Nazism in Europe in the 1940’s or any support for movements such as the Sandanistas in Nicaragua or similar organisations throughout Latin America for most of the last century, including organised resistance to General Pinochet’s oppressive regime in Chile. It would have outlawed the provision of support for the opponents of Pol Pot’s regime in Kampuchea, support for the struggles of the African National Congress in South Africa during the Apartheid era, or the Falantil fighters of East Timor during Indonesian occupation. As pointed out during the Senate committee hearings into the legislative package:

[m]any people around the world who were once labelled as terrorists are now regarded as international leaders or even statesmen. People such as Ghandi, and Nelson Mandela have been labelled as terrorists in the past. Hindsight shows us that these people are not terrorists but freedom fighters.²³

Indeed it could be added that a number of Nobel peace prize winners could be classified as former ‘terrorists’.

In present day terms, the legislation outlaws any Australian giving support to groups such as the Free Papua Movement in Indonesian-controlled West Papua, the Zapatistas in Mexico or even groups within Iraq opposed to the regime of Saddam Hussein. By adopting a broadbrush definition of terrorism and applying it to international affairs, the legislation presupposes that Australia and Australians will always support existing State mechanisms over separatist, nationalist, indigenous or democratic movements. As pointed out during the Senate hearings, the simple assumption that terrorism is always conducted against mechanisms of state is unsupportable.²⁴

The main terrorist acts which have been committed this century and throughout human history have been committed by states- by state apparatus...At the end of the day, although individuals and organisations may be responsible for terrorist acts, mass killings throughout human history have occurred when a Stalin, a Pol Pot, or a Hitler totally controlled a state.²⁵

²³ Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Proof Committee Hansard*, Reference: Security Legislation Amendment (Terrorism) Bill 2002 and related bills, 8th April 2002, Melbourne, p 32, extracted from speech by Mr Cameron Murphy, president NSW Council for Civil Liberties.

²⁴ Within the legislation there appears to be a tacit assumption that the definition of terrorism will not be applied to the acts of foreign states. In the absence of a clear statement exempting the violent activities of allied states however, there is no logical reason why Australian government support or involvement in military or intelligence operations abroad could not constitute secondary involvement with an organisation preparing, planning, assisting or fostering the doing of a terrorist act. On its face the definition of a ‘terrorist act’ under div 100.1 of the *Criminal Code Act 1995* (Cth) does not distinguish between acts performed by government and non-government organisations, nor does div 102.1 which defines ‘terrorist organisation’.

²⁵ Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Proof Committee Hansard*, Reference: Security Legislation Amendment

Given the width of the definition of both ‘act of terrorism’²⁶ and ‘terrorist organisation’²⁷ the Australian government, through selective enforcement, will be able to pick and choose on behalf of Australians which international causes they may and may not support. It was pointed out during the Senate hearings that “[d]efining something called ‘terrorism’ and linking it to ideological intention is bound to operate most harshly against those groups who are most politically unpopular, for whatever reason.”²⁸ Furthermore, these definitions can change quite rapidly, one person’s terrorist is another person’s freedom fighter.²⁹

The legislation is not confined to preventing Australians from contributing to actual acts of terrorism by such organisations. It also prevents membership, training, financing, or support of any kind. An example of training could be as innocuous as teaching resistance movements to use email and the internet to better spread their message and communicate throughout the world. Donations for the benefit of independence movements such as the Free Papua Movement, or the Zapatistas in Mexico could attract a penalty of 15 years imprisonment. These penalties could apply even if the donations were intended for food or medicine only and such provisions would operate as an impediment to the activities of organisations which provide overseas aid.³⁰ Participants in the public hearings reiterated that it was difficult to distinguish between freedom fighters and terrorists, and that the classification of individuals and groups can change with time.³¹ There

(Terrorism) Bill 2002 and related bills, 18th April 2002, Melbourne, p 142, extracted from speech by Dr Toscano, delegate from People against Repressive Legislation.

²⁶ Div 100.1 *Criminal Code Act 1995* (Cth)

²⁷ Div 101.2 *Criminal Code Act 1995* (Cth)

²⁸ Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Proof Committee Hansard*, Reference: Security Legislation Amendment (Terrorism) Bill 2002 and related bills, 17 April 2002, Melbourne, p 86, extracted from speech by Mr Julian Burnside on behalf of Liberty Victoria.

²⁹ Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Proof Committee Hansard*, Reference: Security Legislation Amendment (Terrorism) Bill 2002 and related bills, 17 April 2002, Melbourne, p89 per Mr Julian Burnside on behalf of Liberty Victoria.

³⁰ See discussion Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Proof Committee Hansard*, Reference: Security Legislation Amendment (Terrorism) Bill 2002 and related bills, 8 April 2002, Sydney, pp 4, 6.

³¹ Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Proof Committee Hansard*, Reference: Security Legislation Amendment

are clear issues of freedom of political association and freedom of speech involved.

The net cast by the legislation will extend beyond those persons who could be convicted of a secondary terrorism offence. The impacts upon any person accused of any such offence, rightly or wrongfully, are likely to be extreme, and the general chilling effect of the legislation upon the ability of domestic political organisations to offer solidarity (as for example the Seamen's Union did for opponents of the Pinochet regime during the 1970s) will be far reaching.

The rights of persons suspected of secondary terrorism offences

The rights of persons accused or suspected of secondary terrorism offences will be provided for under the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 (the ASIO Bill) which has not yet been passed. The ASIO Bill will define the exact powers of security personnel and the rights of persons suspected of terrorism offences. The key concerns that were expressed during the hearings into ASIO Bill focused on the proposal to authorise detention incommunicado, the removal of the right to silence and specific reversals of the burden of proof for suspects.³²

The Bill provides for extended periods of detention of suspects, initially up to 48 hours³³, but with powers to repeatedly issue further warrants beyond 48 hours. This contrasts markedly to the current maximum period of detention under existing New South Wales law, which is four hours and which can only be renewed to a maximum of twelve hours.³⁴ Under the terms of proposed legislation, suspects can be denied access to legal representation during interrogations³⁵ and

(Terrorism) Bill 2002 and related bills, 8 April 2002, Sydney, pp 32, 45; 18 April 2002, Melbourne, p 189.

³² Commonwealth of Australia, Parliamentary Committee on ASIO, ASIS and DSD, *Unfinished Inquiry Report* 3 May 2002, available at <http://www.aph.gov.au/house/committee/pjcaad/index.htm>

³³ Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002. s 24 (Proposed: *Australian Security Intelligence Organisation Act 1979* s 34F.)

³⁴ *Crimes Act 1900* (NSW) s 356D, s356G.

³⁵ Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002. s 24. (Proposed: *Australian Security Intelligence Organisation Act 1979* s34F)

the common law right to silence has been abrogated by the proposal to create an offence of failure to answer a question. The penalty for failure to answer questions or provide information is five years imprisonment.³⁶ These new powers breach traditional common law protection of the rights of accused persons and also breach Australia's obligations under the International Covenant on Civil and Political Rights.³⁷

Significantly, the provisions of the ASIO Bill when it is finally enacted will impact upon all suspects, or persons or organisations concerned about becoming suspects, whether or not they are ultimately ever charged with or convicted of a terrorism offence.

Critics of the legislation have not only highlighted the broad scope of the legislation but have also questioned the need for new laws. Acts of terrorism of the kind which occurred in the United States and Bali recently would be adequately covered under existing Australian criminal law. The substantive effect of the extra powers and new offences created under the proposed legislation will be to criminalise activities which have hitherto been allowable forms of political activity.

Existing criminal law provisions for dealing with terrorist offences

Whilst the Commonwealth government has consistently argued that new laws are urgently required as weapons in the "war against

³⁶ Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 s24. (Proposed: *Australian Security Intelligence Organisation Act 1979* s 34G)

³⁷ The Bill contravenes articles 9 and 14 of the *International Covenant on Civil and Political Rights*, in particular Article 9(3). "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement." And Article 14(3)(g) "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:..[n]ot to be compelled to testify against himself or to confess guilt."

The privilege against self incrimination is also currently a common law right applicable to all natural persons in Australia. See: *Environment Protection Authority V Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 (Aust High Ct)

terrorism”, an analysis of existing State and Commonwealth criminal law suggests otherwise.

Within Australia’s federal system of government, legislative powers are divided between the Commonwealth and State governments. Since none of the specific heads of power which are conferred on the Commonwealth government under the Australian Constitution refer directly to criminal matters, the States have traditionally legislated in this area and continue to do so in the absence of a comprehensively applicable system of Commonwealth criminal law. The ‘Crimes Acts’ or ‘Criminal Codes’ of the several states provide the familiar offences of homicide, assault, kidnapping, and destruction of property.³⁸ There also exists, at the state level, more specific legislation dealing with firearms and other weapons offences, dangerous goods and general public order offences.³⁹

Existing criminal law within New South Wales for example, is sufficient to provide sanctions against any acts which are knowingly directed towards a violent act of terrorism. The combined effects of the legislative prohibitions upon the possession (without reasonable excuse) of knives, weapons, explosives, firearms and dangerous goods generally and the older common law based offences of murder, manslaughter, assault and kidnapping, clearly are broad enough to cover any terrorist attack involving violence and any attempted attack or any preparatory activity involving weapons of any kind. The *Crimes Act 1900* (NSW) s 357 provides police with a general power of search and seizure of any person, vessel or vehicle in any public place under both the *Firearms Act 1996* (NSW) and the *Weapons Prohibition Act 1998* (NSW) wherever there are reasonable grounds to suspect a breach of either of those Acts. Even where no weapons are involved and there is no actual assault, the offence of

³⁸ See for example the *Crimes Act 1900* (NSW); *Criminal Code Act 1899* (QLD); *Criminal Law Consolidation Act 1935* (SA); *Criminal Code Act 1931* (TAS); *Crimes Act 1958* (VIC); *Criminal Code Compilation Act 1913* (WA).

³⁹ In NSW for example there is prohibition of the possession of firearms, *Firearms Act 1996* (NSW) s7; prohibition of the possession of explosives, *Weapons Prohibition Act 1998* (NSW), s 7, sched 1; and prohibition of the possession of knives *Weapons Prohibition Act 1998* (NSW), s 7, sched 1 and a general prohibition upon the possession of dangerous goods generally, *Dangerous Goods Act 1975* (NSW) s26. There are also specific offences relating to trespass and obstruction in the *Summary Offences Act 1988* (NSW), and criminal sanctions for the use of intimidation to hinder any person from doing any act which they have a lawful right to do, *Crimes Act 1900* (NSW) s 545B.

intimidation⁴⁰ covers any situation where an attempt is made by the use of violence, intimidation, hiding of tools or following a person from place to place to prevent that person from performing any act which they have a lawful right to do.

Liability for terrorist acts, attempted acts of terrorism and planned acts of terrorism (where two or more persons are involved) which may constitute incomplete offences under specific legislation is extended by the common law offence of conspiracy. The law of conspiracy provides a means whereby all participants in a planned attack can be held responsible, before or after the event or even if the event fails to eventuate.⁴¹ Precedents already exist for the successful use of this charge against political activists in Australia in circumstances where the alleged terrorist acts were never completed.⁴²

Commonwealth jurisdiction over criminal law matters has thus far been restricted to offences committed on Commonwealth lands, or in relation to Commonwealth property or having a connection with other Commonwealth heads of power such as importing, exporting, or external affairs.⁴³ However, state criminal legislation outlined above is also enforceable in relation to Commonwealth places where enforcement is not inconsistent with Commonwealth law.⁴⁴

At the Commonwealth level, the two most significant pieces of general criminal legislation are the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1999* (Cth).

Prior to the passage of the new laws, the *Crimes Act* already included provisions outlawing acts of treason,⁴⁵ treachery,⁴⁶ sabotage⁴⁷ and

⁴⁰ *Crimes Act 1900* (NSW) s 545B.

⁴¹ Conspiracy provides a flexible means of extending criminal liability to all participants in a plan, whether or not the plan comes to fruition. Historically it has been widely used against political groups, trade unions and unpopular causes. In Australia for example conspiracy charges were brought against former cabinet ministers in *Connor and Whitlam v Sankey* [1976] 2 NSWLR 570 (NSW Sup Ct)

⁴² See: *Alister v R* (1984) 58 ALJR 97 (Aust High Ct) and the discussion of the use of the charge of conspiracy in politically motivated prosecutions in Brown D, et al, *Criminal Laws, Materials and Commentary on Criminal Law and Process in NSW*, 3rd ed, Federation Press, Sydney, 2001, pp 1307 – 1310.

⁴³ S 51 *Commonwealth of Australia Constitution*

⁴⁴ *Commonwealth Places (Application Of Laws) Act 1970* (Cth).

⁴⁵ *Crimes Act 1914* (Cth) s 24

⁴⁶ *Crimes Act 1914* (Cth) s 24AA

⁴⁷ *Crimes Act 1914* (Cth) Part VII

offences relating to postal services,⁴⁸ and provided the Commonwealth government with specific powers to outlaw associations which encourage, inter alia, “the destruction or injury of property of the Commonwealth”.⁴⁹

Other Commonwealth legislation which criminalises acts of terrorism include the Crime (Aviation Act) 1991, the Crime (Hostages) Act 1989, the Crime (Biological Weapons) Act 1976, the Crime (Internationally Protected Persons) Act 1976 and the Public Order (Protection of Persons and Property) Act 1971.

During the Senate Committee inquiry into the proposed new anti-terror laws,⁵⁰ the Attorney-General’s Department could only identify one area in which there appeared to be deficiencies in the existing criminal law in the context of acts of terrorism. Under existing criminal law, in order to be guilty of attempting, aiding and abetting or conspiring in relation to murder or property damage, the accused must be aware of the specific murder or property damage.

Clearly, there are no major lacunae in existing criminal law which would impede or prevent the prosecution of those involved in terrorist activity.⁵¹ To the extent that there have been specific gaps in existing criminal law identified by the government, appropriate legislation could have been enacted to deal with those gaps. The extremely wide scope of the new laws not only threatens existing rights of political participation in Australia, it also represents a major usurpation of jurisdiction by the Commonwealth government over matters formerly controlled at a state level.

⁴⁸ *Crimes Act 1914* (Cth) Part VIIA

⁴⁹ *Crimes Act 1914* (Cth) s 30A

⁵⁰ Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Proof Committee Hansard*, Reference: Security Legislation Amendment (Terrorism) Bill 2002 and related bills, 19 April 2002, Canberra

⁵¹ This view was taken in the Senate Committee inquiry by, inter alia, Julian Burnside QC from Liberty Victoria, the Law Council of Australia and the Federation of Community Legal Centres (Victoria) Inc. See Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Proof Committee Hansard*, Reference: Security Legislation Amendment (Terrorism) Bill 2002 and related bills, 17 April 2002, Melbourne, p 82, and Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Proof Committee Hansard*, Reference: Security Legislation Amendment (Terrorism) Bill 2002 and related bills, 18 April 2002, Melbourne, pp 102 and 150.

Whilst the Commonwealth government has been unable to demonstrate a need for such far reaching laws to combat genuine acts of violent terrorism, the moral panic which has followed the recent attacks in the United States and Bali has provided an opportunity for the Government to politically justify a far reaching attack upon the civil and political liberties of the Australian public. The combined effect of the extra powers and new offences created under the proposed legislation will be to criminalise a range of political activities which have hitherto been lawful. Whether the current Commonwealth government uses the laws to suppress domestic political activity will not alter the fact that the presence of these laws on the statute books will constitute an ongoing menace to politically active Australians.

Conclusion

While few would contest the need to review our laws to fill any gaps which may exist in relation to genuinely violent terrorist attacks of the kind witnessed recently in the United States and in Bali, and incidentally elsewhere on the planet for most of human history, there is no demonstrated need to define terrorism in such a way which strikes at the heart of democratic rights, abrogates traditional common law rights, and infringes basic freedom of association.

There already exists abundant criminal laws at both the State and Commonwealth level which specifically deal with protests, riots, assault, public safety, property damage, trespass, kidnapping, intimidation, as well as offences such as treason, espionage, hijacking, taking of hostages, development of biological weapons or offences against internationally protected persons.⁵²

The recent enactments and proposed ASIO Bill do not represent a strategic assessment by the federal government of current failings in our ability to respond to the threat of terrorism but rather a knee jerk reaction and a politically opportunistic attack upon the common law rights and political freedoms of all Australians.

There are virtually no safeguards against cynical political use of such powers by future regimes. These laws bring Australia in line with numerous other repressive regimes in other parts of the world, and seriously undermine our capacity to pressure those regimes to

⁵² See note 8 and notes 11- 17 above.

safeguard human rights in their own legal systems. In particular, the range of secondary terrorism offences established by the new legislation reveals a dangerously shallow understanding of modern history, and establishes an Australia in which governments will have the power to dictate which international organisations Australians may and may not support. As pointed out by Dr Joseph Toscano during the Senate hearings, “[t]he road to an authoritarian government does not happen overnight; it happens by parliamentarians or people trying to do the right thing, by combating terrorism.”⁵³

⁵³ Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Proof Committee Hansard*, Reference: Security Legislation Amendment (Terrorism) Bill 2002 and related bills, 18th April 2002, Melbourne, p 147, extracted from speech by Dr Toscano, delegate from people against Repressive Legislation.