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# INTOLERANCE OF TERROR, OR THE TERROR OF INTOLERANCE? RELIGIOUS TOLERANCE AND THE RESPONSE TO TERRORISM

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## Introduction

In assessing Australia's legislative approach to terrorism, it is often stressed that an appropriate balance must be struck between national security interests and fundamental human and civil rights.<sup>1</sup> Implicit in this is the idea that some sacrifice of our human or civil rights is necessary for the ultimate triumph over the threat to national security.

While the loss of civil liberties by the Australian citizenry as a natural consequence of the introduction of counter-terrorism legislation is hotly debated, there does not appear to be as much attention on the impact of counter-terrorism legislation on religious communities, and in particular, Muslim communities.

There is no reason to doubt that religion played a part in the recent terrorist attacks in New York, Bali, Madrid and London. These events have pushed to the fore the connection between religion and terror, and terms such as "Islamic terrorism" (a juxtaposition that reinforces the view that Islam is a cause of terrorism) now proliferate. While many proponents of Islam would argue passionately that Islam rejects terrorism, one cannot fail to acknowledge that terrorist attacks around the world can be, and indeed have been, fuelled by religious motivations, no matter how misguided.

However, since much of the discourse has posed modern terrorism as a religious problem, this has led, inevitably, to solutions that come at the expense of religious freedom. This formulation has led to the further implementation of laws that have had an adverse impact on religious tolerance of Muslims through the creation of certain offences and the inevitable use of racial or religious profiling.

This paper argues that there has been a conceptual flaw in the formulation of Australia's legal and political response to terrorism. Part II of this paper looks at the relationship between religion, terrorism and

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<sup>1</sup> See, e.g., Ben Golder and George Williams, "Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism" (2006) 8 (1) *Journal of Comparative Policy Analysis* 43.

counter-terrorism legislation post-September 11; and Part III examines how this backdrop leads to the implementation of specific counter-terrorism laws and their effect on the delicate balance between religious freedom and national security.

## II. Religion, Terrorism and Counter-terrorism Legislation

The terrorist attacks of 11 September led to an unprecedented shift in the legislative landscape. Terrorism is now defined at law and there has been an extraordinary focus on the nexus between religion and terrorism. In this environment, the emphasis of religious motivation—and particularly that inspired by Islam—in defining terrorism is of dramatic prominence.

Despite the government's insistence that the war on terrorism is not a war on Islam,<sup>2</sup> the counter-terrorism laws and the discourse around them are clearly targeted at "extremism" of a religious kind. For example, the government white paper on *Transnational Terrorism: the Threat to Australia*, released in March 2004, posits that Muslim extremism is the modern terrorist threat faced by Australia to the exclusion of all other sources of threats:

The threat we face today is driven by an extremist interpretation of Islam. This form of extremism is absolutist. It leaves no room for compromise and it seeks no place at the negotiating table. It uses violence to signal its committed path to a final end. It is not bound by social norms, laws or values. These terrorists justify and feed their ideology through skilful exploitation of dynamics within mainstream societies. They use adverse political, social and economic conditions as a rallying cry to recruit and motivate their members. They exploit distrust of the West and feelings of humiliation and anger. They invoke events that resonate with most Muslims, such as the Israeli-Palestinian conflict and the war in Iraq, as justifications for their ideological cause.<sup>3</sup>

This viewpoint of Islamic extremism as a threat of terrorism informs the legal and socio-political response to terrorism.

### A. RELIGION AND THE LEGAL RESPONSE TO TERRORISM

Defining terrorism and hence the parameters of its threat is not an easy task because of the fine line between terrorism and liberation struggles on the one hand, and between terrorism and criminal activity on the other, and to distinguish them calls upon one's subjective standpoint.<sup>4</sup> While

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2 See, e.g., the Prime Minister John Howard's comment, "There is nothing in our laws, nor will there be anything in our laws, that targets an individual group be it Islamic or otherwise," in "PM not 'targeting' Muslims", *The Age*, 9 November 2005; see also 'Ruddock doubts terror cell claims', *The Age*, 28 September 2005.

3 Department of Foreign Affairs and Trade, *Transnational Terrorism: The Threat to Australia*, 29 March 2004, Chapter 2.

4 Nathan Hancock, *Terrorism and the Law in Australia: Legislation, Commentary and Constraints*, Research Paper No 12 (2002) para 2.3.1; Ben Golder and George Williams, "What is 'Terrorism'? Problems of Legal Definition" (2004) 27 *University of New South*

acts of terrorism necessarily include some action that would be criminal, the government argued that the existing criminal law was not sufficient to deal with terrorism.<sup>5</sup> Justice Hope, the Commissioner reviewing national protective arrangements following the Sydney Hilton hotel bombing in 1978, stated in his report that “virtually all terrorist acts involve what might be called ordinary crimes—murder, kidnapping, assault, malicious damage, and so on—albeit for political motives.”<sup>6</sup> It is the motivation that is one of the central considerations in defining “terrorism”.

Prior to the terrorist attacks on 11 September, religious motivation was not specifically mentioned in legal definitions of terrorism, even in most European jurisdictions. The UN Declaration on Measures to Eliminate International Terrorism in 1997 simply refers to “Criminal acts intended or calculated to provoke a state of terror . . . for political purposes,” and adds that motivations such as religion should never justify terrorism.<sup>7</sup>

In Australia, a Parliamentary Research Paper prompted by the need for analysis of Australia’s preparedness for terrorism in 2001, concluded that should the Commonwealth enact a separate terrorist offence, such an offence might target acts or threats of violence or national concern that are “motivated by political, social or ideological objectives”.<sup>8</sup> Religion was not expressly included in the recommendation.

However, section 100.1 of the *Criminal Code* now defines a “terrorist act” as including an additional reference to religious motivation.<sup>9</sup> One of the reasons cited by the Attorney-General as to why the existing legislative framework was inadequate was that the provisions for the proscription of unlawful associations under Part IIA of the *Criminal Code* were primarily directed at politically-motivated organisations “rather than those inspired by religious or ideological motivations”.<sup>10</sup>

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Wales Law Journal 270.

5 See, for example, the federal Attorney-General Philip Ruddock’s view that “the criminal law system which waits until an offence has occurred and then deals with the consequences is not seen to be appropriate in the new environment,” ABC Radio, “Law Council Hopes High Court will Stop New Anti-Terrorism Laws”, AM, 7 December 2005.

6 Protective Security Review, Report (Unclassified Version), AGPS, Canberra, 1979, 42.

7 UN Declaration on Measures to Eliminate International Terrorism, Res. 49/60 of 9 December 1994; Silvio Ferrari, ‘International Law and Religion Symposium: Article: Individual Religious Freedom and National Security in Europe After September 11’ (2004) Brigham Young University Law Review 357, 364–365.

8 Nathan Hancock, Terrorism and the Law in Australia: Legislation, Commentary and Constraints. Research Paper No. 12, 2001–2002, Parliament of Australia, para 2.3.5.

9 Section 100.1 of the Criminal Code defines “terrorist act” as an action or threat of action where:

the action falls within subsection (2) and does not fall within subsection (3); and the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and the action is done or the threat is made with the intention of: 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 intimidating the public or a section of the public.

10 Senate Legal and Constitutional Committee, Parliament of Australia, Consideration of Legislation Referred to the Committee, Security Legislation Amendment (Terrorism) Bill 2002 [No.2]; Suppression of the Financing of Terrorism Bill 2002; Criminal Code

Religious motivations, then, appear to be a central concept in defining terrorism.

The inclusion of religion in the legal definition of “terrorist act” has serious consequences. It has been argued that the definition of “terrorist act” is overly broad and hence it could cover a range of legitimate activities, including activities associated with legitimate freedom movements that oppose tyranny (previously including organisations such as the African National Congress in South Africa and Fretilin in East Timor).<sup>11</sup> There are many independence movements around the world that are fighting oppressive regimes, many in the Muslim world. The definition at law does not allow for such movements to be supported in any way, even if they have legitimacy at international and legal levels.

The definition also increases the prospect that religious motivations in general are suspect or should be at least seen as suspect. It has been argued that a person protesting on religious grounds against the publication of books by Salman Rushdie, and who intentionally knocks down a fence posing a serious risk to public safety, is capable of being found guilty of committing a terrorist act, and would be subject to heavy penalty such as life imprisonment.<sup>12</sup>

## B. RELIGION AND THE SOCIO-POLITICAL RESPONSE TO TERRORISM

The uncompromising stance on terrorism by enacting tough anti-terrorism laws may indicate an over-reliance on legal solutions to what is essentially a socio-political problem. However, unless the causes of terrorism are properly dealt with in the global context, any extremist or violent tendencies cannot be easily dispelled by the threat of the force of law alone. In his report on the *Inquiry into Legislation Against Terrorism* in 1995, Lord Lloyd of Berwick opined that “it is an illusion to believe that the fanaticism and determination of well established terrorist organisations can be defeated by laws alone, even of the most severe and punitive kind,”<sup>13</sup> concluding that “there is no legislative fix or panacea against terrorism”.<sup>14</sup> A prominent Muslim leader has reasoned,

There are two fronts in the war against terrorism: addressing the often genuine political and social problems that terrorism seeks to solve, and addressing the ideological foundation by which such terrorism is justified.

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Amendment (Suppression of Terrorist Bombings) Bill 2002; Border Security Legislation Amendment Bill 2002; Telecommunications Interception Legislation Amendment Bill 2002, 25.

11 See, e.g., Agnes Chong, Patrick Emerton, Waleed Kadous, Annie Pettitt, Stephen Sempill, Vicki Sentas, Jane Stratton and Joo-Cheong Tham, *Laws for Insecurity? Report on the Federal Government’s Proposed Counter-Terrorism Measures (2005)* 10; Sarah Jones, “Australian Counter-Terrorism Legislation and the International Human Rights Framework”, (2004) 27 *University of New South Wales Law Journal* 428, 432.

12 Silvio Ferrari, above n 7, 366.

13 Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Cm 3420, October 1996, cited by Hancock, above n 8, para 2.2.1.

14 *Ibid.*

While the former is largely the responsibility of governments, the struggle against the ideology of terrorism can be fought only by Muslim scholars speaking the one language that extremists universally respect: the language of theology.<sup>15</sup>

Yet, in Australia at least, there is an unexplored tension between legislating against religious terrorism and the idea that religious teaching, and in particular, fundamentalist teaching, may actually assist in preventing terrorism. While the government appears to have engaged the community through the Muslim Community Reference Group, ostensibly a consultative committee to advise the government, upon closer inspection it becomes clear that it is only achieved on a superficial level. There are two aspects to this.

Firstly, the government went to some lengths to exclude those members of the community whom it regarded as “extremist”, arguing that they did not want to give a voice to radical elements.<sup>16</sup> However, this argument is fundamentally flawed.

If religious terrorism is based on an incorrect interpretation of the religion, then it follows the leaders with real spiritual and theological authority amongst those most susceptible to terrorist recruitment are best placed to shatter those ideas.<sup>17</sup>

However, in spite of significant efforts on the part of the Muslim community in defending the religion of Islam against allegations that it is a violent, or terrorist religion, a perception persists that religious fundamentalism leads to, or even equates to, terrorism. The two concepts are often used interchangeably in modern day counter-terrorism rhetoric. However, it is incorrect to associate fundamentalism with terrorism.<sup>18</sup> For example, the most austere and conservative scholars in Saudi Arabia have been some of the most vehement opponents of terrorism. In 2004, the Grand Mufti of Saudi Arabia and Chairman of the Council of Senior Religious Scholars Shaikh Abdulaziz Aal-Shaikh delivered a sermon to almost two million pilgrims at the annual pilgrimage of Hajj that denounced terrorism as well as those who perpetrate it in the name of Islam:

You must know Islam’s firm position against all these terrible crimes. The world must know that Islam is a religion of peace and mercy and goodness; it is a religion of justice and guidance . . . Islam has forbidden violence in all its forms. It forbids hijacking airplanes, ships and other means of transport, and it forbids all acts that undermine the security of the innocent.<sup>19</sup>

15 Amir Butler, “Theology key to halting rise of extremism”, Sydney Morning Herald, 24 August 2005.

16 ABC Radio, “‘Extreme fools’ left out of Muslim advisory group: Cobb”, PM, 16 September 2005 <<http://www.abc.net.au/pm/content/2005/s1462305.htm>> at 20 March 2006.

17 Amir Butler, “PM’s Muslims don’t represent all Muslims”, The Age, 23 August 2005.

18 For an in depth analysis of the subgroups in Islam, their ideological positions and their relationship with terrorism, see Quintan Wiktorowicz, “A Genealogy of Radical Islam” (2005) 28 *Studies in Conflict and Terrorism* 75.

19 Royal Embassy of Saudi Arabia, Washington DC, “Saudi Arabia’s top cleric urges Muslims to reject terrorism” (Media Release, 2 February 2004); “Top Saudi religious authority condemns terrorist”, CNN.com, 1 February 2004 <<http://edition.cnn.com/2004/>

In some senses, religious fundamentalism is a key aspect to the psychological attack on terrorism. Conservative leaders will be able to debate and debunk any erroneously-held beliefs. This has proved to be a successive model in Saudi Arabia and Yemen.<sup>20</sup>

Secondly, in only giving voice to the “moderate” leaders and excluding certain sections of the community, the government created a vehicle whereby it was able to lend credence to a particular brand of Islam, reinforcing the division between “fundamentalist Islam” (read “extremist”, “terrorist”) and “moderate Islam” (read “acceptable”). In establishing a committee ostensibly to target extremism in the community but which shuns particular parts of the community, the government has chosen the parts of the religion that are deemed to be the correct, or acceptable, or approved form of practice.

This non-inclusive approach has two effects. The first is that it leads to the community feeling targeted, and thinking that the government will not accept their own solutions to a problem that is widely perceived to be theirs. Secondly, it speaks of a governmental intolerance of ideas and religious practice. Implicit in this intolerance is the view that the Muslim community and Islam itself, is antithetical to a solution to “terrorism”. As a result, the religion of Islam is constructed as inherently violent and incompatible with democracy. This sets up a discourse that coercive and draconian law is the only option.

### **III. Specific Features of Counter-Terrorism Laws and their Effect on Religious Practice**

Specific provisions of counter-terrorism legislation that are contained within the political and legal framework discussed in Part II suffer from having the flow-on effect of limiting the freedom of religion. Article 18 of the United Nations Universal Declaration of Human Rights defines the freedom of religion as including the right to freedom of thought, conscience and religion, as well as the right to manifest the person’s religion or belief in teaching, practice, worship and observance.

This part of the paper will examine how these protections have been undermined by specific features of the counter-terrorism laws, namely, the proscription powers contained in Part 5.3 Division 102 of the *Criminal Code*; the association offence under section 102.8; the sedition offences under section 80.2; and lastly various other features likely to lead to the use of racial or religious profiling.

#### **A. THE PROSCRIPTION REGIME**

Under the *Criminal Code*, a “terrorist organisation” is defined in two ways. Firstly, section 102.1(1) (a) defines a “terrorist organisation” as one that

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WORLD/meast/01/31/saudi.hajj.ap/> at 13 June 2006.

20 Amir Butler, “Freedom of Speech: Liberty or Liability?” (Speech delivered at Laws for Insecurity? Public Forum on Terrorism Law, Melbourne, 17 November 2005).

is “directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)”. Secondly, an organisation can also be proscribed by the Attorney-General as a terrorist organisation if he or she is satisfied on reasonable grounds that it is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act,<sup>21</sup> or that it advocates the doing of a terrorist act.<sup>22</sup> In effect, this grants power to the executive to criminalise organisations considered a threat to Australia’s national security. It creates a conclusive presumption that the organisation is a terrorist organisation, and facilitates the burden of proof in criminal hearings.<sup>23</sup>

The Security Legislation Review Committee review of anti-terrorism legislation introduced in 2001, was critical of the process of proscription and believed that “a fairer and more transparent process should be devised for proscribing an organisation as a terrorist organisation”.<sup>24</sup> In practice, this proscription process has been criticised as highly subjective and political.<sup>25</sup> The broad executive discretion given to the Attorney-General may be subject to political considerations such as foreign policy determinations that are far less likely to arise in a rigorous judicial setting.<sup>26</sup> For example, the organisation Palestinian Islamic Jihad was proscribed despite the fact that it had no known presence in Australia, no known links to Australia, or any financing from Australia.<sup>27</sup> It would appear that the listing was made “largely on the basis that other major countries had already listed it”<sup>28</sup>.

The added political underpinnings substantially encourage a politicised reading of the “political, religious or ideological motivations” in the definition of “terrorist act”. To date, all but one of the nineteen proscribed organisations in Australia are self-identified as Muslim groups,<sup>29</sup> while the

21 Criminal Code s 102.1(2)(a).

22 Criminal Code s 102.1(2)(b).

23 Security Legislation Review Committee, Review of the Operation, Effectiveness and Implications of the Amendments made by the Security Legislation Amendment (Terrorism) Act 2002, the Suppression of the Financing of Terrorism Act 2002, the Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002, the Border Security Legislation Amendment Act 2002, the Telecommunications Interception Legislation Amendment Act 2002, and the Criminal Code Amendment (Terrorism) Act 2003 (2006), 61.

24 *Ibid*, 4.

25 Nigel Brew, The Politics of Proscription, Parliamentary Research Note No. 63 (21 June 2004).

26 For a discussion of the proscription regime and consideration of other possible models, see Security Legislation Review Committee, above n 23, 85–100.

27 Parliament Joint Committee on ASIO, ASIS and DSD (as it then was), Review of the Listing of the Palestinian Islamic Jihad (PIJ) (2004), 20–21.

28 Nigel Brew, above n 25.

29 The Criminal Code Regulations 2002 (Cth) cl 4A–4W specify that for the purpose of paragraph (b) of the definition of “terrorist organisation” in sub-s 102.1(1) of the Criminal Code, the following organisations are proscribed: Al Qa’ida, Jemaah Islamiyah, Abu Sayyaf Group, Jamiat ul-Ansar (JuA), Armed Islamic Group, Salafist Group for Call and Combat/GSPC, Tanzim Qa’idat al-Jihad fi Bilad al-Rafidayn, Ansar al-Islam, Asbat al-Ansar, Islamic Movement of Uzbekistan, Jaish-e-Mohammad, Lashkar-e Jhangvi (LeJ), Egyptian Islamic Jihad, Islamic Army of Aden (IAA), Hizballah’s External Security Organisation (ESO), Palestinian Islamic Jihad (PIJ), HAMAS’ Izz al-Din al-Qassam Brigades, Lashkar-e-Tayyiba (LeT) and Kurdistan Workers Party (PKK).

proportion of proscribed Muslim organisations in comparable overseas jurisdictions is comparatively lower.<sup>30</sup>

This is all the more pertinent in view of the legislative amendments in the *Anti-Terrorism Act (No. 2) 2005* which introduced the concept of proscription on the grounds that the organisation “advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)”.<sup>31</sup> It is widely perceived, at least by Muslim communities, that this new criteria for proscription was intended to ban a specific Muslim organisation, since it immediately followed a finding by the Australian Security and Intelligence Organisation that the group in Australia could not be proscribed under the then existing provisions in the *Criminal Code*.<sup>32</sup> This is problematic because, as discussed above in Part II, the definition does not exclude support of legitimate liberation movements.

In the current political climate, the proscription regime can be used to criminalise local organisations or affiliations between individual Muslims. Once an organisation is proscribed, it will be an offence for a person to direct the activities of the organisation,<sup>33</sup> to provide support to the organisation,<sup>34</sup> to be a member of the organisation,<sup>35</sup> or even to associate with a member of the organisation.<sup>36</sup> A person who is even only remotely connected to the organisation would be under increased surveillance by virtue of recent legislative amendments.<sup>37</sup>

If proscribed, it is more than likely that an organisation would be incapacitated, severely restricting the religious freedom of all members. Congregations and participants in the group would be subject to collective punishment in the form of limits to their religious activities, e.g. attending classes, teaching classes, performing prayers together, donating money or clothes to the organisation, or speaking to members of the organisation to express their support of its continued existence.

## B. ASSOCIATION OFFENCE UNDER SECTION 102.8 OF THE CRIMINAL CODE

The association offence under section 102.8 of the *Criminal Code* is one of the more controversial provisions of the counter-terrorism laws. It makes it an offence to associate with a director, promoter or member of a terrorist organisation. The Security Legislation Review Committee has recommended that section 102.8 should be repealed as it “transgresses a

30 This compares with 27 out of 49 in the UK, 25 out of 42 in the US, and 11 out of 47 in the EU.

31 Criminal Code s 102.1(4)(b), amended by the Anti-Terrorism Act (No. 2) 2005 (Cth).

32 For a detailed discussion see Submission No. 17(b) to Security Legislation Review Committee, above n 23, (January 2006) 6-8 (Australian Muslim Civil Rights Advocacy Network).

33 Criminal Code s 102.2.

34 Criminal Code s 102.7.

35 Criminal Code s 102.3.

36 Criminal Code s 102.8.

37 Telecommunications (Interception) Amendment Act 2006 (Cth).



fundamental human right—freedom of association—and interferes with ordinary family, religious and legal communication,”<sup>38</sup> citing as its reasons the breadth of the offence, lack of detail and certainty, as well as the narrowness of its exemptions.

The offence moves away from criminalising *what* a person does, to *who* they know or spend time with regardless of their intention. This has an immense effect on the freedom of individuals to associate, and limits their right to practice their religion. A wide range of legitimate activities, including social and religious festivals and gatherings, could be covered by the offence.<sup>39</sup> That all but one organisation are self-identified as Muslim organisations means that this provision applies almost exclusively to the communications of Muslims. In addition, in order to enforce this provision it is conceivable that there would be an immense increase in surveillance and scrutiny of Muslim communications and organisations.<sup>40</sup>

As if to acknowledge that the offence will indeed target the free practice of religion, section 102.8(4)(b) of the *Criminal Code* provides for a specific exemption for religious association where the association occurs at a place being used for public religious worship and takes place in the course of practising a religion.

However, the narrowness of the exemption means that many of the usual activities that would occur within a religious community are not covered. Muslim communities, like many ethnic communities, are tightly knit and religious association is not confined to mosques in structurally delineated times alone. In his or her religious life, a Muslim is expected to attend religious festivals where congregational prayers are performed at an outdoor venue rather than a traditional place of worship such as a mosque; he or she may attend regular classes and Qur’an study groups which are frequently conducted in people’s homes or hired halls, but not always in mosques; and he or she may attend the celebration of a religiously and socially significant event such as a wedding or the birth of a child in a public place. If a person were to “associate” with another within the meaning of section 102.8 in any of the above cases, he or she would have no defence under the current legislation.

### C. SEDITION OFFENCES UNDER SECTIONS 80.2(1)–(9) OF THE CRIMINAL CODE

The sedition offences, as amended by the *Anti-Terrorism Act (No. 2) 2005* also have a significant impact on religious freedom in Australia. There are now five sedition offences in the *Criminal Code*. It is an offence to urge another person to overthrow the *Constitution*, the governments or

38 Security Legislation Review Committee, above n 23, 4.

39 Submission No. 84 to Senate Legal and Constitutional Committee, Parliament of Australia, Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2004 (2004), 15 (Australian Muslim Civil Rights Advocacy Network).

40 Ibid, 9–11.

their lawful authority,<sup>41</sup> or to interfere with parliamentary elections.<sup>42</sup> It is also an offence to urge force or violence against other groups in society whether distinguished by race, religion, nationality or political opinion in circumstances where it would threaten the peace, order and good government of the Commonwealth.<sup>43</sup> Finally, it is also an offence to urge another to engage in conduct that would assist an organisation or country that is either at war with the Commonwealth, or engaged in armed hostilities against the Australian Defence Force.<sup>44</sup>

It is difficult to appreciate that the sedition offences criminalise the communication of ideas without the requirement of an intention that a relevant offence be committed. It has been strongly argued by a broad cross-section of lawyers, academics, civil libertarians, media and artists that the offences are likely to silence political dissent instead. In the words of the Australian Law Reform Commission, apart from the treason offences, “sedition is quintessentially ‘political’ crime, punishing speech that is critical of the established order.”<sup>45</sup>

In the current political climate where Muslims are expected to subscribe to “Australian values,”<sup>46</sup> and where any political dissent from Muslims is viewed with suspicion, these offences will have an additional effect on Muslim community groups, who may, for example, wish to express solidarity with other Muslims living under oppressive regimes or various kinds of occupying forces, or express legitimate support for self-determination struggles around the world. This is particularly the case where the Australian armed forces are at war in Muslim-majority countries such as Iraq and Afghanistan, such that any person who wishes to express support or who urges others to assist those back home would fall foul of sections 80.2(7) or (8).

The provisions contribute to the normalisation of Islamophobia and may lead to the criminalisation of statements made by Muslims as “incitement” where there may otherwise be no evidence of violent acts that threaten the safety of the public, perpetuating the perception that religious ideas are fundamentally against the authority of the Commonwealth.

In writing about the UK “glorification of terrorism” offence, the Islamic Human Rights Commission observed that statements made by Muslims will be regarded as “glorification” by virtue of their and their audience’s faith.<sup>47</sup>

41 Criminal Code s 80.2(1).

42 Criminal Code s 80.2(3).

43 Criminal Code s 80.2(5).

44 Criminal Code ss 80.2(7) and (8).

45 Australian Law Reform Commission, Review of Seditious Laws, Discussion Paper 71 (2006), 34.

46 See, ABC News online, “Minister tells Muslims: accept Aussie values or ‘clear off’”, 24 August 2005 <<http://www.abc.net.au/news/newsitems/200508/s1445181.htm>>; Josh Gordon and Jewel Topsfield, “Our values or go home: Costello” *The Age*, 24 February 2006.

47 Fahad Ansari, Another Pyrrhic Victory: Are Muslims Missing the Bigger Picture (2006) Islamic Human Rights Commission, <<http://www.ihr.org.uk/show.php?id=1685>> 23 May

Already Muslim dissent against oppression overseas has been curtailed in a climate of fear and uncertainty. It is clear that should this offence make it into law that Muslims will be the first targets and this will include those who support legitimate liberation struggles as defined by international law be it in Palestine, Iraq, Chechnya or elsewhere in the world. They may even be prosecuted for espousing the same sentiments as the Prime Minister's wife [who was accused of being a Palestinian suicide bomber sympathiser], or feting figure who are no more or less "terrorists" than Nelson Mandela.<sup>48</sup>

The Federation of Community Legal Centres (Vic) Inc's submission to the Australian Law Reform Commission review of the sedition laws similarly argued that "the statements of Muslim community members may be perceived through the lens of the highly politicised concept of 'extremism' and as a result assessed as 'terrorist' or 'seditious'".<sup>49</sup>

The spotlight on Muslim speech due to the sedition offences leads to a significant chilling effect on the Muslim community in Australia.<sup>50</sup> It has been suggested that Muslims fear using "legitimate concepts and terminology" due to the anxiety of being misunderstood by authorities.<sup>51</sup> Some even engage in self-censorship of certain words or concepts, such as a religious lesson on "jihad,"<sup>52</sup> for fear that it could easily be misunderstood as glorifying or encouraging terrorism. There are also concerns surrounding the "extremely thin line" between empathising with the Palestinian cause and justifying the actions of suicide bombers which could not be drawn with any legal certainty.<sup>53</sup> There is a fear that the censorship, whether by oneself or externally imposed, of those who criticise government policy would likely drive extremists further underground.<sup>54</sup> It has also been suggested that the sedition laws are likely to inhibit inter-community dialogue that is necessary to bring about understanding and the peaceful resolution of differences.<sup>55</sup>

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48 Massoud Shadjareh, Chair of Islamic Human Rights Commission, "UK Terrorism Bill—Who will be Prosecuted for Glorifying Terror and Why?" (Press Release, 15 February 2006).

49 Submission No. 33 to Australian Law Reform Commission, above n 45 (10 April 2006) (Federation of Community Legal Centres (Vic)).

50 Submission No. 54 to Australian Law Reform Commission, above n 45 (17 April 2006) (Australian Muslim Civil Rights Advocacy Network).

51 Alan Travis and Patrick Wintour, "Terror Bill Chilling for Muslims, Blair Warned", *The Guardian* (England), 11 November 2005.

52 "Jihad" is an Arabic word that means "struggle". In the Islamic context it is used to mean two different things: struggle to follow one's faith and to control one's worldly desires, and military struggle. For example, one might struggle against one's inclination to worldly entertainment to spend more time on worship. It can also mean military conflict against an oppressor, e.g. the fighters against Soviet occupation of Afghanistan in the 1980s were known as "mujahideen" (lit. one who struggles). Unfortunately, in the Western media, the term "jihad" has become synonymous with terrorism, but this is not its true meaning.

53 Alan Travis and Patrick Wintour, above n 51.

54 *Ibid.*

55 Submission No. 45 to Australian Law Reform Commission, above n 45, (13 April 2006) (Emrys Nekvapil).

#### D. INCITEMENT OF GROUP VIOLENCE UNDER SECTION 80.2(5) OF THE *CRIMINAL CODE*

A particular sedition offence warrants specific attention. Section 80.2(5) of the *Criminal Code* makes it an offence to urge a group, whether distinguished by race, religion, nationality or political opinion, to use force or violence against another group, which force or violence would threaten the peace, order and good government of the Commonwealth. While some have welcomed the inclusion of the offence, citing that this is the first time Australia's obligations under international law to proscribe advocacy of racial, religious and national hatred has been recognised at federal law,<sup>56</sup> there are also philosophical shortcomings.

Firstly, the framing of the sedition offence as one of inter-group violence in the context of terrorism acts to emphasise the idea that they are intrinsically linked,<sup>57</sup> reinforcing the stereotype that certain ethnicities or religions are connected to terrorism.<sup>58</sup> Submissions to the Australian Law Reform Commission review argued that the backdrop for the sedition offences “may strengthen the misleading and dangerous impression that the problem of terrorism has its roots in Islam and that the leaders of Islamic communities may be likely to contravene the sedition provisions.”<sup>59</sup> The characterisation of inter-group violence based on race or religion as political offences in the context of counter-terrorism measures further amplifies the division between different groups in society without regard to the principles of tolerance.

Secondly, it is ironic since the government has been a long-time opponent of religious vilification legislation as a matter of policy.<sup>60</sup> Inherent in that is the acknowledgement that people are free to express their ideas, that others are free to argue against the ideas in kind, rather than through the brute force of the law.<sup>61</sup> A member of the House of Lords said, “rants should be rejected with argument, not with police or prisons.”<sup>62</sup> The

56 Australian Law Reform Commission, above n 45, 189.

57 Australian Law Reform Commission, above n 45, 191.

58 Australian Law Reform Commission, above n 45, 191, citing a number of submissions including that of the Chief Minister of the ACT, Submission No. 44 (13 April 2006); Dr Ben Saul, Submission No. 52 (14 April 2006). See in particular Submission No. 45 cited in Australian Law Reform Commission report, above n 45, 191.

59 Submission No. 16 to Australian Law Reform Commission, above n 45, (9 April 2006) (Pax Christi).

60 See, e.g., Human Rights and Equal Opportunity Commission, Article 18, Freedom of Religion and Belief (1998) Human Rights and Equal Opportunity Commission, Sydney; Human Rights and Equal Opportunity Commission, Isma—Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians (2004) Human Rights and Equal Opportunity Commission, Sydney.

61 See also A Lester, G Bindman, *Race and Law*, Longman Group Limited, London, 1972, 357; R Chow, “Inciting Hatred or Merely Engaging in Religious Debate: The Need for Religious Vilification Laws” (2005) 30 *Alternative Law Journal* 121.

62 Australian Law Reform Commission, above n 45, 103. See also Syed Atiq ul Hassan, *Australian Freedom of Speech and the Induction of Sedition Laws* (2005) *Tribune International* <<http://www.tribune-intl.com/articles/read.asp?newsID=41>> at 13 June 2006.

approach of the government in introducing section 80.2(5) to prevent incitement of group-based violence, ostensibly to protect groups in the community, including religious groups, appears disingenuous at best. It has also been argued that it evidences a concern to protect the majority “rather than vulnerable racial or religious minority groups”.<sup>63</sup>

While to date no charges have been made, the sedition offences have been discussed in the context of the so-called “books of hate” being sold in some Islamic bookshops. While these books have been found to not be in breach of the broad sedition offences or any other federal or state laws prohibiting the incitement of violence or racial hatred, the government continually asserts their intention to amend the law to outlaw such literature.<sup>64</sup> To be continually seeking to amend the laws is likely to be perceived by Muslim communities as a relentless pursuit to limit their freedom to speak out against injustice, to encroach upon the freedom of the community to express their thoughts. Furthermore, it is perceived by some members of the Muslim community that the government bans particular books because it cannot argue against them on a logical or rational level. Counter-productively, this gives banned books a kind of *cachet* that they would not otherwise have.

#### E. FEATURES OF COUNTER-TERRORISM LEGISLATION LIKELY TO LEAD TO PROFILING ON THE BASIS OF RACE OR RELIGION

The strategy of racial profiling has been criticised as “dangerously ineffective”.<sup>65</sup> It has been argued in Australia<sup>66</sup> and overseas that such measures increase community tension<sup>67</sup> and are detrimental to the harmony of the community. In the context of anti-terror laws, this effect is magnified.<sup>68</sup>

63 Submission No. 187 to Senate Legal and Constitutional Committee, Inquiry into Anti-Terrorism Bill (No 2) 2005 (P Mathews), cited by Australian Law Reform Commission report, above n 45, 192.

64 “Govt mulls law change over terror books” The Age, 16 May 2006; “AG flags tougher sedition laws” news.com.au, 18 May 2006.

65 Ben Golder and George Williams, above n 1, 56.

66 Ibid, 43; Jude McCulloch and Bree Carlton (2006) “Pre-empting Justice: Suppression of Financing of Terrorism and the ‘War on Terror’”, 17(3) Current Issue in Criminal Justice 397; Joseph Pugliese, “In Silico Race and the Heteronomy of Biometric Proxies: Biometrics in the Context of Civilian Life, Border Security and Counter-Terrorism Laws” (2005) 23 The Australian Feminist Law Journal 1; Agnes Chong and Vicki Sentas, “Part III: Monitoring the Impact of Terrorism Laws on Muslim and Culturally and Linguistically Diverse Communities” in Combined Community Legal Centres’ Group (NSW) Inc, et al, Australian NGO Submission to the UN Special Rapporteur on Counter-Terrorism and Human Rights (2006) <[http://www.naclc.org.au/docs/SR%20report0306\(final\).pdf](http://www.naclc.org.au/docs/SR%20report0306(final).pdf)>.

67 See e.g., David Cole, Enemy Aliens, Double Standards and Constitutional Freedoms in the War on Terrorism (2003); Elaine Catherine Hagopian (ed), Civil Rights in Peril: The Targeting of Arabs and Muslims (2004); Tram Nguyen, We are all Suspects Now: Untold Stories from Immigrant Communities after 9/11 (2005); Liz Fekete, “Anti-Muslim Racism and the European Security State” (2004) 46(1) Race and Class 3.

68 See e.g., David Cole, Enemy Aliens, Double Standards and Constitutional Freedoms in the War on Terrorism (2003); Elaine Catherine Hagopian (ed), Civil Rights in Peril: The Targeting of Arabs and Muslims (2004); Tram Nguyen, We are all Suspects Now: Untold Stories from Immigrant Communities after 9/11 (2005); Liz Fekete, “Anti-Muslim Racism

In view of the utter devastation of terrorist attacks, the traditional criminal law was deemed to be inappropriate in dealing with terrorism as it focuses on the behaviour after the fact,<sup>69</sup> and that terrorism is so heinous that it must be prevented at all costs. Therefore, since September 11 there has been a general shift towards preventative or pre-emptive measures of law enforcement which criminalise certain acts that may occur in the very early stages of planning, even if no terrorist act actually occurs.<sup>70</sup>

Pre-emptive measures by definition are concerned with the identification of suspicious behaviour based on predictive elements rather actual action constituting a crime. While the anti-terrorism laws do not specifically target the action or speech of particular groups, some of the measures promote or lend to the practice of profiling on the basis of features such as a person's race or religious conviction. In particular, those aspects of law enforcement and surveillance powers that involve direct dealings with people are most prone to this technique. This includes preventative detention,<sup>71</sup> control orders,<sup>72</sup> police stop and search and question powers,<sup>73</sup> and the suppression of financing terrorism.<sup>74</sup>

The preventative detention provisions allow a person to be detained if the police are satisfied on reasonable grounds that the person may be involved in a terrorist act.<sup>75</sup> There is an increased risk of preventive powers being used discriminatorily, exposing vulnerable and visible communities to arbitrary interference. In the United States, up to 1,200 people were detained within two months of the 11 September attacks under various powers,<sup>76</sup> including the controversial material witness powers.<sup>77</sup> A research study by Human Rights Watch and the American Civil Liberties Union reveals that of the seventy people who were arrested as material witnesses, "all but one was Muslim, by birth or conversion. All but two were of Middle Eastern, African, or South Asian descent, or African-American".<sup>78</sup> In addition, the Department of Justice questioned almost 5000 young Arab and Muslim men in the few months after 11 September.<sup>79</sup> All of the people detained were cleared by the FBI and found to have had nothing to do with terrorism.

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and the European Security State" (2004) 46(1) *Race and Class* 3.

69 See for example the Attorney-General's comments as quoted in ABC Radio, "Law Council hopes High Court will Stop New Anti-Terrorism Laws" AM, 7 December 2005.

70 Jude McCulloch and Bree Carlton, above n 66.

71 Criminal Code Part 5 Div 105.

72 Criminal Code Part 5 Div 104.

73 Crimes Act 1914 (Cth) Part IAA Div 3.

74 Suppression of the Financing of Terrorism Act 2002 (Cth).

75 Criminal Code s 105.4.

76 PBS Newshour, "Locked Up", Newshour, 11 November 2001 <[http://www.pbs.org/newshour/bb/terrorism/july-dec01/detainee\\_11-8.html](http://www.pbs.org/newshour/bb/terrorism/july-dec01/detainee_11-8.html)> 4 March 2006.

77 L Levenson, "Detention, Material Witnesses and The War On Terrorism" (2002) 35 *Loyola of Los Angeles Law Review*.

78 Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11 (2005) Human Rights Watch and the American Civil Liberties Union <<http://hrw.org/reports/2005/us0605/>> at 2 November 2005.

79 Sameer Ashar, "Immigration Enforcement and Subordination: The Consequences of Racial Profiling after September 11" (2002) 34 *Connecticut Law Review* 1185, 1192.

Similarly in the UK, in the aftermath of the terror bombings in London on 7 July 2005, the number of Asian and Black people who have been stopped and searched under section 44 of the *Terrorism Act 2000* (UK) increased more than twelve-fold compared to the statistics pre-7 July 2005.<sup>80</sup> The guidance document for police managers in relation to the powers suggests that a person's ethnic background may be relevant in deciding who to stop in response to a terrorist threat, and specifies as an example that "some international terrorist groups are associated with particular ethnic groups, such as Asians, and people of Middle Eastern appearance, which are ethnic groups that police officers would most likely associate with Islam."<sup>81</sup>

Control orders may be imposed if a court is satisfied on the balance of probabilities that it would substantially assist in preventing a terrorist act, or that the person has trained with a proscribed organisation.<sup>82</sup> It has been argued that these powers potentially open the door for racial or religious profiling in two different areas: grassroots policing and in the court room.<sup>83</sup>

The stop, question and search powers may be exercised with respect to a person in a Commonwealth place where the police suspect on reasonable grounds that the person might have just committed, might be committing, or might be about to commit a terrorist act.<sup>84</sup> In 'prescribed security zones,' there is no requirement for reasonable suspicion for the powers to be exercised. As extensive research shows, personal biases and prejudices are likely to weigh on the mind of the police officer.<sup>85</sup> Indeed, Police Federation of Australia Chief Executive Mark Burgess confirmed this when he suggested that the police should have legal protection against being sued for unlawful discrimination when using the stop, question and search powers.<sup>86</sup>

In an examination of the suppression of financing of terrorism legislation, McCulloch and Carlton argue that pre-emptive criminal justice singles out individuals and organisations "for differential treatment and reinforcing social division and exclusion of already marginalised groups" because of its emphasis on untested or untestable intelligence, innuendo,

80 Vikram Dodd, "Surge in Stop and Search of Asian People after 7 July", *The Guardian* (England), 24 December 2005.

81 UK Home Office, *Stop AND Search Action Team, Interim Guidance* (2004) 12.

82 Criminal Code s 104.4(1).

83 Agnes Chong and Vicki Sentas, above n 66, 44.

84 Crimes Act 1914 (Cth) s 3UB.

85 See, e.g., Jock Collins, "Youth, Ethnicity and Crime in Australia" (Paper to the Les Recontres du CEDEM Centre for Studies on Ethnicity and Migrations, Université de Liege, 25 April 2002); Jock Collins, "Ethnic Minorities and Crime in Australia: Moral Panic or Meaningful Policy Responses" (Paper to a Public Seminar organised by the Office of Multicultural Interest, Western Australia Perth, 8 November 2005); J Collins, G Noble, S Poynting and P Tabar, *Kebabs Cops Kids and Crime—Youth, Ethnicity and Crime* (2000).

86 ABC Radio, "Police worried about legal action from anti-terrorism laws" AM, 27 September 2005 <<http://www.abc.net.au/am/content/2005/s1469047.htm>> at 27 September 2005.

gossip or prejudice to predict crime.<sup>87</sup> Further, since research showed that the financial profile of the 11 September hijackers did not evidence any planning for terrorist-related activity, one has to resort to other features to determine suspicion,<sup>88</sup> which may include the person's background, lack of local knowledge, and even the person's name. Recently, money transfer agency Western Union has delayed or blocked thousands of cash transfers to the United Arab Emirates on the basis of suspicion of terrorist activity simply because of the names of either the sender or recipient being Mohammed or Ahmed.<sup>89</sup> A further example is a recent request to universities to report any "suspicious activities" by students from specific countries suspected of harbouring weapons of mass destruction.<sup>90</sup> This followed an incident in which a student by the Muslim name of "Abraham" was questioned by the police when he borrowed books from the university library on martyrdom in Islam and terrorism for his PhD research.<sup>91</sup>

Pre-emptive measures necessarily mean that some activities, even if not connected with any actual criminal activity, will be scrutinised.<sup>92</sup> The Council on American-Islamic Relations has raised concerns about the singling out of Muslims at airports, the use of the *USA Patriot Act* to require businesses to monitor their customers and report "suspicious transactions," the targetting of immigrants from Muslim majority states, and how Muslim legal immigrants have been interrogated in their homes about their practice of Islam, what they thought about various religious concepts such as *jihad*, the mosques they attended, and the views of their imams.<sup>93</sup>

The use of racial or religious profiling is counter-productive to the aim of national security in its alienation of the very community whose cooperation is essential in combating terrorism.<sup>94</sup> Such targetting is likely to create feelings of suspicion in the community that is not commensurate with a society that respects the freedom of people to practise their religion.

#### IV. Conclusion

The current approach to combating terrorism in Australia has seen the implementation of a regime that has had an adverse impact on religious tolerance. It stems from a misguided view of terrorism, one which views religion only as a cause of terrorism rather than also a possible ally in

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87 Jude McCulloch and Bree Carlton, above n 66, 404.

88 *Ibid* 397.

89 Anjan Sundaram, "Western Union Blocks Arab Cash Transfers", AAP, 6 July 2006.

90 Dorothy Illing, "Campus terror crackdown", *The Australian*, 26 April 2006.

91 Clay Lucas and Julia Medew, "Federal police quiz Muslim over library books" *The Age*, 26 July 2005; Lynn Bell, "AFP 'targeted' Muslim convert over library books" *ABC News Online*, 26 July 2005.

92 Jude McCulloch and Bree Carlton, above n 66, 403.

93 Mohamed Nimer, "Muslims in America after 9-11" (2002) 7 *Journal of Islamic Law and Culture* 1.

94 See Jonathan White, *Defending the Homeland, Domestic Intelligence, Law Enforcement and Security* (2004); Karl Nickner, "Canadian Muslims are First Line of Defence against Homegrown Terrorism" *The Montreal Gazette*, 10 June 2006.



the fight against it. Implicit in this is the lack of a critical analysis of the distinction between religious fundamentalism and religious extremism of a kind likely to lead to terrorism. This has manifested itself in legal responses to terrorism, and also in the government's approach from the socio-political perspective. It shows a reliance on an assumption that the scourge of terrorism can be addressed by tough laws.

This construction further manifests itself in the actual making of laws that contribute, whether intended or not, to an unprecedented focus on the actions and speech of members of the Muslim communities. The proscription regime and the related offences, such as association or membership, legitimise the scrutiny of all aspects of religious organisations, restricting people's rights to congregate, to speak, to pray, to give charity, or to provide support to their congregation. Other new powers such as the preventative detention, control order and stop, question and search powers are so broad as to allow the spectre of racial or religious profiling to arise. Finally, the sedition offences introduced in a counter-terrorism context reinforce the existing community intolerance of other religious ideas and thoughts, banning outright what should more properly be dealt with by intelligent debate, logic and reason.

These impacts on Muslim communities are significant and permanent, and will lead to the institutionalisation of religious intolerance. Instead, the legislative and political responses to terrorism should take a broader view. There should be an emphasis on developing a more wide-ranging, textured, and most importantly, *inclusive* approach to combating terrorism with social, economic and policy dimensions. However, it is feared that, in view of the alienation already existing due to the current legal and political responses to terrorism and the lack of commitment to religious tolerance, an obstacle will remain.