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**CASTAN CENTRE FOR HUMAN RIGHTS LAW SUBMISSION TO  
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## 0. SUMMARY

1. This submission seeks to analyse aspects of Australia's legal, political and cultural responses to the threat of terrorism in recent years.
2. A human rights culture is essential both to prevent excesses in counter-terrorism and to curtail terrorism itself. Civil and political rights are just as important as economic, social and cultural rights in creating societies free from terrorism.
3. Australia lacks a bill of rights, though some human rights protection is found in the *Constitution* and Federal, State and Territory legislation. The 'war on terror' has increased debate on the need for a bill of rights and other forms of human rights monitoring. Australia has not derogated from any of its international human rights obligations.
4. The debate on human rights and security in Australia is a largely political one. Thus, it is essential that adequate scrutiny is given to anti-terrorism legislation. Scrutiny of anti-terrorism legislation is most prominent in the ACT, where a human rights culture is emerging following the introduction of the *Human Rights Act 2004*.
5. The Federal government attempts to incorporate human rights rhetoric into its security policy, but is very critical of increased human rights oversight and new human rights instruments. The Federal government has been criticised by some for over-stating the threat posed to Australians by terrorism.
6. Australia's definition of terrorism consists of existing offences that are committed for a political, religious, or ideological cause. Ambiguity remains over when terrorist legislation will be used, as opposed to conventional criminal procedures.
7. The Federal government is able to proscribe organisations as 'terrorist organisations'. There is much debate as to whether the processes for listing terrorist organisations are influenced by diplomatic pressure or anti-Muslim bias. Terrorist organisations from many

different backgrounds have threatened Australians and Australia's allies in the past and continue to do so.

8. Australian law limits expression that advocates violence and association with organisations listed as 'terrorist organisations'. Despite these being clear limits on Australian's liberties, insofar as both are aimed at preventing violence, not mere political descent, they are not inherently undemocratic.

9. The Australian government, following the United Kingdom, is considering introducing a mandatory identity card system. This increases the possibility of ethnic profiling. Adequate legal protection from misuse – preferably as part of a bill of rights – must be enacted before any such system is introduced.

10. The Australian government has introduced regimes of 'preventative detention' that lack the sort of judicial oversight that international human rights law requires for such policies. Serving and retired judges will provide limited oversight over these regimes, which may threaten the independence of the judiciary in Australia.

11. Australian law lacks sufficient safeguards to prevent discriminatory policies being implemented. Whilst the government has denied that its anti-terrorist policies have targeted Muslims, but members of the government have engaged in anti-Muslim rhetoric. Politicians must temper their language and appeal to Australia's tradition of tolerance, not to peoples fears and prejudices.

12. Throughout its history Australia has faced numerous incidents of political violence and public panic. Lessons need to be learnt from the mistakes of the past so that they are not repeated.

13. Rather than viewing human rights and counter-terrorism as antithetical, the reality is that both are interdependent. That challenge that the Australian government, and governments around the world face, is finding ways of incorporating the protection of human rights into counter-terrorism policies, laws and languages.

## 1. INTRODUCTION

This submission is not intended to exhaustively cover every aspect of the Australia legal, political and cultural responses to the threat of terrorism. There have been over a dozen Bills passed amending Australian law relating to terrorism and other aspects of national security, ranging from criminal law reform, to refugee and immigration reform, to telecommunications reforms.<sup>1</sup> Just as significant for the maintenance and furthering of human rights, however, have been the shifts in Australia's political discourse and culture. These changes are both widespread and often quite nuanced and subtle. Again, this submission cannot cover them all. This submission includes some of the preliminary arguments that are being developed in the Castan Centre's research project, 'An Australian Bill of Rights in an Age of Fear', of which I am a part. As such, its concerns go beyond the black letter law of anti-terrorism and national security legislation in Australia, to examine the legal and political culture that has developed in this country in recent years. The focus is on transparency, honesty, and respect for human rights - and the lack thereof - in Australia's legal and political culture. It is hoped that this submission is of some interest and assistance to the Panel in considering the profound changes that have beset Australia and the rest of the world in recent years, in the ongoing response to terrorism.

All legislation referenced in this submission is from the Australian Commonwealth (Federal) level, unless otherwise stated.

## 2. THE IMPORTANCE OF HUMAN RIGHTS

Human rights are not only essential to prevent excesses in counter-terrorist measures, but also essential to combating terrorism itself. Environments devoid of human rights are breeding grounds for terrorism. Economic, social and cultural rights are essential in preventing another generation of terrorists from emerging. Adequate food, housing, and employment are

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<sup>1</sup> For a full list see <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/826190776D49EA90CA256FAB001BA5EA?OpenDocument> accessed February 24, 2006. For the Attorney General's overview of these changes see Philip Ruddock, 'Australia's legislative response to the ongoing threat of terrorism' (2004) 27 *University of New South Wales Law Review* 254.

necessary for any functional society. Equally, increased investment in education is necessary to instil in the next generation respect for universal human rights and critical thinking. It is reductionist and incorrect, however, to reduce the causes of terrorism simply to poverty. Many high-profile terrorist organisations of the past and the present have been formed by highly educated and sometimes affluent individuals. One need not think only of al Qaeda, but also the various leftist terrorist groups that emerged in Europe in the 1960s and 1970s. In terms of human rights, then, it must be recognised that the enjoyment of civil and political rights are just as fundamental to the prevention of terrorism as economic, social and cultural rights are. In a polis in which there is a free press, a thriving civil society and the opportunity for lawful, non-violent political dissent, where political leaders are held to account through democratic political processes, the desire to resort to terrorism to effect political change is significantly reduced.

It is essential that societies cultivate a human rights culture where practices of justice, equality and non-discrimination are protected and wherein the avenues of political and legal debate remain open. The only alternative to this is for our communities and societies to descend further down the path of the ‘security culture’<sup>2</sup> where public space and political discourse becomes militarised and inappropriately closed off by fear, whilst personal and national security become the motivating political forces, not human rights.

### **3. HUMAN RIGHTS IN AUSTRALIA**

Arguably the most significant aspect of the human rights situation in Australia is the absence of a Bill or Charter of Human Rights at the Federal level. The *Constitution* does offer several important protections, both expressed in the *Constitution*’s text, and implied by the High Court, such as the right to vote, the right to a jury trial, freedom of religion (to a degree), freedom of political communication, and the right to seek review of government action, and has sometimes, therefore, been said to include an ‘informal Bill of rights’. In 2004, the Australian Capital Territory passed the *ACT Human Rights Act 2004*, introducing a statutory Charter of Rights modelled on the United Kingdom’s *Human Rights Act 1998*. The State of

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<sup>2</sup> See Stephen J. Toope, ‘Fallout from “9-11”: Will a security culture undermine human rights?’ (2002) 65 *Saskatchewan Law Review* 286.

Victoria is expected to introduce a similar Bill later this year,<sup>3</sup> with the States of Western Australia and Tasmania considering adopting Bills of Rights as well.<sup>4</sup> The absence of a Bill of Rights at the Federal level has been of concern to human rights advocates and politicians for a long time, and numerous attempts have been made over the years to introduce either a statutory or a constitutional Bill of Rights. Since the beginning of the ‘war on terror’, arguments for greater human rights protection via a Bill of Rights have significantly increased.<sup>5</sup>

As George Williams has noted, it is problematic to have laws that solely attack terrorism without corresponding laws to indicate what rights, freedoms and responsibilities we want protected from terrorism.<sup>6</sup> Whether it is the right to life, freedom of religion, or freedom of expression, to actually produce a charter of the human rights that our society considers worth protecting from violence and terror, is an essential part of resistance to terrorism. Without such a charter, the risk is that what ill-defined rights Australians do enjoy now will keep slipping in the face of terrorism until there are no more rights for the terrorists take from us.

Australia has ratified all significant international human rights treaties, but they have only been partially transformed into Australian law, primarily in the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*. Whilst historically Australia has been a strong advocate of international human rights, under the current government that has altered somewhat with Australia now showing increasing – even proud – defiance of the (admittedly far from perfect) United Nations human rights system<sup>7</sup> and criticism from domestic and international human rights advocates and NGOs. It is important to note, however, that Australia has not attempted to derogate from any of its international human rights treaty obligations. Partly, in must be said, this is because when Australia has been held to be in

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<sup>3</sup> See Victorian Attorney-General, ‘Media release: Victoria leads the way on human rights’, December 20, 2005; Victorian Human Rights Consultation Committee, ‘Rights, responsibilities and respect’, December, 2005.

<sup>4</sup> Marcus Priest, ‘Tasmania, WA join push for bills of rights’ *Australian Financial Review*, January 13, 2006, p. 42.

<sup>5</sup> See, *inter alia*, Julie Macken, ‘Bill of rights debate back in the House’ *Australian Financial Review*, October 28, 2005, p. 72.

<sup>6</sup> Tony Jones, ‘Terrorism threat increases need for basic human rights protection: experts’, *Lateline* ABC Television, October 25, 2005.

<sup>7</sup> See, *inter alia*, Devika Hovell, ‘The sovereignty stratagem : Australia’s response to UN human rights treaty bodies’ (2003) 28 *Alternative Law Journal* 193.

breach of its international human rights obligations, it has opted simply to ignore or criticise the decision or the body making the decision. The same thing can be said for allegations of human rights abuse by Australia's international allies. When repeated allegations of torture and other abuses have been raised concerning the United State's Guantánamo Bay facility – especially in relation to the detention of Australians Mamdou Habib and David Hicks – the federal government has rejected the allegations, affirming the line taken by the United States' government.

Many of Australia's recent anti-terrorism laws and policies, such as control orders and preventative detention, have been modelled on laws from the United Kingdom, notably, Britain's significant legislative response to the London Bombings of last July, the *Prevention of Terrorism Act 2005*. The problem is, however, that Britain's *Prevention of Terrorism Act 2005* is compelled and designed to work alongside Britain's *Human Rights Act 1998* that allows for significant judicial oversight of any reduction in the human rights of British citizens. Under the *Human Rights Act 1998* (UK) the judiciary is compelled to interpret the provisions of the *Prevention of Terrorism Act 2005* (UK), and other legislation, in a way which complies with the *Human Rights Act 1998* (UK), wherever possible. In cases when it is not possible to interpret the *Prevention of Terrorism Act 2005* (UK) in accordance with the human rights Britain recognises, the possibility exists for a declaration of incompatibility to be issued compelling the government to re-examine the legislation held to be inconsistent with human rights.<sup>8</sup> In only one jurisdiction, the Australian Capital Territory, is a similar procedure available, under the *ACT Human Rights Act 2004*. At the federal level, at which the overwhelming majority of Australia's anti-terrorism provisions have been enacted, there is no judicial overview of systematic human rights.

It has been suggested that the *Inspector-General of Intelligence and Security Act 1986* could be amended to include the full range of Australia's international human rights obligations within the ambit of that Commonwealth Officer's prerogative to, when requested, review the practices of Australia's security services - the Australian Security and Intelligence

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<sup>8</sup> The same is true of Canada's *Anti-Terrorism Act 2001* and the Canadian *Charter of Rights and Freedoms*. For an insightful analysis of Canada's approach to anti-terrorism, in relation to the *Charter*, see Faisal A. Babha, 'Tracking "terrorists" or solidifying stereotypes? Canada's *Anti-Terrorism Act* in light of the *Charter's* equality guarantee' (2003) 16 *Windsor Review of Legal and Social Issues* 95.

Organisation, the Office of National Assessments, the Australian Security Intelligence Service, the Defence Intelligence Organisation and the Defence Signals Directorate. Currently, the Inspector-General is able to report on any violations of Federal human rights legislation - the *Age Discrimination Act 2004*, the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984* – by these services, which, while offering some degree of protection, only partially transform international human rights treaties into Australian law. Such an amendment to the law would be significant not only because it would provide additional oversight and human rights protection - albeit of an advisory nature - but also because it would further the relationship between human rights and national security. Such an approach, to have the full range of international human rights obligations incorporated into national security overview, whether enacted by the Australian government, or any other government, would be a laudable display of commitment to international human rights and a high-level recognition of the indivisibility of national security and human rights. Any extension of the Inspector-General's ambit, however, must be accompanied by a corresponding increase in the department's staff and budget. In the 2003-4 financial year, just five staff were employed to oversee security agencies employing thousands.<sup>9</sup> Equally, it is necessary to increase the level of public scrutiny in the review process which is by-and-large kept out-of-sight of the public. The old adage that justice must not just be done, but must also be seen to be done is more important than ever given the present threat to national security and human rights.

#### **4. THE DEBATE ON HUMAN RIGHTS AND ANTI-TERRORISM IN AUSTRALIA**

In the absence of a Bill of Rights, the challenge of balancing national security with human rights is, in other words, a largely political exercise.<sup>10</sup> Given this, the impetus is on Australia's politicians to defend human rights in word and deed, with the impartiality that judges would, in other jurisdictions.

It is imperative, given the lack of proper judicial and human rights oversight in Australia and the hitherto unseen nature of the anti-terrorism laws now being passed here and abroad, that

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<sup>9</sup> Chas Savage, 'Guarding the Guardians in an Age of Terror' (2005-2006) 19 *Dissent* 14 at p. 17.

<sup>10</sup> George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror*, Sydney: University of New South Wales Press, 2004, at p. 37.

adequate scrutiny is given to legislation before it is enacted. In late 2005, just 3 weeks were given to the Senate Legal and Constitutional Affairs Committee to scrutinise the *Anti-Terrorism Bill (No. 2) 2005*, and the government was initially reluctant to have any sort of committee review. There was an enormous amount of public debate surrounding that particular Bill, with the Senate Committee receiving almost three hundred submissions in this short period of time, from lawyers, academics, community organisations, human rights activists and NGOs, government departments and the general public. However, this debate was largely made possible by the actions of the Australian Capital Territory's Chief Minister, John Stanhope, who released the (original and subsequently revised) *Anti-Terrorism Bill 2005* on his website, much to the displeasure of the government, who subsequently excluded the Chief Minister from future consultations on the Bill. Equally, it was largely the media and artistic community who pushed the debate forward, concerned with the amendment to the laws on sedition contained in the Bill.<sup>11</sup> It is worth noting, however, that despite the strong stance of the government concerning the necessity of the legislation and rejecting concerns about its drafting (especially in relation to sedition), significant dissent and debate was generated within the government, with a number of 'backbench' MPs and Senators expressing their concerns about certain aspects of the Bill. Indeed, in the Senate Legal and Constitutional Affairs Committee there was a similar high degree of scepticism shown towards certain aspects of the Bill by members of the government, as there was by members of the opposition, minor parties and critics of the Bill appearing before the Committee. The final report of the Committee reflected the quite bipartisan approach taken, with 51 amendments to the Bill recommended.<sup>12</sup> In the case of certain previous anti-terrorism Bills, the debate was more muted, however,<sup>13</sup> with no obvious lobby group affected, and even less time given for scrutiny. For example, the *ASIO Legislation Amendment Bill 2003* was passed by the Senate on December 5, 2003, just eight days after it was first introduced in the House of Representatives on November 27. The government prevented the Senate from referring the

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<sup>11</sup> Schedule 7, *Anti-Terrorism Act (No. 2) 2005*.

<sup>12</sup> Senate Legal and Constitutional Affairs Committee, 'Provisions of the *Anti-Terrorism Bill (No. 2) 2005*', November 2005, at pp. ix-xvi.

<sup>13</sup> Although the early post-September 11 Bill, the *Security Legislation Amendment (Terrorism) Bill 2002* was subject to significant debate in both Houses of Parliament and was amended before being passed by the Senate. See Christopher Michaelson, 'International human rights on trial – the United Kingdom's and Australia's legal responses to 9/11' (2003) 25 *Sydney Law Review* 275 at 281-2.

Bill to the Legal and Constitutional Affairs Committee for the sort of scrutiny that the legislation mandated.<sup>14</sup>

The passage of the ACT's *Human Rights Act 2004* has had consequences for that Territory's government's handling of human rights and national security. However, it is not just the specific judicial oversight in a Bill of Rights - be it statutory or Constitutional - that makes it advantageous, especially during periods of national security. The human rights *culture* that bills of rights invariably bring about is just as important for maintaining a focus on civil liberties and non-discriminatory legal practices during times such as ours. The citizens of the ACT, as part of a growing human rights culture, were expecting greater rights-focussed scrutiny and explanation of their government's actions. Thus, as Channel 9's *Sunday* program noted, in the debate over the passage of the Federal government's *Anti-Terrorism Bill 2005*, 'the only leader, state or federal, to enact a Bill of Rights had to explain to his Muslim constituents why he agreed to the stripping of those liberties.'<sup>15</sup> Whilst the same level of human rights-focussed debate did not occur in other jurisdictions, the rest of Australia, especially the media, were expecting greater arguments to emerge from the ACT than elsewhere.<sup>16</sup>

## **5. AUSTRALIAN GOVERNMENT USE OF HUMAN RIGHTS & SECURITY RHETORIC**

Each side in the debate on anti-terrorism and human rights seeks a monopoly on the use of the phrase by taking very different approaches, emphasizing different aspects of human rights and different ways to balance competing human rights. The Federal Attorney-General, Philip Ruddock, for example, while widely condemned by human rights advocates and political opponents for implementing policies that violate human rights, in fact routinely incorporates human rights rhetoric into his public comments. Mr Ruddock's and the Federal government's focus on utilizing human rights rhetoric is often misleading, however. In 2004, when Mr

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<sup>14</sup> Joo-Cheong Tham, 'Casualties of the domestic "war on terrorism": A review of recent counterterrorism laws' (2004) 28 *Melbourne University Law Review* 512 at pp. 520-1.

<sup>15</sup> Adam Shand and Paul Steindl, 'Make laws, not war', *Sunday*, Chanel 9, October 16, 2005.

<sup>16</sup> Indeed, one of the Prime Minister's main concerns about the ACT Bill of Rights was that its influence would spread beyond the borders of the ACT. It would appear that he was right. Sophie Morris, 'Howard's axe hangs over ACT's historic bill of rights' *The Australian* March 3, 2004, p. 3.

Ruddock delivered the Deakin Law School Oration, he entitled his speech ‘National Security and Human Rights’,<sup>17</sup> and yet in his entire speech his only mention of human rights was the selective quotation of High Commissioner for Human Rights, Louise Arbour, who had recently insisted that

the successful protection of citizens and the successful protection of their rights are not only compatible with each other but are, indeed, interdependent. There can be no genuine personal security if rights are in peril, any more than legal guarantees can exist in an environment of fear and anarchy.<sup>18</sup>

Elsewhere, Mr Ruddock seems to have attempted to conflate human rights and national security concerns into the rather Orwellian phrase ‘human security’. ‘In combating terrorism,’ the Attorney General writes,

we should focus on creating ‘human security’ legislation that protects both national security and civil liberties. Human security requires not only the absence of violent conflict, but also respect for human rights and fundamental freedoms. The tightening of security will have some effect on certain rights, and it is our duty to ensure that we employ measures to minimise the impact of counter-terrorism laws on human rights. It should not, however, be presumed that steps to enhance our national security will unduly jeopardise our civil liberties.<sup>19</sup>

It is not just fear of terrorism and fear of intrusive new national security legislation that has punctuated the debate on terrorism, anti-terrorism and human rights in Australia, but also fear of what greater human rights protection must entail. Much of this has centred on the Australian Capital Territory and Victoria. In 2004, the Australian Capital Territory enacted Australia’s first Bill of Rights in the *ACT Human Rights Act 2004*, with Victoria set to follow suit. The fear mongering began almost immediately, with the federal government voraciously critical. Attorney-General Philip Ruddock condemned the proposal, warning that it might lead to the US-style ‘right to bear arms’,<sup>20</sup> and insisting that,

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<sup>17</sup> Philip Ruddock, ‘National Security and Human Rights’ (2004) 9 (2) Deakin Law Review 295.

<sup>18</sup> *Id.* at 300.

<sup>19</sup> Philip Ruddock, *supra* n. 1 at p. 254.

<sup>20</sup> Michael Pelly, ‘The rights stuff’, *Sydney Morning Herald*, December 31, 2005, p. 20.

bills of rights are a lawyers' feast proposed by lawyers who think that the best people to determine what your rights are lawyers, rather than MPs elected by the people.<sup>21</sup>

Mr Ruddock, it is interesting to note, was himself a lawyer before entering Parliament.

As well as its ambiguous approach to human rights, it has been a common complaint that the Australian government, and other governments, are exacerbating the fear of attack for domestic gains. As prominent Australian barrister Julian Burnside commented,

You have got a greater chance of dying of a bee sting than of dying in a terrorist attack. That is what the statistics tell us. Now the Government has managed to parlay this into a general prevailing climate of anxiety about terrorism and, using that as a cloak, they want to introduce all sorts of restrictions on our freedoms.<sup>22</sup>

A good example of the way that fear can snowball emerged after the meeting in September 2005 between the Federal government and State and Territory leaders. It had earlier been reported that ASIO believed there to be between 70 and 80 people in Australia that it considered potential terrorist threats. After the meeting, however, that figure skyrocketed to 800. It is suggested that this figure emerged from the security services' belief that for every known suspect, there may be ten-or-so other possible suspects who escape the attention of Australia's national security services. Crucially, that figure was neither confirmed nor denied by authorities. Proof, for some, that there was advantage to be gained for the government from exaggerating the threat and hence the fear.<sup>23</sup> Former senior national security official Lieutenant-Colonel Lance Collins was once such sceptic. 'The Government doesn't have to totally convince 100% of the population 100% of the time,' he argued. 'They just need to inject enough ambiguity into the debate to make sure that enough people decide to give up trying to sort it out and trust the government of the day.'<sup>24</sup> Former Prime Minister Malcolm Fraser agrees, arguing that the government is aware of the public's fear of terrorism and that

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<sup>21</sup> Rick Wallace, 'Bill of Rights to be a Lawyers' Feast: Ruddock' *The Australian* December 22, 2005, p. 5.

<sup>22</sup> Shand and Steindl, *supra* n. 15.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

an already anxious Australia ‘can be made more fearful... It may be brilliant politics,’ he says, ‘but will such laws make Australia secure?’<sup>25</sup>

## 6. DEFINING ‘TERRORISM’ IN AUSTRALIA

ASIO chief Denis Richardson has observed that ‘terrorism takes many forms, and there is no definitive list.’<sup>26</sup> Indeed, since it was first developed in the late 18<sup>th</sup> century as English rhetoric against the purges and political violence unleashed by the revolutionary government in France, ‘terrorism’ has been a most effective term to label ones enemies, be they anti-government radicals, or over-bearing governments themselves.<sup>27</sup> Nevertheless, Australian law has been amended post-September 11, 2001, to provide a definition of terrorism as a criminal offence.

Observing Australia’s definition of terrorism, it is important to note that there is no activity now contained in section 100.1 of the *Criminal Code* that, prior to the amendments in the *Criminal Code Amendment (Terrorism) Act 2003*, was not already an offence under the criminal law of Australia. The actions that constitute terrorism under Australian law are acts causing or threatening harm,<sup>28</sup> causing property damage,<sup>29</sup> causing death,<sup>30</sup> endangering life,<sup>31</sup> creating a serious risk,<sup>32</sup> or interfering with an electrical system.<sup>33</sup> The distinguishing feature of the crime of terrorism is that it must be committed ‘with the intention of advancing a

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<sup>25</sup> Malcolm Fraser, ‘Laws for a secret state without any safeguards’, *The Sydney Morning Herald*, October 20, 2005. <http://www.smh.com.au/articles/2005/10/19/1129401313470.html#> accessed November 10, 2005.

<sup>26</sup> Cited in Binoy Kampmark, ‘How to read an anti-terror kit: LOFA and its implications for Australian identity and security’ (2004) 35 *Journal of Intercultural Studies* 287-301 at p. 289.

<sup>27</sup> For an impressive history and contemporary analysis of the use of the term ‘terrorism’, and a necessary call for ‘semantic hygiene’ regarding its use, see Pierre Mesnard y Mendez, ‘Access to an identification of “terrorism”: Words and actions’ (2002) 14 (2) *Rethinking Marxism* 109. For a legal approach to the definition see Ben Golder and George Williams, ‘What is “terrorism”? Problems of a legal definition’ (2004) 27 *University of New South Wales Law Review* 270.

<sup>28</sup> *Criminal Cod Act 1995* s. 100.1 (2) (a).

<sup>29</sup> *Criminal Cod Act 1995* s. 100.1 (2) (b).

<sup>30</sup> *Criminal Cod Act 1995* s. 100.1 (2) (c).

<sup>31</sup> *Criminal Cod Act 1995* s. 100.1 (2) (d).

<sup>32</sup> *Criminal Cod Act 1995* s. 100.1 (2) (e).

<sup>33</sup> *Criminal Cod Act 1995* s. 100.1 (2) (f).

political, religious, or ideological cause',<sup>34</sup> and is aimed at influencing a government in Australia or overseas<sup>35</sup> or influencing the public.<sup>36</sup>

It is very much open to debate whether committing the sort of offences outlined here for religious, political or ideological reasons makes them inherently more repugnant than similar offences committed for different reasons.<sup>37</sup> The fact remains, though, that this sort of legislation is not unique, and however problematic the definition may be, it is necessary to put the approach in its correct political light. What I mean is that it is possible to view this approach to certain serious offences as roughly equivalent to so-called 'Hate Crimes' legislation that imposes a higher penalty for offences inspired by racial, religious or homophobic hate, and is generally supported by human rights advocates and those identifying as politically progressive.<sup>38</sup> In the case of both terrorist offences and hate crimes, activities that would be hitherto covered by existing criminal statutes and codes are reclassified and potentially attract a higher penalty, due to their ideological content. Looking to even more basic legal principles, one notes that so-called 'crimes of passion' often attract a lesser penalty than so-called 'cold blooded' offences. In other words, the reasons behind the offence have always been relevant to the criminal law, and this is also the case in anti-terrorist legislation. The significant innovation of these terrorist offences and hate crimes legislation is that they move the motive for the crime away from usually just a concern in the sentencing procedures, and now make motive an essential part of proving the crime itself.<sup>39</sup> Whilst one can debate the merits of this, a practical problem would appear to emerge in regards to the application of terrorist offences. The problem is that it is difficult to know when section 100.1 of the Commonwealth's *Criminal Code* relating to terrorism will be used, or should be used, as opposed to the criminal offences contained in other legislation that lack the requisite

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<sup>34</sup> *Criminal Cod Act 1995* s. 100.1 (1) (b).

<sup>35</sup> *Criminal Cod Act 1995* s. 100.1 (1) (c) (i).

<sup>36</sup> *Criminal Cod Act 1995* s. 100.1 (1) (c) (ii). Note that this definition is very close to the definitions adopted by s. 1 of the United Kingdom's *Terrorism Act 2000* and by Canada in s. 83.01 of its *Anti-Terrorism Act 2001*.

<sup>37</sup> See Sarah Joseph, 'Australian counter-terrorism legislation and international human rights framework' (2004) 27 *University of New South Wales Law Journal* 428-53 at pp. 432-3.

<sup>38</sup> On this debate see Susan B. Gellman and Frederick M. Lawrence, 'Agreeing to agree: A proponent and opponent of hate crimes laws reach for common ground' (2004) 41 *Harvard Journal on Legislation* 421.

<sup>39</sup> Bernadette McSherry, 'Terrorism offences in the *Criminal Code*: Broadening the boundaries of Australian criminal law' (2004) 27 *University of New South Wales Law Review* 354 at pp. 359-64.

political, religious or ideological intent. This raises the prospect of discriminatory application of the laws.

A recent example may prove illuminating. On December 11, 2005, Sydney's beachside suburb of Cronulla erupted into violence when several thousand people were involved in an anti-Lebanese and anti-Muslim riot in which both men and women of Middle Eastern appearance were the victims of physical and verbal assault. Whilst the violence was sparked by the attack on lifeguards by a group of men of Middle Eastern appearance, the riots quickly became about racist and anti-Muslim sentiments, with explicitly anti-Lebanese and anti-Muslim slogan chanted and carried on signs and clothing, with anyone of Middle Eastern or Muslim appearance being targeted and physically attacked or chased from the area. This was clearly intended to intimidate and influence Sydney's Lebanese and Muslim communities. It also caused and threatened harm, endangered life, and caused property damage. Thus, all the necessary elements of the Federal crime of terrorism in section 100.1 of the Commonwealth's *Criminal Code* would appear to have been met, and yet, of the numerous charges laid against dozens of individuals, not one of them was a terrorist offence. Instead, offenders were charged with a variety of conventional assault and breach-of-the-peace offences under New South Wales criminal law. Equally, no formal action has been taken against the several anti-immigrant and white supremacist organisations involved in the violence.

## 7. PROSCRIPTION OF TERRORIST ORGANISATIONS IN AUSTRALIA

Following the provisions of section 102.1 of the *Criminal Code Act 1995* the government can specify organisations as 'terrorist organisations'.<sup>40</sup> The result is that directors of such an organisation may be imprisoned for up to 25 years,<sup>41</sup> members of the organisation may be imprisoned for up to 10 years,<sup>42</sup> recruiters for the organisation may be imprisoned for up to 25 years,<sup>43</sup> those involved in training or training with the organisation may be imprisoned for up

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<sup>40</sup> For further details and debate concerning debate surrounding the overview of this process see, Joo-Cheong Tham, *supra* n. 14 at pp. 518-24; Robert McClelland, 'The legal response to terrorism: A Labor perspective' (2004) 27 *University of New South Wales Law Review* 262 at pp. 265-7; Nigel Brew, *Parliamentary Research Note No 63: The Politics of Proscription*, Canberra, 2004.

<sup>41</sup> *Criminal Code Act 1995* s. 102.2.

<sup>42</sup> *Criminal Code Act 1995* s. 102.3.

<sup>43</sup> *Criminal Code Act 1995* s. 102.4.

to 25 years,<sup>44</sup> a person who funds, or receives funds from such an organisation may be imprisoned for up to 25 years,<sup>45</sup> a person providing support<sup>46</sup> for such an organisation may be imprisoned for up to 25 years,<sup>47</sup> and a person associating with a person s/he knows to be member of a named terrorist organisation may be imprisoned for up to 3 years.<sup>48</sup> Given the vast array of serious offences that follow on from the naming of a certain organisation as a 'terrorist organisation' it is essential that the process for proscribing organisations is transparent, predictable, receptive to public comment and review, and free from both discrimination and political interference and the perception of discrimination or political interference. Whilst I will not contest the *substantive* outcome of the proscription process,<sup>49</sup> I do have concerns about the process employed by the Australian government to proscribe terrorist organisations, especially in regard to discrimination and political interference and the public perception thereof.

In December, 2005, following the visit of Turkish Prime Minister Recep Erdogan, the first non-Muslim terrorist organisation, the Turkish-based Kurdish Workers' Party (the PKK) was proscribed.<sup>50</sup> Prior to this, all the proscribed terrorist organisations were nominally Muslim.<sup>51</sup> Now, it is 18 of the 19 terrorist organisations that are proscribed by Australian law that are nominally Muslim.<sup>52</sup> This differs markedly from the United Kingdom, which lists 54 terrorist organisations from various religious and secular ideological backgrounds, from Asia, Africa

<sup>44</sup> *Criminal Code Act 1995* s. 102.5.

<sup>45</sup> *Criminal Code Act 1995* s. 102.6. On February 26, 2006, Melbourne man Jack 'Jihad' Thompson was found guilty of knowingly receiving funds for al Qaeda, proscribed as a terrorist organization in section 4A of the Commonwealth's *Criminal Code Regulations 2002*.

<sup>46</sup> 'Support' is defined as 'support or resources that would help the organisation engage in' a terrorist act, as defined in section 100.1 of the Commonwealth's *Criminal Code Act 1995*.

<sup>47</sup> *Criminal Code Act 1995* s. 102.7.

<sup>48</sup> *Criminal Code Act 1995* s. 102.8.

<sup>49</sup> By this I mean that I do not believe that any of the 19 organisations listed as 'terrorist organisations' by the Australian government are *not* engaged in terrorism and thus improperly so-named. For further debates on this matter, however, please see the submissions received by the Parliamentary Joint Committee on Intelligence and Security 'Review of the listing of the Kurdistan Workers Party (PKK) as a terrorist organisation under the *Criminal Code Act 1995*', especially the detailed submission by the Federation of Community Legal Centres (Victoria) Inc., at <http://www.apf.gov.au/house/committee/pjicis/pkk/subs.htm> accessed February 26, 2006.

<sup>50</sup> *Criminal Code Regulations 2002* regulation 4W. Note that whilst many, if not most of the members and supporters of the Kurdish Workers' Party will be Muslims, the organisation itself is a secular, nationalist, originally Marxist political organisation.

<sup>51</sup> By this I mean the organisations publicly identify as Islamic organisation and articulate goals and strategies that they consider to be based in Islamic tradition and belief. I strongly disagree.

<sup>52</sup> *Criminal Code Regulations 2002* regulations 4, 4A-N, 4Q, 4T-W.

and Europe.<sup>53</sup> Equally, the United States has also acknowledged the threats that terrorism from all over the world can pose, proscribing 42 foreign terrorist organisations with diverse ideological affiliations, and from various geographic locations, from Columbia to Japan, Northern Ireland to Israel, and Spain to Sri Lanka.<sup>54</sup> Importantly, the United States also recognises the threat the home grown terrorism plays, such as from militant anti-abortion activists.<sup>55</sup> This leads to question whether or not Australia is regulating to proscribe terrorist organisations in a discriminatory manner. Article 26 of the ICCPR, guarantees the equality of all before the law regardless of ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’<sup>56</sup> If Australia is targeting nominally Islamic organisations - however unpalatable they may be - for proscription, whilst neglecting to proscribe organisations engaged in similar activities, but articulating a different ideology, then there would certainly appear to be an argument that Australia is in violation of its international human rights obligations in this regard. The proscription of truly global terrorist organisations such as al Qaeda<sup>57</sup> or nearby (South East Asian) organisations that have made threats against Australia such as Jamaah Islamiyah<sup>58</sup> would appear to be not only reasonable, but absolutely necessary. However, in the case of far-away organisations posing no direct threat to Australia, things become less clear. Australia proscribes the fundamentalist Islamic organisation HAMAS,<sup>59</sup> operating in the Occupied Palestinian Territory, and yet non-Islamic organizations from the region such as the secular/Marxist Popular Front for the Liberation of Palestine and the fundamentalist Jewish organisation, Kahane Chai (Kach) are not proscribed. All three are proscribed by the United States.<sup>60</sup>

Of course, Australia will not be in violation of any non-discrimination provisions if it should so happen to be the case that it is *only* nominally-Islamic organisations and the Kurdish

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<sup>53</sup> United Kingdom Home Office, ‘Proscribed Terrorist Groups’, October 14, 2005. <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/terrorism-act/proscribed-groups> accessed November 6, 2005.

<sup>54</sup> US Department of State, Office of Counterterrorism, ‘Foreign Terrorist Organisations’, October 11, 2005. <http://www.state.gov/s/ct/rls/fs/37191.htm> accessed November 6, 2005.

<sup>55</sup> See, Carol Mason, ‘Who’s Afraid of Virginia Dare? Confronting Anti-Abortion Terrorism after 9/11’ (2003-2004) 6 *University of Pennsylvania Journal of Constitutional Law* 796.

<sup>56</sup> See also article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>57</sup> *Criminal Code Regulations 2002* regulation 4A.

<sup>58</sup> *Criminal Code Regulations 2002* regulation 4B.

<sup>59</sup> *Criminal Code Regulations 2002* regulation 4U.

<sup>60</sup> US Department of State, Office of Counterterrorism, *supra* n. 54.

Workers' Party who pose a threat. This is far from the truth, however. For example, Australia has already suffered one religiously-inspired anti-abortion murder at a medical centre that would be explicitly treated an act of terrorism in the United States.<sup>61</sup> Equally, Australia has long been suspected as a significant source of funding for the 'Liberation Tigers of Tamil Elam' (LTTE / 'Tamil Tigers') organisation, proscribed by both the United States and the United Kingdom. Indeed, the Australian chapter of the International Commission of Jurists expressed concern at a recent raid on Tamil Australians allegedly involved in financing the LTTE,<sup>62</sup> and yet the LTTE has not been proscribed under section 102.1 of the *Criminal Code Regulations 2002*. Nevertheless, political influence is possibly involved in this case, with the ICJ Australia noting that the information on the Tamil Australians 'very likely' came from Sri Lankan officials, around the time of the election of the strongly anti-LTTE, Sinhalese Nationalist Mahinda Rajapakse to the office of President.<sup>63</sup> It would appear that in the latest case of proscription, too, it took foreign intervention for the Australian government to act. In this case, it was arguably the intervention of Prime Minister Recep Erdogan, which led to government action to have the PKK organisation banned. Whilst the Attorney-General Philip Ruddock insisted that the proscription had no link with the visit of Mr Erdogan, he admitted that there had been a reversal of judgement regarding the PKK. 'The judgement at an earlier point in time was that [the PKK] didn't warrant proscription,' Mr Ruddock said. 'The judgement at this point of time is that it does.'<sup>64</sup> However, other than Mr Erdogan's visit, there is little to account for why the government's view of the PKK should have changed, with no significant increase in the volume or the intensity of PKK activity, nor any threat made to Australia or Australian interests.<sup>65</sup> It would appear that something other than direct security concerns are at work in the process of proscribing terrorist organisations in Australia.

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<sup>61</sup> ABC News Online, 'Convicted anti-abortion killer sentenced to life in jail', <http://www.abc.net.au/news/newsitems/200211/s729925.htm> November 19, 2002, accessed November 8, 2005.

<sup>62</sup> ICJ Australia, 'Media Release: ICJ concerns over ASIO raids on Sri Lankan Tamils in Melbourne' November 27, 2005.

<sup>63</sup> *Ibid.*

<sup>64</sup> Tom Allard, 'From refugees to outlaws: Kurdish group banned', *The Sydney Morning Herald*, February 21, 2006, p. 6.

<sup>65</sup> See the statement on the PKK provided by the Attorney-General's office in relation to the Parliamentary Joint Committee on Intelligence and Security 'Review of the listing of the Kurdistan Workers Party (PKK) as a terrorist organisation under the *Criminal Code Act 1995*' at <http://www.aph.gov.au/house/committee/pjicis/pkk/background.pdf> accessed February 26, 2006.

The result of this appears to be that, left to its own devices and without international political influence, the Australian government is content to proscribe only Islamic organisations. It is not only damaging for the government's relationship with Australian Muslims to be seen to be focussing disproportionately on Islamic militant organisations, but it is also counterproductive in the fight against terrorism. Arguably, the Australian government would serve its citizens and the international community better by focussing on organisations with a presence - financial or physical - in Australia, rather than those that, however violent, have at best tenuous links with Australia, and offer no direct threat. Practically, this would mean that the Australian government ought to pay more attention to the proscription of the LTTE than the PKK, for example. It would also mean, perhaps just as significantly, that Australia would start to pay attention to home-grown ideological violence, such as the aforementioned anti-abortion violence, or the multiple small white supremacist organisations that have been involved in acts of politically-motivated, racist violence, rather than focussing exclusively on proscribing foreign terrorist organisations, as is currently the case. Prime candidates for proscription as terrorist organisations would be the Australian Nationalists Movement, who were responsible for firebombing a Synagogue in and vandalising Chinese-owned business in Perth, Western Australia,<sup>66</sup> as well as the Patriotic Youth League and Australia First Party, both of whom are militant, anti-immigration organisations who have been blamed for inciting violence in the past, notably during the Cronulla riots in Sydney on December 11, 2005.<sup>67</sup> Thus, a more balanced approach to terrorist organisations would serve not only the international fight against terrorism - of which preventing financing is a significant aspect - but also go a long way to removing the stigma of Anti-Muslim bias and discrimination from the government's regulations in this area, increasing the confidence of Muslim and non-Muslim Australians in their government.

Further, rather than rhetorically and legislatively focussing on nominally Islamic organisations, the Australian government - and all governments must recognise that terrorism is a crime that occurs in all ethnic and religious communities. For example, one of

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<sup>66</sup> Simon Pitsis, 'Synagogue "attacker" gets bail', *The Australian* July 21, 2004, p. 6.

<sup>67</sup> Viva Goldner and Joe Hildebrand, 'Neo-Nazis join the fray' *The Daily Telegraph* (Sydney), December 12, 2005 <http://www.news.com.au/story/0,10117,17536340-2,00.html> accessed December 12, 2005; *The Daily Telegraph* (Sydney), 'Thuggish louts shame us all', December 12, 2005 <http://www.dailytelegraph.news.com.au/story/0,20281,17532954-5001031,00>., accessed December 12, 2005.

Australia's first terrorist attacks was the 1978 bombing of the Sydney Hilton Hotel, believed to have been aimed at killing the then Indian Prime Minister Morarji Desai, which killed two Sydney Council workers and a police officer instead. Evan Pederick, a convert to the Indian Ananda Marga religious sect later confessed to planting the bomb, but ambiguity remains over who 'masterminded' the attack, and the event continues to be a significant chapter in Australian social history, seen as perhaps Australia's first realisation that we are not immune from global political violence.<sup>68</sup> Even before that incident however, Australia was the site of a terrorist bombing campaign in the 1960s and 1970s by the Croatian anti-Communist Ustasha organisation.<sup>69</sup> What is significant about the Hilton bombing and the Ustasha campaign, is that they shows that as a global political and economic hub, the threats of political and religious violence that face Australia cannot be reduced to any single issue, or any single ethnic or religious group. Rather, terrorism and political and religious violence emerges from all nationalities and communities, including home-grown, xenophobic Australian terrorism. Former Prime Minister Malcolm Fraser expressed concern about the perception of terrorism and religion in the current debate in Australia:

There is a danger that Islam, which is essentially a peaceful religion, will be blamed for the actions of terrorists and that we will be increasingly divided by religion and race.<sup>70</sup>

Terrorism, Fraser correctly insisted, is not only an Islamic phenomenon, nor is it uniquely a contemporary problem. Indeed, '[t]he Crusaders from Britain who fought against Islam in the Middle Ages; the Spanish Inquisition; the IRA and the Protestant militias in Ireland all practised terrorism,' Fraser noted.<sup>71</sup> If, as it appears, the government is uniquely focussed – in rhetoric and action – on Islamic terrorism, then it is acting in both a reckless and a discriminatory manner.

## 8. FREEDOM OF EXPRESSION AND ASSOCIATION

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<sup>68</sup> On the lasting legacy of the incident see, *inter alia*, Natalie O'Brien, Janet Fife-Yeomans 'Hilton bombing still burns a fuse' *The Australian*, February 8, 2003, p. 3, 21.

<sup>69</sup> See Jude McCulloch, "Counter-terrorism", human security and globalisation – from welfare to warfare state?' (2003) 14 *Current Issues in Criminal Justice* 283 at p. 289. McCulloch argues here that because of its conservative, anti-communist agenda, ASIO and the Australian Federal Police 'sympathised' with Ustasha and did not pursue it as a terrorist organisation as such.

<sup>70</sup> Malcolm Fraser, *supra* n. 25.

<sup>71</sup> *Ibid.*

Several amended offences have been created in the area of freedom of expression by the *Anti-Terrorism Act (No. 2) 2005*. Notably, section 80.2 (1) of that Act defining the crime of sedition, that holds:

- a person commits an offence if the person urges another person to overthrow by force or violence:
- (a) the Constitution; or
  - (b) the Government of the Commonwealth, a State or a Territory; or
  - (c) the lawful authority of the Government of the Commonwealth.<sup>72</sup>

This provision, it must be acknowledged, is not inherently anti-democratic. In relation to freedom of speech and sedition in Australian law and society, I adhere to the principles set out by Sir Harry Gibbs in his Fifth Interim Report of the Review of Commonwealth Criminal Law in June 1991, in which he noted the incompatibility of the Australia's antiquated sedition proceedings with freedoms in a contemporary liberal democracy, and thus urged that the crime of sedition be repealed *except* for when violence was advocated.<sup>73</sup> Insofar as section 80.2 (1) of the *Anti-Terrorism Act (No. 2) 2005*, amending the Commonwealth *Criminal Code* adheres only to the advocacy of violence, I would consider this new prohibition to be acceptable.

The revised Section 4.3 of the *Anti-Terrorism Act (No. 2) 2005* amends section 30A of the Commonwealth *Crimes Act 1914* and allows for declaring 'unlawful'

- any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages the doing of any act having or purporting to have as an object the carrying out of a seditious intention.<sup>74</sup>

Section 4 of Schedule 7 *Anti-Terrorism Act (No. 2) 2005* amends the *Crimes Act 1914* to now define 'seditions intention' as 'an intention to use force or violence' to effect political ends. Again, insofar as the legislation makes it clear that 'force or violence' is a prerequisite here, this would meet the Gibbs test for acceptable sedition legislation. It is significant, however, that in its original formulation of this amendment, the federal government wished to define

<sup>72</sup> Section 80.2 (2) of the *Anti-Terrorism Act (No. 2) 2005* allows for the lower standard of reckless to also be considered in this offence.

<sup>73</sup> Attorney-General's Department, *Review of Commonwealth Criminal Law, Fifth Interim Report*, 1991, at paragraph 32.18.

<sup>74</sup> *Crimes Act 1914* s. 30A (1) (b).

‘sedition intention’ as the mere ‘intention to effect’ certain political ends, without the explicit necessity of ‘force or violence’. I acknowledge the significant public debate on the matters of sedition, as well as dissent and debate within the government for this significant, though on the face of it minor, amendment. So whilst this legislation clearly does limit freedom of association, I believe that this is acceptable, so long as it is founded on the prevention of violence, rather than with mere dissent. As with the concerns expressed in section 7, above, concerning the proscription of terrorist organisations, however, there remains the outstanding issue of the non-discriminatory use of this provision. It is essential that, should it choose to use this provision to declare an organisation ‘unlawful’, the government acts in a fair, transparent and non-discriminatory manner to ensure that the safety and rights of all Australians are protected. Put very bluntly, this power ought to be brought to bear amongst violent white supremacist organisations as much as it is used against violent Islamic extremist organisations.

## 9. PRIVACY, IDENTITY AND HUMAN RIGHTS

In Australia, again following the lead of the United Kingdom, a national identity card is back on the agenda. This policy first was raised in 1987 by the Labor government of Bob Hawke, but ultimately rejected by Australians and strongly opposed at the time by the Liberal-National Coalition, lead by the then Opposition Leader John Howard,<sup>75</sup> who argued that a national identity card ‘involves a level of intrusion of a draconian kind into the day-to-day lives of many people.’<sup>76</sup> In July 2005, however, Mr Howard, now Prime Minister, said that

we haven’t made a decision to have an ID card in this country, but ... we should properly assess whether (things have changed) in the light of what's happened in the 17 or 18 years that have gone by since the Australia Card was debated, and I acknowledge back then I had a view which (was) critical of that.<sup>77</sup>

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<sup>75</sup> On the defeat of the Australia Card see, *inter alia*, Ewart Smith, *The Australia Card: The story of its defeat*. (South Melbourne: Sun Books, 1989); J. G. Starke, ‘The demise of the Australia Card Bill and the disallowance of federal regulations’ (1988) 62 *Australian Law Journal* 6.

<sup>76</sup> David Humphries, ‘Resistance is not futile - Libs gear up for ID debate’ *Sydney Morning Herald*, July 19, 2005, p. 4.

<sup>77</sup> Steve Lewis and John Kerin, ‘Red-faced Ruddocks ID card rethink’ *The Australian*, July 16, 2005, p. 4. Note that the bracketed text appears in the original newspaper report.

Clearly, ‘what's happened in the 17 or 18 years that have gone by’ has been the rise of international terrorism. But, argues former Opposition Leader John Hewson, a national identity card has been viewed for decades as a ‘panacea for many policy failures, such as electoral fraud, wrongful detention, deportation, tax evasion, welfare fraud and, most recently, terrorism’.<sup>78</sup> One would certainly hope that a national identity card is a cure-all, however unlikely that may be, given its expected cost. The London School of Economics Identity Project’s estimated the median cost of the British identity cards and new biometric passports and their related infrastructure will be over \$Aus34 billion (\$US25 billion), with a possibility of the costs actually blowing out to over \$Aus45 billion (\$US33 billion).<sup>79</sup> Based on the London School of Economics report, Peter Hendy, Chief Executive Officer of the Australian Chamber of Commerce and Industry, suggests a similar scheme in Australia could cost \$Aus15 billion (\$US11 billion).<sup>80</sup>

It is very hard to envisage precisely how identity cards will help combat terrorism. As *The Spectator* magazine noted in relation to the new British identity regime, ‘[n]o biometric database would have stopped the 9/11 hijackers who made no attempt to hide their identities’.<sup>81</sup> Rather, the editorial correctly identifies, what is essential to terrorism and counter-terrorism is not identity, but intention. The desire of governments - including the Australian government - to use identity cards as an anti-terrorism device is deeply troubling. It would suggest that it is no longer going to be ‘intention’ that is the abiding forensic concern of local and national security organisations, but rather, ‘identity’. This, I would argue, sets the stage for policies of ‘ethnic profiling’ to be put into place. Whilst it is obviously far easier to establish a person’s identity than it is to establish her or his intentions or ideological beliefs, it is the latter that is of use in anti-terrorism policies, not the former. Indeed, if identity becomes the abiding concern of security forces in some form of heavy handed and abstractly vulgar approach to anti-terrorism, then it is likely to greatly antagonise those who are suspected of terrorism simply for their identity, which will almost certainly mean having a certain type of name that ‘identifies’ one as belonging to a certain class of person believed to be higher risk than other classes.

<sup>78</sup> John Hewson, ‘Australia Card is inevitable’ *Australian Financial Review*, July 22, 2005, p. 74.

<sup>79</sup> Edgar Whitley, et al. *The Identity Project: An assessment of the UK Identity Cards Bill and its implications*. London, June 27, 2005 p. 245.

<sup>80</sup> Dhana Quinn, ‘Be vigilant about ID card scheme, expert warns’ *PM ABC Radio*, February 21, 2005.

<sup>81</sup> *The Spectator*, ‘Enemies of Liberty’ *The Spectator*, November 27, 2004, p. 7.

There is still much that the international legal community and human rights advocates have to say on this emerging aspect of national security. Legal experts and human rights advocates, as well as governments and the private sector, are still coming to terms with the implications of what new security and identity-verifying technology in fact allows. I believe there may be a rush to embrace new technology in the field of personal identification and national security without allowing proper time for public discussion and research into the long term consequences of new technology, equally governments must ensure that there is the right legal infrastructure in place to ensure that any new and onerous legal regime is adequately regulated. In the Australian and international context, a Bill of Rights is required to ensure not just that rights such as privacy and non-discrimination are respected by government, but also to ensure that there is a thriving human rights culture in the country that can properly scrutinise the actions of the government and, perhaps just as importantly, the private sector, in regards to this new technology and security environment.

I suggest, on the issue of an identity card and the broader right to privacy, that a middle ground must be found. The constant-scrutiny ‘Big Brother’ model is simply unacceptable. A relationship between the State and its citizens that reverses the classic liberal position of ‘public state, private citizen’ to a point where citizens are expected to be transparent to government and business while the State is increasingly able to avoid scrutiny of its policies and behaviour is unthinkable to the majority of Australians and, I’m sure, the majority of people all around the world. It has dire consequences for democracy. Equally, we must recognise that, partly as a legacy of the (rapidly diminishing) welfare state system, the State and its citizens interact at myriad levels in day-to-day life. It is simply unrealistic to maintain the comically idealised libertarian view of today’s citizens as

a merry band of forest-dwelling freemen, emerging into the glare of state supervision only as and when they damn well please, and who then slip back into some strange state of anonymous liberty.<sup>82</sup>

Rather, what we need is a form of negotiated surrender. Citizens in Australia will be willing to allow a reasonable level of State scrutiny and information management so long as they are confident that the State will not act improperly itself, nor will it seek to abuse the trust of its

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<sup>82</sup> Gunnar Pettersson, ‘They already know who you are’ *New Statesman* May 17, 2004, p. 21.

citizens by out-sourcing the data to private interests. I believe that the development of a human rights culture within the framework of a bill of rights, augmenting existing privacy and anti-discrimination legislation, is the best way to manage this relationship.

## 10. THE ROLE OF THE JUDICIARY IN PREVENTATIVE DETENTION REGIMES

Under its new anti-terrorism legislation, the government is beginning to envisage a new role for the Australian judiciary, that may call into question its independence and impartiality. Under the *Australian Security Intelligence Organisation Act 1979* individuals can be detained for questioning in relation to a ‘terrorist offence’ for up to 7 days.<sup>83</sup> The individual does not need to be suspected of a crime. A person may be detained if the ‘issuing authority’ is satisfied on ‘reasonable grounds’ that the issuing of a warrant to detain and question the person ‘will substantially assist the collection of intelligence that is important in relation to a terrorist offence’.<sup>84</sup> The ‘issuing authority’ will be either a former Judge<sup>85</sup> or a serving Judge<sup>86</sup> with at least five years experience in either case. Equally, under Division 105 of the *Anti-Terrorism Act (No. 2) 2005*, a person may be placed in ‘preventative detention’ for up to 14 days, under allied legislation to be enacted by State and Territory Parliaments, to ‘prevent an imminent terrorist act occurring’<sup>87</sup> or to ‘preserve evidence of, or relating to, a recent terrorist act’.<sup>88</sup> As is the case under the *Australian Security Intelligence Organisation Act 1979*, the detention must be approved by an ‘issuing authority’ who is either a retired Judge or a serving Judge with at least five years experience.<sup>89</sup>

The concern for the role and reputation of the judiciary stems from their involvement in approving the detention of people who have not been convicted of any crime or even necessarily accused of any crime. Article 9(1) of the ICCPR declares that

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his

<sup>83</sup> *Australian Security Intelligence Organisation Act 1979* s. 34 HC.

<sup>84</sup> *Australian Security Intelligence Organisation Act 1979* s. 34 D (1)

<sup>85</sup> *Australian Security Intelligence Organisation Act 1979* s. 34 B (1).

<sup>86</sup> *Australian Security Intelligence Organisation Act 1979* s. 34 B (2).

<sup>87</sup> *Anti-Terrorism Act (No. 2) 2005* s. 105.1 (a).

<sup>88</sup> *Anti-Terrorism Act (No. 2) 2005* s. 105.1 (b).

<sup>89</sup> *Anti-Terrorism Act (No. 2) 2005* s. 105.2 (1).

liberty except on such grounds and in accordance with such procedure as are established by law.

The UN Human Rights Committee commented on the use of ‘preventative detention’ in the case of *van Alphen v Netherlands*. They insisted that

if so-called ‘preventative-detention’ is used, for reasons of public security, it ... must not be arbitrary, and must be based on grounds and procedures established by law, information of the reasons must be given and court control of detention must be available as well as compensation in the case of a breach.<sup>90</sup>

Note that this would not necessarily cover the case under the *Australian Security Intelligence Organisation Act 1979* where a person is detained merely on the basis of being suspected of having some evidence which may help in an investigation. Though such a scenario may fall into the category envisaged by the Committee in defining ‘arbitrariness’, noting that

‘arbitrariness’ ... must be interpreted ... to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.<sup>91</sup>

Firstly, my concern is with the absence of ‘court control of detention’, as *van Alphen* prescribes, in the above scenarios. The ‘control’ will either be from a retired Judge or a serving Judge acting in a non-judicial capacity.<sup>92</sup> Clearly, in either scenario, the role of the

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<sup>90</sup> UN doc. CCPR/C/39/C/305/1988 (1990) at paragraph 6.3.

<sup>91</sup> UN doc. CCPR/C/39/C/305/1988 (1990) at paragraph 5.8.

<sup>92</sup> Under Australia’s Constitutional arrangement, however, insofar as this power is going to be applied at the Federal level, it is unlikely that approving non-judicial (that is, merely executive-approved) detention is a constitutionally valid exercise of judicial power. See *R v Kirby; ex parte Boilermakers Society of Australia* (1956) 94 CLR 254; upheld by the House of Lords at [1957] 2 All ER 45. Indeed, there has been significant debate as to whether judges can legally perform these duties in a non-judicial capacity. In the case of *Fardon v Attorney General (Qld)* (2004) 210 ALR 50 it was confirmed that State judges can approve preventative detention orders, but it is still unclear whether that is the case at the Federal level. At least one Judge, Gummow J, suggested that it is not permitted (at 2004) 210 ALR 50 at 71-6) and this aspect of the government’s anti-terrorism legislation may end up being argued about before the High Court of Australia some time in the future. Should this happen, and should a majority of the High Court rule this provision to be unconstitutional, I would be concerned that the government might launch another attack on the High Court, as they did following the controversial 4-3 decision in the *Wik* native title case (1996) 141 ALR 129.

serving or former Judge is to provide a degree of oversight and impartiality in the detention regime. This, it must be said, while far from an ideal situation, and falling well short of ‘court control of detention’, is nonetheless preferable to simply having to gain approval from the Attorney-General, for example. The concern is that the good reputation of Judges in Australia is being used as mere decoration, to dress-up a highly problematic regime of non-judicial detention with the appearance of a more rigorous process of approval and scrutiny than is actually the case. In a sense, the government is deliberately confusing the *office* of a judge with the *person* of a judge, hoping that the Australian people will not understand the difference. The former implies ‘court control of detention’, the latter does not. There is a real possibility of the independence of retired Judges being compromised or appearing to be compromised. Insofar as they are not availed of the protection from dismissal that a sitting Judge is, a retired Judge that is serving as an ‘issuing authority’ in either of the two above detention regimes, may act – or be considered by the public to be acting, erroneously perhaps – in such a way as to retain the favour of the government so as to maintain his or her position as an ‘issuing authority’. The question remains in my mind, and I’m sure in the minds of the Australian public, whether the government would continue to employ the services of an ‘issuing authority’ who ruled in such a way as to thwart their desire to place certain individuals in preventative or otherwise non-judicial detention. This would further weaken the already limited review mechanisms in these regimes. It is perhaps even more problematic for a sitting judge to be engaged in this process as the same perception of pro-government bias may be apparent, with corresponding problems for the judge when sitting in a judicial capacity, hearing cases.

## **11. RACIAL PROFILING AND RACIAL DISCRIMINATION**

There exists, absent a Bill of Rights in Australia, no sufficient impediment to the government engaging in racially discriminatory behaviour, should they so choose. Section 9 of the *Racial Discrimination Act 1975* does prohibit

any person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of any human right or

fundamental freedom in the political, economic, social, cultural or any other sphere in public life.

However, this is a mere Act of Parliament which the Federal government can alter or override. Equally, there is no clear judgement from the High Court on whether the controversial ‘race power’ in section 51 (xxvi) of the Commonwealth Constitution, allowing the government to legislate in relation to ‘the people of any race for whom it is deemed necessary to make special law, can be used to the *detriment* of a particular ethnic group, or whether - as one would prefer and expect in this day and age - it can only be used for their benefit.<sup>93</sup>

Perhaps the most abiding concern in regard to racial discrimination in Australia’s counter-terrorism efforts is the threat of racial or ethnic profiling, targeting people belong to – or merely suspected of belonging to<sup>94</sup> – ethnic or racial groups whose members are considered more likely to engage in terrorist activities.<sup>95</sup> In Australia, those groups would be Arabs and Muslims. Indeed, it has already been suggested that some form of ethnic profiling might be employed in Australia’s fight against terrorism. Federal MP Petro Georgiou told the Castan Centre on October 18, 2005, that Mark Burgess, Chief Executive of the Police Association of Australia had already requested legal immunity from anti-discrimination legislation, fearing lawsuits arising from the stop-and-search powers that Mr Burgess felt might be applied - or appear to be applied - in a discriminatory manner.<sup>96</sup> Equally, prominent Barrister, Julian Burnside QC, has suggested that ASIO is not just singling out Muslim Australians, but systematically questioning them in relation to terrorism:

One of the things that government is doing at the moment is systematically calling in Muslim men from 18 to 25 years old, give or take a bit, asking them in to have a chat to ASIO. Now you can imagine the sense of fear that that creates in the Muslim community.<sup>97</sup>

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<sup>93</sup> See *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

<sup>94</sup> See Muneer Ahmed, ‘Homeland insecurities: Racial violence the day after September 11’, (2002) 30 (3) *Social Text* 101.

<sup>95</sup> This would be of greater concern were an identity card regime introduced. See section 9, above.

<sup>96</sup> Petro Georgiou, ‘Multiculturalism in the War on Terror’, Castan Centre for Human Rights Law, Monash Law Chambers, October 18, 2005.

<sup>97</sup> Shand and Steindl, *supra* n. 15.

As Federal Labor MP Daryl Melham argued, ‘by targeting and alienating Australia’s Islamic communities, the Government is jeopardising the co-operation and assistance vital for successful counter-terrorism efforts.’<sup>98</sup>

Whilst the government has repeatedly insisted that their anti-terrorism and national security policies do not single out Muslims,<sup>99</sup> the rhetoric of some members of the government has undermined that and contributed to the perception that the government is targeting Muslims. The Treasurer, Peter Costello, has been especially unhelpful in this regard. His comments on August 23, 2005, which he repeated several times in late February, 2006 are indicative of the sorts of comments that can lead to division and suspicion:

This is a country, which is founded on a democracy. According to our Constitution, we have a secular state. Our laws are made by the Australian Parliament. If those are not your values, if you want a country which has *shari’a* law or a theocratic state, then Australia is not for you. This is not the kind of country where you would feel comfortable if you were opposed to democracy, parliamentary law, independent courts and so I would say to people who don’t feel comfortable with those values there might be other countries where they’d feel more comfortable with their own values or beliefs.<sup>100</sup>

Mr Costello continued, when asked if his attitude might, should the sort of environment in the United Kingdom after the London bombings come to Australia, morph into laws to deport those with dual citizenship,

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<sup>98</sup> Daryl Melham, ‘Here’s the real security threat: laws that steal our freedoms’, *The Age* (Melbourne), 15

September, 2005, p. 13.

<sup>99</sup> See, *inter alia*, Australian Associated Press, ‘Raids not anti-Muslim: PM’ November 9, 2005.

<sup>100</sup> Tony Jones, ‘Respect Australian values of leave: Costello’, *Lateline* ABC Television, August 23, 2005. See also, Waleed Aly, ‘The Making of Muslim Australia’ *The Age*, October 23, 2005 <http://www.theage.com.au/news/general/the-making-of-muslim-Australia/2005/10/22/1129775997101.html> accessed November 6, 2005; Malcolm Farr, ‘Accept our ways or leave: Costello’ *The Daily Telegraph* (Sydney), November 11, 2005 <http://www.dailytelegraph.news.com.au/story/0,20281,17204050-5001021,00.html> accessed November 11, 2005.

where people have dual citizenship and they're not comfortable with the way Australia is structured, it may be possible to ask them to exercise their other citizenship.<sup>101</sup>

Not only is this needlessly divisive, but it is intellectually dishonest; Costello has elsewhere declared the basis of the Australian legal system to be not democracy or secularism, but rather 'Judeo-Christian ethics' and even the Ten Commandments.<sup>102</sup> It would problematically appear that Costello is targeting Islam in the public sphere and the assertion that Muslims have a right to their own ethical traditions, and a right to judge public policy according to those ethical standards. Indeed, it appears that when it is a case of Islam in the public sphere, Costello insists that secularism must trump that, but when secularism is on the public agenda, it must always be trumped by Christian values. Further, Mr Costello has been extremely reticent to offer any proof of a significant number of Australian Muslims seeking to impose *shari'a* law in Australia. Rather, by targeting the fringe beliefs of a tiny minority within an already embattled minority, Mr Costello is tainting all Muslims with the assertion of undermining Australia's legal and cultural norms, with no proof and seemingly no regard for the misconceptions he may cause.

Mr Costello is not the only one who has sought political advantage by antagonising Australian Muslims and appealing to the fear of difference that works hand-in-hand with national security fears. In November, 2002, after the Moscow theatre siege, conservative New South Wales MP Fred Nile suggested banning *chadors* in public, arguing that bombs might be hidden beneath them.<sup>103</sup> For the most part, the response was dismissive. Foreign Minister Alexander Downer commented that, 'I suppose people could hide all sorts of equipment in all sorts of clothing, you could hide things under a raincoat I suppose, I don't think we're going to ban raincoats'.<sup>104</sup> However, some public figures were less than helpful.

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<sup>101</sup> Tony Jones, *supra* n. 100.

<sup>102</sup> See, *inter alia*, Barry Cassidy, 'Government can afford pre-election spending, Costello says' *Insight ABC Television* July 11, 2004; Don Watson, 'A Jekyll-and-Hyde just waiting in the wings', *The Sydney Morning Herald* 26 August, 2005 [www.smh.com.au/text/articles/2005/08/25/1124562975320.html](http://www.smh.com.au/text/articles/2005/08/25/1124562975320.html) accessed 6 November, 2005; Marion Maddox, *God Under Howard*. (Crows Nest, NSW: Allen & Unwin, 2005).

<sup>103</sup> Peta Donald, 'Nile Attacks Muslim Women's Traditional Dress', *AM ABC Radio*, November 21, 2002.

<sup>104</sup> David Weber, 'Nile links traditional Islamic dress, extremism' *The World Today ABC Radio*, November 22, 2002.

NSW Premier Bob Carr rejected the suggestion from a strategic perspective, but did nothing to ease people's fears or separate Islam from terrorism, arguing that, 'the danger we face, frankly, is a car bomb'.<sup>105</sup> Prime Minister John Howard went further in musings that preceded his eventual rejection, 'I don't have a clear response to what Fred's put', the Prime Minister said. 'I mean, I like Fred, and I don't always agree with him but, you know, Fred speaks for the views of a lot of people. On the other hand I feel it's very important at the moment that Islamic people don't feel they're being singled out.'<sup>106</sup> Recently, Mr Howard has gone further, however, arguing, in relation to women's traditional Islamic dress, that it is, 'confronting'. 'I don't mind the headscarf,' Mr Howard told conservative Sydney radio talk-show host John Laws, 'but it's really the whole outfit ... I think most Australians would find it confronting.'<sup>107</sup>

In 2005, the debate on Islamic dress was briefly renewed when two members of the Federal government, Bronwyn Bishop and Sophie Panopoulos, called for a ban on headscarves in Australian public schools. Both Panopoulos and Bishop declared that wearing headscarves was a rebellious act on the part of Muslims and an attempt at creating division amongst Australians, with Bishop insisting that the headscarf was, 'worn as a sign of defiance and difference between Muslim and non-Muslim students'.<sup>108</sup> Equally, Bishop's Chief of Staff, when asked whether a ban should be extended to *yarmulkes*, as France laws banning religious symbols in schools had, replied 'no' because 'people of the Jewish faith have not used the headgear to campaign against Australian culture, laws and way of life.'<sup>109</sup> Bishop added that, 'when you have a clash of cultures, the dominant culture is the one that you follow and that's ours ... That's the one that makes us free.'<sup>110</sup> Panopoulos went further in expressing her personal disapproval of Muslim headscarves, '[a]s a female MP I am concerned about

<sup>105</sup> Australian Associated Press, 'Outrage over Fred Nile's Chador ban call', November 21, 2002.

<sup>106</sup> David Weber, 'Nile links traditional Islamic dress, extremism' *The World Today* ABC Radio, November 22, 2002.

<sup>107</sup> Farah Farouque, 'Howard wants to see the back of *burqa*, which has its fans, protects modesty and sells modestly', *The Age*, February 28, 2006, p. 3. This comment is remarkably similar to one made by Jacques Chirac in 2003, that most French people see 'something aggressive' about headscarves. John Henley, 'Something Aggressive About Veils, Says Chirac', *The Guardian* (London), December 6, 2003, p. 19. Notably, this comment was a decisive factor in the re-emergence of the *affaire des foulards* in France that ultimately saw the headscarf, and other religious symbols such as the Jewish *yarmulke* banned in French public schools.

<sup>108</sup> Jane Fraser, 'Challenged by headgear' *The Australian*, November 17, 2005, p. 9.

<sup>109</sup> *Ibid.*

<sup>110</sup> Samantha Maiden and Paige Taylor, 'Bishop backs school headscarf ban' *The Australian*, 27 October, 2005, p. 2.

women's rights in this country. There are those who subscribe to a belief system that devalues and degrades women, that accepts a legal system that would relegate women back to the Dark Ages' she warned, in relation to her belief in the rise of a fundamentalist 'Islamic class' in Australia.<sup>111</sup> However, senior members of the government including the Education Minister and the Prime Minister rejected the call.<sup>112</sup> This is perhaps a good example of the way in which the fear of Islamic terrorism can become the fear of difference, and a popular topic for politicians seeking attention, seemingly unconcerned about demonising large groups and causing division. Most prominent, perhaps, were the recent comments of government MP Danna Vale, in February of this year who warned, in relation to the regulation of the abortion drug RU 486, that non-Muslim Australians were 'aborting ourselves almost out of existence' to the point that Australia may become a Muslim-majority state.<sup>113</sup> As with the Fred Nile incident, the Prime Minister was once again condemned for his failure to quickly rebuke the divisive remark.

It is hard to see how comments of the type articulated by the aforementioned politicians achieves anything other than increasing division in the community in general, and increasing alienation amongst Australia's Muslims in particular. Deliberately singling-out Muslims for vaguely-defined criticism and accusing them of fundamentalism, misogyny and deliberate divisiveness will make the radicalisation of young Muslims more likely, not less likely. Rather than taking the necessary steps to increase social harmony, build an inclusive, diverse society and address Muslims' feelings of alienation and victimisation, these high-profile members of the Australian government are doing the opposite. As conservative commentator, and supporter of the government's anti-terrorism policies, Greg Sheridan remarked over Mr Costello's recent reprise of his anti-Muslim comments in a speech in February of this year,

The reason the speech deserves attention, and censure, is because it plays around with race and religion in an entirely negative and dangerous way and to no policy purpose. Unless you are an exceptionally irresponsible person, this is not what you do.<sup>114</sup>

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<sup>111</sup> Patricia Karvelas, 'MP unveils new attack on headscarf', *The Australian* September 6, 2005, p. 6.

<sup>112</sup> Maiden and Taylor, *supra* n. 110.

<sup>113</sup> Michelle Grattan, 'We may become a Muslim nation: Vale', *The Age* (Melbourne) February 14, 2005, p. 6.

<sup>114</sup> Greg Sheridan, 'The Grating Pretender', *The Australian*, March 2, 2006, p. 10.

Of equal importance is the fact that such comments can only undermine Australian Muslims' support for anti-terrorism legislation and national security policies that the government insists do not disproportionately target Muslims. When comments of senior MPs and Ministers is seen to quite deliberately target Muslims, faith in the legal framework of Australia's anti-terrorism measures can only be weakened. It is imperative, in the name of effectively countering terrorism, that populist short-term political points scoring, achieved by appealing to societies fears and latent prejudices, gives way to better considered comments, policies and laws. Rather than appealing to misconceptions about fundamentalism or disloyalty, politicians in Australia and elsewhere must be encouraged to appeal to the tolerant and inclusive nature of democratic societies.

Arguably the most visible example of xenophobia of Australia in a long time occurred on December 11, 2005, in Sydney's beachside suburb of Cronulla when several thousand people were involved in an anti-Lebanese and anti-Muslim riot in which both men and women of Middle Eastern appearance were the victims of physical and verbal assault. Whilst the violence was sparked by the alleged attack on lifeguards by a group of men of Middle Eastern appearance, the riots quickly became about racist and anti-Muslim sentiments, with explicitly anti-Lebanese and anti-Muslim slogans chanted and carried on signs and clothing, and with anyone of Middle Eastern or Muslim appearance being targeted. Local Federal MP Bruce Baird argued that a key reason behind the riots was terrorism. Mr Baird pointed out that near to where the riots took place was a memorial to victims of the 2002 Bali bombings, in which Islamic terrorists killed several hundred people, including 88 Australians which included six women from Cronulla. When Mr Baird was asked – irresponsibly, perhaps - if the riots were 'revenge' for the Bali terrorist attack, he replied, 'I think so'.<sup>115</sup> 'Where this riot took place is actually the site of where we've got the Bali memorial for these women,' Mr Baird said, in reference to the local Bali bombing victims. He added that, 'I think there's been increasing emphasis on terrorism and our security.' Whilst suggesting that the attack on the lifeguards was the 'match that sets alight the fuel', he noted the background of tension caused by several high-profile sexual assaults committed by young men of Middle Eastern descent in Sydney several years before, as well as terrorism and 'all the events that have happened since September 11'.

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<sup>115</sup> Australian Associated Press, 'Terrorism, gang rapes behind riots: MP', December 12, 2005.

Thus, any consideration of terrorism and the law must recognise the far-reaching consequences of terrorism for the everyday lives of Australians. Laws, policies and public pronouncements designed to meet the requirements of combating terrorism must also extend all necessary protection to those vulnerable to the inevitable violence and backlashes that terrorism and the fear of terrorism leads to. The specific legal approach to this issue is to insist on the criminal nature of terrorism. Terrorism is not war, pitting state against state - though the oft-used and abused term 'war on terror' is deeply unhelpful in this regard - let alone a global 'clash of civilisations'. If lawmakers can successfully communicate to citizens that terrorism is a criminal offence for which individual persons and organisations must be held responsible, not entire religions or ethnic groups, then incidents like the Cronulla riots will hopefully be a less frequent occurrence as the fight against the crime of terrorism continues.

## **12. LESSONS FROM AUSTRALIA'S LEGAL HISTORY**

It is beneficial, in understanding the legal and social background of the current 'age of terror', to note similar eras and periods of heightened concern in Australia's past. Ten years ago, for example the concern was not so much global terrorism, but the global drug trade. Politicians did not speak of the 'war on terror', but, rather, 'the war on drugs' or, more generally, 'the war on crime'. Then, as now, activists and sceptical academics were arguing the ineffectual nature of such an approach and the problematic nature of a 'war' on 'drugs' or 'crime'. Interestingly, since the rise of global terrorism after September 11, 2001, the rhetoric on the 'war on drugs' has shifted, beginning to refer to 'narco-terrorism', rather than the more prosaic 'drug trafficking'.<sup>116</sup>

Going back not ten years, but fifty years, the concern was not terrorism, nor drugs, but communism. In 1950, Australia's Menzies government introduced the *Communist Party Dissolution Bill 1950*, to dissolve the Australian Communist Party, criminalize membership of communist organisations, and prohibit those believed to hold Marxist views from public

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<sup>116</sup> See Jude McCulloch, 'State of emergency: the militarisation of civil society' (2005-2006) 19 *Dissent* 7 at p. 8.

service. The law was passed by (a somewhat sceptical) Parliament, but ultimately defeated first by the High Court of Australia, and secondly in a popular referendum.<sup>117</sup> Interestingly, contemporary Australian laws proscribing terrorist organisations and membership of proscribed organisations appear to be directly modelled on the *Communist Party Dissolution Bill 1950*.<sup>118</sup>

Going back further into Australia's criminal history, we come to the 1868 assassination attempt on the life of the visiting English Royal, Prince Alfred, by Irish Catholic nationalist Henry O'Farrell. Memory of this case was recently revived by Victorian Premier Steve Bracks, in his eloquent argument against the anti-multicultural scapegoating of Arabs and Muslims by Australian politicians.<sup>119</sup> Mr Bracks – himself of Lebanese descent - points out that the assassination attempt 'sent Australia into a frenzy of sectarianism that did not abate for generations.' The reason for this, Mr Bracks argues, was that rather than being blamed on 'the lone act of a mentally unstable individual', (who was promptly hanged) culpability was extended to *all* Irish Catholics in Australia. Central to this process of demonisation Premier Bracks argues, was a speech given by prominent politician Sir Henry Parkes, who insisted that the crime was part of a wider Irish Catholic plot. Sir Henry is now depicted on the Australian five dollar note.

If we take one final step back even further in Australia's history, all the way back to 1830, then the fear was not about terrorism, drugs, communism, or the Irish, but the intrinsically Australian crime of 'Bushranging'. Rural bandits were a feature of colonial life in Australia, and have now been thoroughly romanticised, holding a position in our nation's popular consciousness roughly equivalent to the positions that cowboys hold in American popular consciousness. In 1830, however, the colony of New South Wales passed the *Bushrangers Act 1830*, reversing the onus of proof, requiring those arrested under the act (perhaps for as little as failing to adequately prove their identity) to prove their innocence of any criminal

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<sup>117</sup> See Roger Douglas, 'A smallish blow for liberty? The significance of the *Communist Party* case' (2001) 27 (2) *Monash University Law Review* 253.

<sup>118</sup> George Williams, *supra* n. 10 at p. 30; Jenny Hocking, 'Protecting democracy by preserving justice "even for the feared and the hated"' (2004) 27 *University of New South Wales Law Review* 319 at pp. 323-6.

<sup>119</sup> Steve Bracks, 'Honour those who fought for Australian democracy' *The Age* (Melbourne) March 2, 2006, <http://www.theage.com.au/news/opinion/dont-dishonour-australian-democracy/2006/03/01/1141191728913.html> accessed March 2, 2006.

offence. As is the case today, the justification for this harsh regime was the specifically ‘political’ nature of ‘bushranging’. Insofar as it targeted the essential infrastructure of the nascent colony (roads, banks, the postal system, etc) ‘bushranging’ was the terrorism of its day.<sup>120</sup>

In each of these cases, our understanding of the fears of the society becomes clearer and we can better analyse the legal responses to those concerns. The dilemma we face today is to engage in something of an immanent critique of both the climate of fear and its legislative response. I believe that a human rights-focussed analysis is best equipped to deal with this. A bill of rights-inspired popular human rights culture will enable a society to temper its fear with justice and the prudential defence of universal rights.

### **13. CONCLUSION.**

As former United Nations High Commissioner for Human Rights, Sergio Vieira de Mello argued,

I am convinced that the best – the only – strategy to isolate and defeat terrorism is by respecting human rights, fostering social justice, enhancing democracy and upholding the primacy of the rule of law. We need to invest more vigorously in promoting the sanctity and worth of every human life; we need to show that we care about the security of all and not just a few; we need to ensure that those who govern and those who are governed understand and appreciate that they must act within the law.<sup>121</sup>

As this quote argues, counter-terrorism requires not just legal and technological sophistication, but also empathy. Rather than viewing human rights and counter-terrorism as antithetical, the reality is that both are interdependent. That challenge that the Australian government, and governments around the world face, is finding ways of incorporating the protection of human rights into counter-terrorism policies, laws and languages. As I have hopefully illustrated in this submission, Australian politicians and Australians generally have

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<sup>120</sup> See Simon Bronitt, ‘Australia’s legal response to terrorism: Neither novel nor extraordinary?’ in Tom Davis (ed) *Human Rights 2003: The Year in Review* (Melbourne: Castan Centre for Human Rights Law/Monash University) 2004, 39-54 at pp. 44-5.

<sup>121</sup> Cited in Alex P. Schmid, ‘Terrorism and human rights: A view from the United Nations’ (2005) 17 *Terrorism and Political Violence* 25 at p. 30.

not always been successful in this, and at this stage, it would appear that a genuine synthesis of national security and respect for human rights is somewhat counterintuitive to the political culture in Australia.

Many of the issues surrounding human rights and anti-terrorism in Australia, I would suggest, will increasingly take on the language and policies of the bill of rights debate. As the anti-terrorism and human rights debate appears to be the conflation of civil rights, criminal law reform and anti-discrimination advocacy, human rights experts and advocates are increasingly looking to more systematic approaches to protecting our rights in an age of fear. Thus, it is imperative that even as terrorism and counter-terrorism change the legal, political and cultural landscape of Australia and the world, those compelled to uphold civil rights and human dignity continue to revise and advance strategies for the maintenance and advancement of human rights as an essential aspect of the fight against terrorism.