

## AUSTRALIAN COUNTER-TERRORISM LEGISLATION AND THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

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### I INTRODUCTION

Since 11 September 2001, terrorists have struck with shocking and spectacular ruthlessness in New York, Washington DC, Bali, and, as I write these words, the world is still absorbing the shock of the commuter train bombings in Madrid on 11 March 2004. The global terrorist network, al Qaeda and its affiliates are the prime suspects for the Madrid atrocity. The spectre of an al Qaeda connection has sent shivers down Australia's collective spine. Spain perhaps became a prime target due to its enthusiastic support for the US-led invasion of Iraq. Australia was and remains a higher profile member of the 'Coalition of the Willing'.<sup>1</sup> A common and understandable reaction in this country to the tragedy in Spain, apart from compassion for the victims, has been to assume that a successful terrorist attack in Australia is a matter of when, rather than if.

Indeed, since September 11, all democratic nations have perceived themselves to be under greater threat of major terrorist attacks from Islamic fanatics bent on destroying democratic freedoms and values.<sup>2</sup> These 'new' global terrorists are particularly frightening, given that there seems to be no realistic scope for negotiation to satisfy their grievances; al Qaeda's demands seem to equate with nothing less than the capitulation of many, if not all, democratic societies and their replacement with fundamentalist Islamic societies.<sup>3</sup> Such a perceived omnipotent threat of course demands a strong reaction, so governments around the world have responded with laws aimed at weeding out the terrorist contagion, entailing a simultaneous reduction in the civil and political liberties and rights of

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1 See Christopher Michaelsen, 'International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11' (2003) 25 *Sydney Law Review* 275, 300–1.

2 Dom Rowe, 'Counter Terrorism and Liberal Democracy: Law since September 11' (2002) 13(1) *Polemic* 9.

3 On 15 April 2004, al Qaeda leader Osama Bin-Laden apparently offered a 'truce' to European nations if they should stop 'attacking Muslims'. The terms of this offer are unclear, as is the ability of Bin-Laden to actually put such a truce into effect. See 'Bin Laden Offers a Truce on His Terms', *The Australian* (Sydney), 16 April 2004, 1. No European country has followed up this offer.

populations at large. This ‘trade-off’ between security and liberty has been seen by many governments as a responsible and indeed necessary means of combating such a dangerous threat to our way of life. While the restriction of civil liberties is regrettable from a human rights point of view, it must be remembered that states have a positive duty under international human rights law to take reasonable steps to protect the human rights of their people from threats posed by others (such as terrorists), including rights to life and security of the person.<sup>4</sup>

On the other hand, the danger posed by modern global terrorism may not be as pervasive as is portrayed by governments and the media. Indeed, the popular perception of al Qaeda’s ubiquitous power arguably ‘constitutes a critical concession to the terrorists’.<sup>5</sup> As Dr Wright-Neville, a former senior intelligence analyst for the Australian government, has stated:

it is a claim based on little or no evidence. It confers a disproportionate power upon an otherwise limited organisation. As such it is empowering to the terrorists and their supporters and simultaneously advances their longer-term strategic agenda of forcing their enemies to over-react and make fundamental errors of judgement.<sup>6</sup>

Increased police powers and the curtailment of rights and freedoms may be the very response that the ‘freedom-hating’ terrorists have hoped to provoke.<sup>7</sup> Such measures may even be counterproductive by galvanising the perpetrators of terrorist violence,<sup>8</sup> and alienating those most readily identified as ‘terrorist candidates’, who are more likely to be the targets of the exercise of new police powers. Such marginalisation in turn provokes greater sympathy and even inspires recruits for the terrorist cause.<sup>9</sup>

In responding to terrorism, Australia and all states must tread a fine line between overreaction and failure in their duty to protect their populations. International human rights law assists states in defining that line. International human rights law is not a ‘suicide pact’ that dictates impotence on the part of compliant states as the permissible response to terrorism.<sup>10</sup> Most human rights are qualified in that they can be limited by appropriate measures designed to protect

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4 See *Velasquez Rodriguez v Honduras*, decision of the Inter-American Court of Human Rights, (1988) 9 *Human Rights Law Journal* 212. See also Human Rights Committee, ‘General Comment 6’ in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 128, [3], UN Doc HRI/GEN/1/Rev.6 (1994).

5 David Wright-Neville, ‘Australia’s Counter-Terrorism Laws and the Assault on Politics’ in Tom Davis (ed), *Human Rights 2003: The Year in Review* (2004) 72.

6 Ibid.

7 As noted by UN Secretary-General Kofi Annan in August 2003: ‘if we compromise on human rights in seeking to fight terrorism, we hand terrorists a victory they cannot achieve on their own’. See UN Press Release SG/SM/8798, cited in Hilary Charlesworth, ‘Is the War on Terror Compatible with Human Rights – An International Law Perspective’ in Davis, above n 5, 25.

8 Wright-Neville, above n 5, 75. See also Jenny Hocking, ‘Counter-Terrorism and the Criminalisation of Politics: Australia’s New Security Powers of Detention, Proscription and Control’ (2003) 49 *Australian Journal of Politics and History* 355, 361.

9 Hocking, above n 8, 371.

10 See Clare Dyer, ‘Woolf Warns Government over Human Rights’, *The Guardian* (London), 16 October 2002, 1 (reporting a speech by Lord Woolf on the impact of the *Human Rights Act 1998* (UK) on the UK’s response to terrorism): ‘But the *Human Rights Act* was not a suicide pact, he added: “It does not require this country to tie its hands behind its back in the face of aggression, terrorism or violent crime. It does, however, reduce the risk of our committing an ‘own goal’”’.

legitimate ends, such as the protection of national security and public order. Suspension or 'derogation' from most human rights norms is also permitted in times of public emergency.<sup>11</sup> Hence, sensible interpretation and implementation of human rights norms allows a state to protect itself against threats such as terrorism. On the other hand, international human rights law also ensures that states are not recognised as having a blank cheque to overstep the mark in combating such threats, and unduly harm the recognised rights of human beings.

Of course, the continuing relevance of international human rights law in the wake of September 11 has been confirmed by major international law bodies, such as the UN Security Council, the UN General Assembly, the Commission on Human Rights, and various UN human rights treaty bodies.<sup>12</sup>

International human rights law is a particularly useful yardstick in Australia, one of the very few democratic countries without a comprehensive municipal bill of rights.<sup>13</sup> This article will conduct a 'human rights' evaluation of the most significant counter-terrorism laws enacted by the Commonwealth Government since September 2001. The standards to which the legislation will be compared in this article are, mainly, Australia's human rights obligations under the International Covenant on Civil and Political Rights 1966<sup>14</sup> ('ICCPR'). The interpretation of the rights therein will be informed by the jurisprudence of the United Nations Human Rights Committee ('HRC'), the monitoring body established under the ICCPR.<sup>15</sup>

## II THE FEDERAL LEGISLATIVE RESPONSE TO SEPTEMBER 11

The federal Parliament has responded to the threat posed by modern global terrorism with a flurry of legislative activity. The two key legislative 'planks' of the government's counter-terrorism scheme are amendments to the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'), and amendments to the *Australian*

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11 See also Hilary Charlesworth, 'Human Rights in the Wake of Terrorism' (2003) 41 *Law Society Journal* 62.

12 See *High Level Meeting of the Security Council: Combating Terrorism*, SC Res 1456, UN SCOR, 4688<sup>th</sup> mtg, UN Doc S/RES/1456 (2003). See generally United Nations, *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism*, especially [1]–[9], UN Doc HR/PUB/03/1 (2003) ('*UN Terrorism/Human Rights Digest*').

13 In 2004, Australia's first indigenous bill of rights came into effect in the Australian Capital Territory.

14 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

15 The main sources of HRC jurisprudence are its decisions in individual complaints issued under the Optional Protocol to the ICCPR, and its consensus comments in Concluding Observations on States Parties, and in General Comments (expanded interpretations of aspects of the ICCPR, in particular the meaning of particular rights). See generally Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (2<sup>nd</sup> ed, 2004) [1.31] ff.

*Security Intelligence Organisation Act 1979* (Cth).<sup>16</sup> The original Bills, proposed in the immediate wake of September 11, were substantially amended in response to parliamentary committee reports, which tempered many of the most draconian aspects of the original Bills.<sup>17</sup> However, as detailed below, there remain serious concerns over the human rights compatibility of the legislative amendments.

## A The Criminal Code Amendments

### 1 The New Terrorist Offences

The *Security Legislation Amendment (Terrorism) Act 2002* (Cth) inserted new provisions into the *Criminal Code 1995* (Cth), which were again amended by the *Criminal Code Amendment (Terrorism) Act 2003* (Cth) and the *Criminal Code (Terrorist Organisations) Act 2004* (Cth). The *Criminal Code* now prescribes a new offence of terrorism and a number of derivative offences. A 'terrorist act' is defined in s 100.1 of the *Criminal Code* as an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (3); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of
  - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
  - (ii) intimidating the public or a section of the public

An action falls within sub-s (2), and thus is classified as a terrorist act (unless it falls within sub-s (3)) if it:

- (a) causes serious harm that is physical harm to a person; or
- (b) causes serious damage to property; or
- (c) causes a person's death; or
- (d) endangers a person's life, other than the life of the person taking the action; or
- (e) creates a serious risk to the health or safety of the public or a section of the public; or
- (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
  - (i) an information system; or
  - (ii) a telecommunications system; or
  - (iii) a financial system; or
  - (iv) a system used for the delivery of essential government services; or
  - (v) a system used for, or by, an essential public utility; or
  - (vi) a system used for, or by, a transport system.

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16 See generally, on Australia's legislative response to terrorism, National Security Australia <<http://www.nationalsecurity.gov.au>> at 15 November 2004. These articles analyse the relevant legislation. It is possible that further amendments will have occurred by the time of publication.

17 See George Williams, 'Australian Values and the War against Terrorism' (2003) 26 *University of New South Wales Law Journal* 191.

An action falls within sub-s (3), and is thus excluded from the definition of a terrorist act, if it:

- (a) is advocacy, protest, dissent or industrial action; and
- (b) is not intended:
  - (i) to cause serious harm that is physical harm to a person; or
  - (ii) to cause a person's death; or
  - (iii) to endanger the life of a person, other than the person taking the action; or
  - (iv) to create a serious risk to the health and safety of the public or a section of the public.

Under s 101.1, a person is liable for life imprisonment if he or she commits a terrorist act. Under s 101.1(2), the person is liable under Australian law even if the terrorist conduct and its results occur wholly overseas.

This definition of terrorism is very broad. It clearly catches actions that fall outside an 'intuitive' definition of terrorism, and certainly criminalises actions that fall far short of the catastrophic attacks that motivated the legislative changes. For example, a striking worker who intentionally and seriously assaults a 'scab' while manning a picket line in protest against a certain government policy is caught within this definition of terrorism. Though such an action constitutes a serious crime deserving of punishment, it hardly amounts in the popular imagination to a 'terrorist act'.

Does this definition of a 'terrorist act' breach Australia's human rights obligations? The new offences proscribe behaviour that is intended to hurt or endanger the health and/or wellbeing of human beings, and which results in violent or at least serious consequences. The criminalisation of such behaviour per se does not seem to raise human rights issues, even though such offences will not always deserve the label of 'terrorism'. Certainly, the inclusion of a requirement of intent in s 100.1(3)(b), which was not included in the original Bill, has removed the danger of most protests, demonstrations, or picket lines being caught within the 'terrorism' net if they should degenerate, as unfortunately happens on occasion, into violence.<sup>18</sup>

Almost all aspects of the new prescribed offences already constituted criminal offences under either federal or State law,<sup>19</sup> so the 'need' for a new terrorism offence is highly questionable. Apart from the element of extraterritorial proscription (discussed below), the unique aspect of the offence of terrorism is that the criminal acts are committed with the purpose of promoting a 'political, religious or ideological cause'.<sup>20</sup> The definition singles out criminal acts motivated by politics, religion or ideology, apparently deeming them more

18 Robin Perry, 'Terrorism, Liberty and National Security: The Federal Response to September 11' (2002) 29(6) *Brief* 12.

19 Indeed, the Fraser government was advised in the aftermath of the Hilton bomb blast in 1978 not to introduce specific anti-terrorism laws, as terrorism already breached ordinary criminal laws. See Commonwealth, *Protective Security Review Report*, Parl Paper No 397 (1979) 13. See also Rowe, above n 2, 11.

20 Hocking, above n 8, 367–8.

serious than acts inspired by 'other motives such as revenge, rage, or greed'.<sup>21</sup> Yet it is difficult to characterise the former acts as more morally repugnant than the latter, and it is surely impossible to maintain that the probable perpetrators of the former acts are more likely to be deterred by the passage of more severe legislation. There is therefore weight to Michael Head's conclusion that the 'war on terror' is, at least partially, 'being used for political ends'<sup>22</sup> to target people of a certain ideological persuasion.

The singling out of ideologically motivated crimes by this legislation could constitute discrimination on the basis of political, religious or ideological opinion, if evidence emerges that the 'non-ideological' perpetrators of crimes with like consequences are punished more leniently. Alternatively, discrimination could arise if the terrorist acts motivated by certain political/religious persuasions (for example, fundamentalist Islam) are punished more harshly than terrorist acts inspired by other political/religious opinions (for example, fundamentalist Christianity<sup>23</sup> or Buddhism).<sup>24</sup> Such discrimination would violate Australia's human rights obligations under art 26 of the ICCPR which states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This provision has been interpreted as a free-standing prohibition on discrimination. That is, art 26 prohibits any type of invidious discrimination 'in law or in fact in any field regulated and protected by public authorities'.<sup>25</sup> Therefore, discrimination between the treatment of like 'criminals' on the basis of political opinion, religious opinion (a ground of discrimination prohibited in art 26 by both its reference to 'religion' and 'other status'), or ideological opinion (an 'other status') could breach art 26.

A differentiation of treatment will however be permissible under art 26 'if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.<sup>26</sup> The fact that Australia's anti-terrorism legislation is likely, at least in the short term, to be

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21 Michael Head, 'Counter-Terrorism Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666, 671.

22 Ibid. See also Rowe, above n 2, 10.

23 An example of such an attack is that on the Alfred Murrah Building in Oklahoma by Timothy McVeigh in 1996.

24 An example of such attacks are the sarin gas attacks upon the Tokyo subway system by the Aum Shinrikyo cult in 1994. See also Wright-Neville, above n 5, 62–3.

25 Human Rights Committee, 'General Comment 18' in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 148, [12], UN Doc HRI/GEN/1/Rev.6 (1994). In contrast, one may note that art 14 of the European Convention on Human Rights ('ECHR'), which generally recognises similar rights to those in the ICCPR, is not a guarantee of non-discrimination per se. Rather, ECHR art 14 only guarantees non-discrimination in relation to the enjoyment of other rights recognised in the ECHR.

26 Ibid [13]. Australia also has duties of non-discrimination on the basis of race under the *Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

enforced mainly against suspected Islamist terrorists, may not breach the ICCPR's non-discrimination provisions. If the terrorist threat only arises, in actuality, from people affiliated with a certain religion, the enforcement of the law against these people could be deemed 'reasonable and objective'. However, there is a danger that the enforcement of the law, which is envisaged in the *Criminal Code* to be based on reasonable and objective grounds, could degenerate in reality into enforcement based on racial or religious profiling, stereotypes, and simple prejudice.<sup>27</sup>

The definition and proscription of 'terrorist acts' are not likely, of themselves, to breach Australia's international human rights obligations, given that 'terrorist acts' as defined are serious crimes, even though they do not all instinctively equate with 'terrorism'. It is, however, possible that the implementation thereof could give rise to illegitimate discrimination contrary to art 26. Furthermore, as noted below, the innate breadth of the definition gives rise to problems with regard to the derivative offences outlined in ss 101 and 102.

The extraterritorial element to the offence is problematic. It is trite to note that 'one man's terrorist is another man's freedom fighter'. However, that hackneyed adage is very relevant given that the *Criminal Code* criminalises violent resistance to any foreign government, regardless of the oppressive nature of many such regimes. As noted by Aidan Ricketts, in Australia 'it is easy to forget that political resistance to oppressive regimes is usually conducted in an already violent context'.<sup>28</sup> The political opponents of repressive governments may have little choice but to either suffer in silence or 'fight back'; peaceful resistance may be a perilous pipedream that could result in imprisonment or worse. The current Australian legislation would have branded some of the actions of the African National Congress in apartheid South Africa, the Falantil fighters in East Timor,<sup>29</sup> and, ironically, the Northern Alliance in Afghanistan and opponents of Saddam Hussein in Iraq (whilst the Taliban and Hussein were respectively in power), as 'terrorist acts'.

It may be drawing a long bow to claim that the perpetrator of an intentionally violent act abroad which has serious consequences for another state's public order, even in an apparent 'just' cause, would suffer abuse of his or her human rights if charged under the Australian legislation. Furthermore, the identification of terrorism as a threat to peace and security, and the direction to all states to pass legislation to combat all forms of terrorism – including extraterritorial

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27 See Megan Davis, *Hot Topics 42: Terrorism* (2003) 4–5, on alleged incidents of harassment of Muslims in Australia since September 11. See also Rowe, above n 2, 13; Hocking, above n 8, 368. See, for a discussion of the issue from a US perspective, R Richard Banks, 'Racial Profiling and Antiterrorism Efforts' (2004) 89 *Cornell Law Review* 1201. The Convention on the Elimination of all Forms of Racial Discrimination Committee has noted in a number of Concluding Observations the propensity for post-September 11 anti-terror laws to be implemented in a racially discriminatory way. See *UN Terrorism/Human Rights Digest*, above n 12, 79–81.

28 Aidan Ricketts, 'Freedom of Association or Guilt by Association: Australia's New Anti-Terrorism Laws and the Retreat of Political Liberty' (2002) 6 *Southern Cross University Law Review* 133, 141.

29 Ibid; Rowe, above n 2, 15.

manifestations – by the Security Council in Resolution 1373 indicates that these provisions do not breach international human rights law.<sup>30</sup>

On the other hand, the breadth of the Australian definition of terrorism renders an extraordinary number of foreign crimes, such as deliberate assaults by protesters in another country, subject to a potential exercise of universal jurisdiction in an Australian court. The extraterritorial element of this legislation will likely be selectively enforced, with the government effectively ‘picking and choosing’ the international causes that are legitimate fights for freedom, and those which are illegitimate and therefore ‘terrorist’.<sup>31</sup> In the atmosphere of the current day, it unfortunately seems likely that Muslim causes will be viewed with heightened suspicion.<sup>32</sup> There is therefore again a danger of the legislation being enforced in such a way as to amount to discrimination on the basis of political, religious, or ideological opinion, contrary to art 26. Furthermore, ‘it is entirely contrary to the rule of law for criminal liability under Australian law to turn on the foreign policy priorities of the government of the day’.<sup>33</sup>

Along with the criminalisation of ‘terrorist acts’, new derivative offences have been created by the insertion of a new s 101 into the *Criminal Code*. These derivative offences are: the intentional or reckless provision of, or receipt of, training in connection with terrorist acts;<sup>34</sup> the intentional or reckless possession of a ‘thing’ connected with terrorist acts;<sup>35</sup> the intentional or reckless collection or making of documents likely to facilitate terrorist acts;<sup>36</sup> and ‘other acts done in preparation for or planning of terrorist acts’.<sup>37</sup> An offender is liable for a derivative terrorist offence whether or not a terrorist act actually takes place, and whether or not the offence is committed in Australia or abroad. In all cases, intentional commission of the offence attracts a higher maximum prison sentence than reckless commission.

These derivative offences are certainly worrying from a human rights point of view, especially given the breadth in the definition of a terrorist act, and the fact that they may be committed without specific intent (that is, recklessly) and without violent or even serious outcomes. The offences, particularly the criminalisation of the possession of a ‘thing’ associated with terrorism, are also expressed in inelegant and vague language,<sup>38</sup> and are probably inadequately circumscribed. Such imprecise provisions may breach art 15 of the ICCPR. Article 15 explicitly prohibits the retrospective application of a criminal law. The

30 *Mandatory Action to Fight Terrorism*, SC Res 1373, UN Doc S/RES/1373 (2001).

31 Ricketts, above n 28, 143. The Attorney-General’s consent is needed for any prosecution of an alien for a wholly extraterritorial offence: see *Criminal Code Act 1995* (Cth) s 16(1).

32 Indeed, one may note how Islamic separatist groups in the Philippines and Russia (Chechnya) were eagerly branded by the relevant governments as terrorists on a par with al Qaeda after September 11: Rowe, above n 2, 9.

33 Submission to the Legal and Constitutional Legislation Committee, *Provisions of the Anti-terrorism Bill 2004* (2004) (Patrick Emerton on behalf of the Castan Centre for Human Rights Law) <<http://www.law.monash.edu.au/castancentre/submissions/anti-terrorism.html>> at 15 November 2004, 12.

34 *Criminal Code Act 1995* (Cth) s 101.2.

35 *Criminal Code Act 1995* (Cth) s 101.4.

36 *Criminal Code Act 1995* (Cth) s 101.5.

37 *Criminal Code Act 1995* (Cth) s 101.6.

38 See also Perry, above n 18, 14.

HRC has stated, in a recent General Comment, that art 15 also requires that 'criminal liability and punishment [be] limited to clear and precise provisions in the law that was in place and applicable at the time [a criminal] act or omission took place'.<sup>39</sup> That is, art 15 requires the law to be sufficiently clear so that a person is capable of being aware, at the time of commission of the alleged offence, that his or her conduct is criminal. Indeed, the HRC has already indicated that a number of states have breached art 15 in their rush to criminalise new terrorist offences after September 11.<sup>40</sup> Furthermore, detention pursuant to an insufficiently circumscribed offence may not constitute detention 'on grounds ... established by law', as required under art 9(1) of the ICCPR.<sup>41</sup>

## 2 *Proscription of Terrorist Organisations*

Section 102 was inserted into the *Criminal Code* in 2002, and provides for the proscription of 'terrorist organisations'. Section 102 has been recently amended by the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

A 'terrorist' organisation is defined in sub-s (1)(a) as 'an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)'. Under sub-s (1), courts may find an organisation to be a 'terrorist organisation' in proceedings concerning s 102 offences (discussed below). Under sub-s (2), the Attorney-General may 'list' an organisation as a terrorist organisation if he/she is satisfied on reasonable grounds that the organisation satisfies the sub-s (1) definition. A number of organisations have been listed in Australia, including al Qaeda, Jemaah Islamiyah, Abu Sayaf Group, Hamas, Hizbollah, and Lashkar-E-Tayyiba.<sup>42</sup> 'Listing' regulations are overseen by Parliament, as either house of Parliament may disallow them.<sup>43</sup> 'Listing' regulations will cease to have effect 'on the third anniversary of the day on which they take effect',<sup>44</sup> unless repealed earlier, though the 're-listing' of an organisation is not prohibited.

A number of offences flow from association with a 'terrorist organisation', whether that organisation be listed or subsequently found by a court to constitute a 'terrorist organisation'. An individual commits an offence if he or she is a member of such an organisation, and knows that it is a terrorist organisation, unless that person takes all reasonably practicable steps to cease being a member once he or she realises that the organisation is a 'terrorist organisation'.<sup>45</sup>

39 Human Rights Committee, 'General Comment 29' in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 187, [7], UN Doc HRI/GEN/1/Rev.6 (1994). See also Manfred Nowak, *CCPR Commentary* (1993) 276; *UN Terrorism/Human Rights Digest*, above n 12, 66.

40 See *Concluding Observations on Estonia*, [8], UN Doc CCPR/CO/77/EST (2003); *Concluding Observations on Israel*, [14], UN Doc CCPR/CO/78/ISR (2003).

41 See Joseph, Schultz and Castan, above n 15, [11.10].

42 For a full list see Commonwealth Attorney-General, *Listing of Terrorist Organisations* (2004) National Security Australia <<http://www.nationalsecurity.gov.au/www/nationalsecurityhome.nsf/HeadingPagesDisplay/Listing+of+Terrorist+Organisations?OpenDocument>> at 15 November 2004.

43 See *Acts Interpretation Act 1901* (Cth) s 48; *Criminal Code Act 1995* (Cth) s 102.1A.

44 *Criminal Code Act 1995* (Cth) s 102.1A(2).

45 *Criminal Code Act 1995* (Cth) s 102.3, as amended by the *Anti-terrorism Act 2004* (Cth).

Furthermore, an individual is liable if he or she directs,<sup>46</sup> recruits for,<sup>47</sup> trains or receives training from,<sup>48</sup> funds or receives funds from,<sup>49</sup> or provides support or resources for a terrorist organisation<sup>50</sup> if he or she knows that, or is reckless as to whether, an organisation is a 'terrorist organisation'. These offences are punishable under Australian criminal law even if they take place overseas.<sup>51</sup>

The proscription provisions and the associated offences clearly have implications for the right to freedom of association, recognised under art 22 of the ICCPR, which reads, *inter alia*:

1. Everyone shall have the right to freedom of association with others ...
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others ...

The right to freedom of association is not absolute. It may be limited by proportionate or 'necessary' measures that are prescribed by law and designed to achieve certain enumerated ends. Of those ends, the protection of public safety, public order, and national security seem the most relevant justifications for anti-terrorism laws, though they could also be justified as protecting the 'rights and freedoms of others', such as the rights to life of potential terrorist targets.

It may be a disproportionate limitation on freedom of association to ban an organisation on the basis that it is, for example, indirectly assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs), given the breadth of the definition of 'terrorist act' under the *Criminal Code*. To return to the example outlined above, of the deliberate assault upon a 'scab' by a picketing worker, it seems possible that the listing provisions permit the government to ban a trade union to which that worker belongs, on the basis that its coordination of the relevant picket line may 'indirectly foster' the perpetration of the relevant assault – a 'terrorist act'.

The exclusion of substantive judicial involvement from the proscription process may also deprive Australia's proscription measures of the proportionality needed to comply with art 22 of the ICCPR. Indeed, there seems to be no reason why proscription could not take place on the basis of a judicial declaration sought by the Attorney-General.<sup>52</sup> Judicial review of proscription decisions will be available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) only on questions of law, rather than on their merits.<sup>53</sup> Judicial oversight on the

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46 *Criminal Code Act 1995* (Cth) s 102.2.

47 *Criminal Code Act 1995* (Cth) s 102.4.

48 *Criminal Code Act 1995* (Cth) s 102.5. An accused is strictly liable for training or receiving training from a listed terrorist organisation: see s 102(5)(3), as amended by the *Anti-terrorism Act 2004* (Cth).

49 *Criminal Code Act 1995* (Cth) s 102.6.

50 *Criminal Code Act 1995* (Cth) s 102.7.

51 See *Criminal Code Act 1995* (Cth) s 102.9.

52 Indeed, s 30A of the *Crimes Act 1914* (Cth) permits the proscription of organisations on certain narrow grounds by Federal Court order upon application of the Attorney-General. Head, above n 21, 676.

53 Hocking, above n 8, 368.

merits of proscription would help to ensure against politically motivated or arbitrary proscriptions.

The exclusion of the judiciary from decisions regarding national security is commonly justified by a need to base such decisions on confidential information; 'private' or closed proceedings are felt to be anathema to the judicial process. Similarly, the speculative nature of many 'national security' decisions lacks judicial character. Zemach has stated:

Security decisions involve military, diplomatic, technical, moral and other considerations. They are naturally based on secret information touching national security, and on plans, assumptions, forecasts and techniques not susceptible to judicial approval.<sup>54</sup>

Indeed, the judiciary commonly defers to executive decisions regarding national security, reinforcing the view that national security decisions are properly the province of the executive.<sup>55</sup>

However, superior court cases have generally addressed the circumstance where the 'national security' claims have been raised as a shield to protect government decisions from scrutiny,<sup>56</sup> rather than as a sword to create liabilities in criminal law. In this respect, Hocking has persuasively argued, with regard to the new listing provision:

[The provision is] subversive of the rule of law in its failure to allow for a trial in [respect of proscription], it breaches the notion of equality before the law in its creation of groups for which the usual judicial process does not apply and it breaches absolutely the separation of powers in even allowing for such a use of executive power.<sup>57</sup>

An instructive case in this respect is *Al-Nashif v Bulgaria*, a case under the European Convention on Human Rights ('ECHR').<sup>58</sup> In that case, the European Court of Human Rights stated:

Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information.<sup>59</sup>

The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis

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54 Yaacov Zemach, *Political Questions in the Courts* (1976), quoted in H P Lee, Peter Hanks and Vince Morabito, *In the Name of National Security: The Legal Dimensions* (1995) 182.

55 See generally, *ibid* ch 7, outlining case law from the UK, Australia and Canada.

56 See *Council for Civil Service Unions v Minister for Civil Service* [1985] AC 374; *Church of Scientology v Woodward* (1982) 154 CLR 25.

57 Hocking, *above* n 8, 370. Indeed, it is possible that the proscription provisions breach the doctrine of the separation of powers in the *Commonwealth Constitution*; a challenge has not yet eventuated. This however does not necessarily mean that the provisions breach Australia's human rights obligations.

58 [2002] Eur Court HR 497. ECHR jurisprudence is persuasive authority but is of course not binding on the HRC in interpreting the ICCPR.

59 *Ibid* [123].

in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary.<sup>60</sup>

*Al-Nashif v Bulgaria* concerned the detention for the purposes of deportation of an alien on national security grounds, a situation distinguishable from proscription under the *Criminal Code*. However, the case indicates that, under international human rights law, courts should have a meaningful role in supervising national security decisions that have a major impact on any recognised right.

On the other hand, in *MA v Italy*, the HRC endorsed the legislative proscription of the Italian fascist party under art 22(2), which gave rise to criminal liability for a person involved in the reorganisation of that party,<sup>61</sup> thus confirming that non-judicial proscription of organisations can be compatible with the ICCPR. The Italian fascist party was implicitly characterised by the HRC as an organisation 'engage[d] in activity ... aimed at the destruction of ... rights and freedoms recognised' in the ICCPR. Article 5 of the ICCPR provides that the treaty may not be interpreted as providing for rights to engage in such activity. By similar reasoning, the proscription of 'terrorist' organisations by executive regulations, which are overseen by the legislature, could be permissible under art 22(2). However, one may note that more discretionary executive power is conferred under the Australian provisions, thus increasing the scope for arbitrary exercises of that power. Furthermore, the breadth of the legislative definition of 'terrorism' means that the listing provisions potentially extend to many organisations that do not commit, or even contemplate, the activities outlined in art 5 of the ICCPR.<sup>62</sup>

Similar proscription provisions, accompanied by a similarly broad definition of terrorism, were enacted in the UK under the *Terrorism Act 2000* (UK). These provisions were not criticised by the HRC after its most recent examination of UK law and practice in 2001.<sup>63</sup> The HRC's silence implies that the UK provisions comply with art 22, which in turn implies similar compatibility for the Australian provisions. Nevertheless, concern should be held for the potential for abuse of the non-judicial listing power, especially given the breadth of the definition of 'terrorism'.

As with the derivative offences defined in s 101 of the *Criminal Code*, the offences prescribed in s 102 may suffer from a lack of adequate circumscription,

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60 Ibid [124]. See also *Klass v Federal Republic of Germany* (1978) 28 Eur Court HR (ser A) [55]–[57].

61 Communication no 117/81, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, Volume 2 (1990), 31, [13.3] CCPR/C/OP/2.

62 See also *Refah Partisi (the Welfare Party) v Turkey* [2003] Eur Court HR 87 ('*Refah Partisi*'). In that case, the dissolution by judicial decision of a fundamentalist Islamic political party was found not to breach the ECHR guarantee of freedom of association, as it helped maintain Turkey's secular political system. There was no evidence that the party was itself a terrorist group, though some of its members were sympathetic to Islamic terrorism. *Refah Partisi* of course was an instance of judicial, rather than executive, proscription of organisations.

63 The UK's human rights record was examined pursuant to the reporting system in art 40 of the ICCPR. In Concluding Observations issued pursuant to a dialogue on the UK's most recent report, the HRC did not comment on the proscription provisions of the *Terrorism Act 2000* (UK): *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, UN Doc CCPR/CO/73/UK (2001).

raising potential problems under arts 9(1) and 15 of the ICCPR. In particular, the criminalisation of the reckless 'support' of a terrorist organisation is problematic. 'Support' is defined as intentional activity that helps an organisation directly or *indirectly* engage in preparing, planning, assisting in or fostering the doing of a terrorist act, whether or not that act occurs. 'Support' is not further defined. However, it is clearly something other than the conduct proscribed by the other s 102 offences: recruitment, training, fundraising, and the provision of resources.

'Support' could potentially include the publication of views that are favourable to the particular organisation.<sup>64</sup> In this respect, the 'support' provision may breach art 19 of the ICCPR, which recognises freedom of expression. Freedom of expression is a right that is qualified in a similar manner to freedom of association, that is by proportionate measures prescribed by law and designed to achieve certain enumerated ends, including public order and national security. The criminalisation of the expression of 'support' for a 'terrorist organisation', especially when members of that organisation may feasibly be classified as 'freedom fighters' against a repressive foreign government (such as the African National Congress in South Africa or the Falantil in East Timor in the past, and now the Chechen separatists in Russia) could be a disproportionate restriction on freedom of expression.<sup>65</sup>

The human rights issues arising from the *Criminal Code* amendments largely stem from the breadth of the definition of 'terrorist act'. The acts specified in the definition seem to be deserving of criminal punishment (with the possible moral exception of acts that are carried out in opposition to egregious political regimes). However, the breadth of the definition of a 'terrorist act' means that the definition of a 'terrorist organisation' is also broad. The derivative offences associated with terrorist acts, as well as the offences arising from certain associations with a 'terrorist organisation', consequently encompass a wide range of activities, many of which do not remotely resemble terrorist activity, and may not even deserve to attract criminal liability. The 'terrorist net' cast under the *Criminal Code* is too wide, and leaves the prosecuting authorities and the government – particularly in regard to its listing powers and the exercise of extraterritorial jurisdiction – too much discretion to pick and choose the acts that will be branded as 'terrorist' and will attract serious legal sanctions on conviction.

## B The ASIO Amendment Act

The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) and the *Australian Security Intelligence Organisation Legislation Amendment Act 2003* (Cth) have inserted substantial amendments into the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*'). The *ASIO Act* now authorises the detention for questioning by the Australian Security Intelligence Organisation ('ASIO') of persons where there are reasonable grounds for believing that that person is able to provide

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64 Hocking, above n 8, 369–70.

65 Ricketts, above n 28, 141.

information that will ‘substantially assist the collection of intelligence that is important in relation to a terrorism offence’.<sup>66</sup> Such detention may take place pursuant to a ‘warrant for questioning’ issued by an ‘issuing authority’.<sup>67</sup> An issuing authority is either a federal magistrate or a judge, though that person is acting in his or her personal rather than judicial capacity.<sup>68</sup> ASIO agents must question the detainee in the presence of a ‘prescribed authority’, who will normally be a former judge.<sup>69</sup> Detention of the questioned person may be authorised by a prescribed authority if he or she believes it is necessary to prevent the person subjected to the warrant from absconding, or to prevent the compromising of a terrorist investigation.<sup>70</sup> Continuous detention under a ‘warrant for questioning’ can last for a period of seven days,<sup>71</sup> during which a total of 24 hours of questioning is permitted.<sup>72</sup> Continuous periods of questioning may last up to eight hours.<sup>73</sup> Further warrants may be issued, which can in turn be used as the basis for further periods of seven day detention, so long as they are based on ‘materially different’ information to any previous warrants.<sup>74</sup>

A person subjected to such a ‘warrant for questioning’ is permitted to contact a lawyer of his or her choice.<sup>75</sup> Questioning may however commence in the absence of that lawyer if permitted by the prescribed authority.<sup>76</sup> The lawyer is permitted to be present during the questioning, and must have reasonable opportunities to advise his or her client during breaks in the questioning.<sup>77</sup> Otherwise the lawyer is not permitted to interrupt questioning except to ‘request clarification of an ambiguous question’.<sup>78</sup> Indeed, the prescribed authority can direct the lawyer’s removal if that lawyer is deemed to be ‘unduly disrupting the questioning’.<sup>79</sup> In such a situation, the detainee is permitted to contact an alternative lawyer.<sup>80</sup> Furthermore, the prescribed authority may prevent contact with a specific lawyer if he or she is satisfied that such contact might compromise an investigation into an actual or likely future terrorist offence.<sup>81</sup> In such circumstances, the detainee is permitted to contact another lawyer, though that lawyer may be similarly disallowed by the prescribed authority.

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66 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34C(3)(a).

67 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34D. Under s 34C, the Attorney-General must consent to the request to issue the warrant.

68 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34AB. See also s 34SA(2).

69 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34B. If there are insufficient numbers of former judges available to perform the task, the Minister may appoint a serving State or Territory judge, or a member of a federal administrative tribunal, as a prescribing authority.

70 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34F.

71 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HC.

72 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HB(6). The time is increased to 48 hours if an interpreter is necessarily present during questioning: s 34HB(11).

73 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HB(1), (2).

74 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34D(1a)(b)(i).

75 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34C(3B).

76 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34TB.

77 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34U(3).

78 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34U(4).

79 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34U(5).

80 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34U(6).

81 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34TA.

The *ASIO Act* contains certain safeguards for the rights of persons subjected to a warrant. For example, such a person must at all times be treated with humanity and with respect for their human dignity.<sup>82</sup> Only proportionate force may be used in taking a person subjected to a warrant into custody.<sup>83</sup> All questioning of the person must be video-taped.<sup>84</sup> A detainee is also permitted to seek, via the agency of a lawyer, a remedy from a federal court in relation to the warrant, or treatment in connection with a warrant.<sup>85</sup> Presumably such remedies include the writ of habeas corpus if the detention is unlawful for failure to comply with the procedural and substantive requirements of the *ASIO Act*.<sup>86</sup>

The legislation contains a sunset clause. The new division will cease to have effect in 2006, three years after its enactment,<sup>87</sup> though it is of course possible that Parliament will then enact similar amendments.<sup>88</sup>

## 1 Rights Regarding Detention

As a result of the new amendments, the *ASIO Act* authorises the detention of terrorist suspects and non-suspects without judicial authorisation. These new powers raise serious issues regarding compatibility with international human rights law.

The main concern is that such detention may amount to arbitrary detention, contrary to art 9(1). In *van Alphen v Netherlands*, the HRC stated that, in the context of art 9(1):

‘arbitrariness’ ... must be interpreted ... to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody [and presumably any detention] must not only be lawful but reasonable in all the circumstances. Further, remand in custody [and presumably detention without charge] must be necessary in all of the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.<sup>89</sup>

In another context, the HRC has defined ‘non-arbitrary’ to mean ‘reasonable in the particular circumstances’.<sup>90</sup> ‘Reasonableness’ in turn has been interpreted as meaning that the relevant measure ‘must be proportional to the end sought and be necessary in the circumstances of any given case’.<sup>91</sup>

82 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34 J.

83 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34JB.

84 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34K.

85 *Australian Security Intelligence Organisation Act 1979* (Cth) s34E(1)(f).

86 Indeed, exclusion of the right of courts to review the lawfulness of detention, and order release if detention is unlawful, would breach the *Commonwealth Constitution*: see *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 36–7.

87 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34Y.

88 See George Williams, ‘Amended Bill Hits Security Target’, *The Australian* (Sydney), 27 June 2003, 11, in which the argument was made that ‘there would need to be a compelling justification’ to re-enact these provisions.

89 *van Alphen v The Netherlands*, [5.8], UN Doc CCPR/C/39/C/305/1988 (1990).

90 Human Rights Committee, ‘General Comment 16’ in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 142, [4], UN Doc HRI/GEN/1/Rev.6 (1994). This General Comment concerned art 17, which recognises the right to privacy. However, it is likely that the word ‘arbitrary’ carries the same meaning in every right in which it appears in the ICCPR.

91 *Toonen v Australia*, [8.3], UN Doc CCPR/C/50/D/488/1992 (1994).

Therefore, the prohibition on arbitrary detention equates with a requirement that detention be reasonable and proportionate in the circumstances. Arbitrariness is therefore a slippery concept. Arbitrariness is in the eye of the beholder: what seems reasonable and proportionate to one person may seem unreasonable and disproportionate to another. Furthermore, the arbitrariness of a particular detention will vary according to the circumstances surrounding that detention. The danger posed by modern terrorism probably justifies more extensive detention measures by a government, as the need to combat terrorism expands the potential scope for 'non-arbitrary' detentions. Can it therefore be asserted that the threat presently posed to Australia by terrorists justifies these new powers of detention for the purposes of questioning by ASIO? Is the measure justified in order to protect not only national security and public order, but also the rights of others, such as the rights to life of potential terrorist targets?

The following observations tell in favour of the proportionality of the measures. A warrant for questioning is only issued if it is reasonably believed that it will 'substantially assist' in the accumulation of 'important' intelligence regarding terrorism.<sup>92</sup> Detention, as well as further orders of detention up to a period of seven days, is only authorised under a warrant if necessary to prevent a person's escape, or the compromising of a terrorism investigation.<sup>93</sup> So long as these constraints on the issuance of warrants and detention orders are applied in practice, Australians stand to benefit from the gathering by ASIO of greater intelligence that will hopefully thwart planned terror attacks, or apprehend the perpetrators thereof.

On the other hand, Hocking has warned against the effective placement of 'intelligence on the same legal plane as evidence': 'Intelligence is not "hard" information. Intelligence may be "speculative and unverified" and should have little evidentiary value.'<sup>94</sup>

Hocking's concerns are given added force by the apparent failures of our intelligence services in gathering intelligence on the status of Iraq's weapons of mass destruction programmes, and in anticipating the post-referendum violence in East Timor in 1999, as well as by recent accusations by Lieutenant-Colonel Lance Collins that our intelligence services are over-politicised and often report what the government wants to hear.<sup>95</sup>

Several other factors tell against the proportionality of the detention measures under the *ASIO Act*. First, the detention powers are enlivened if a person is believed to have information relating to terrorism. As discussed above, the legal definition of a 'terrorist act' in Australia is very broad. Detention cannot reasonably be justified for the purpose of getting information regarding every possible offence caught within that definition; some of those offences are simply not serious enough to justify the utilisation of such powers.

Secondly, the Australian legislation is distinctly more oppressive in one important respect than that enacted by other states facing comparable or even

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92 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34C(3A).

93 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34F.

94 Hocking, above n 8, 365.

95 See Editorial, 'Intelligence Called into Question Again', *The Age* (Melbourne), 16 April 2004, 10.

greater risk of terrorist attack, particularly the US and the UK. Of those three prominent members of the 'Coalition of the Willing', only Australia has enacted legislation authorising the long-term detention of non-suspects.<sup>96</sup>

Thirdly, the need for the augmentation of ASIO's considerable powers must be questioned. Prior to the amendments, ASIO already had the power, in certain circumstances, to 'bug phones, install listening devices in offices and homes, intercept telecommunications, open people's mail, monitor online discussion, break into computer files and databases, and use personal tracking devices'.<sup>97</sup> At the least, the proposal of new ASIO powers could have been preceded by a security audit of the necessity for such. An extensive audit had been carried out in 2000 prior to the Sydney Olympic games, so an update 'would not have been a major task in view of the extensive work already completed'.<sup>98</sup>

Fourthly, the detentions are not authorised by a judicial body. Judicial authorisation of the detentions would quarantine the process from the political arms of government. Article 9(3) of the ICCPR states, *inter alia*: 'Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...'

Persons detained under the *ASIO Act* are not detained on a criminal charge, and technically may not benefit from the safeguard provided in art 9(3). It seems an absurd result that non-suspects believed to have information about terrorism have fewer rights than actual terrorist suspects!<sup>99</sup> This circumstance lends weight to the conclusion that the detention of non-suspects without judicial review, especially for a period of seven days, is a breach of art 9(1), even if not technically of art 9(3).<sup>100</sup>

It is possible, however, that the fact that the prescribed authorities are normally former judges may provide a sufficient safeguard to save detentions under the *ASIO Act* from being classified as arbitrary contrary to art 9(1). As stated by the High Court majority in *Grollo v Palmer* ('*Grollo*'), a case concerning the constitutionality of the conferral of the non-judicial power of issuing warrants for telephone interception on federal judges:

[Judges are] accustomed to the dispassionate assessment of evidence. ... In other words, the professional experience and cast of mind of a Judge is a desirable guarantee that the appropriate balance will be kept between the law enforcement agencies on the one hand and criminal suspects or suspected sources of information about crime on the other.<sup>101</sup>

96 See Michaelsen, above n 1, 283. See also Head, above n 21, 674.

97 Head, above n 21, 678–9 (footnotes omitted).

98 Wright-Neville, above n 5, 61.

99 Michaelsen, above n 1, 284.

100 The shortest period of detention prior to presentation by a suspect before a judicial body that has been found to breach art 9(3) is three days: see *Borisenko v Hungary*, UN Doc CCPR/C/76/D/852/1999 (2002).

101 *Grollo v Palmer* (1995) 184 CLR 348, 367. In Australia, it is *prima facie* unconstitutional for federal judges to exercise non-judicial power (see *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254). One exception to this principle, as discussed in *Grollo*, is the 'designated person' exception, whereby a federal judge may take on certain non-judicial functions in his or her personal capacity, as opposed to his or her judicial capacity (see also *Hilton v Wells* (1985) 157 CLR 57).

However, the situation in *Grollo* may be distinguished from the scenario under the *ASIO Act*, as the relevant power in *Grollo* to issue warrants was conferred on serving judges. A former judge, lacking the security of tenure that arises from a current judicial appointment, may be tempted to cultivate executive favour in order to increase the chances of reappointment as a prescribed authority,<sup>102</sup> thus jeopardising the rights of a person subjected to a detention order.

In light of the above analysis, it is concluded that powers of detention authorised under the *ASIO Act* breach art 9(1) of the ICCPR.

## 2 Freedom from Self-Incrimination

As noted, warrants for questioning are issued against a person when there are reasonable grounds for believing that that person is able to provide information that will assist in the collection of intelligence to combat terrorism. Under s 34G of the *ASIO Act*, it is an offence to fail to supply information, including records or other ‘things’, requested under a warrant. Of course, it is a defence if the person does not have the said information, records, or things. The evidential burden is on the person to prove that there is a reasonable possibility that they do not have such information, records, or things.<sup>103</sup> The prosecution then has the legal burden to prove that the defendant in fact had the relevant information.

Under art 14(3)(g), one may not be compelled to incriminate one’s self. Of course, the delivery of information in response to questioning by ASIO agents, which is compelled by law, may result in the revelation of self-incriminating information. Section 34G(8) clarifies that potential self-incrimination does not absolve a person of his or her duty to provide information, records, or things in accordance with the section. However, s 34G(9) states that any evidence gained pursuant to questioning under a warrant may not be used in evidence against the questioned person, other than proceedings regarding an offence (for example, failure to provide information in response to questioning by ASIO) under s 34G. Though s 34G may prohibit the direct use of answers in subsequent criminal proceedings, nothing prevents the ‘derivative’ use of such answers to uncover evidence that can be used against the person in future criminal proceedings.<sup>104</sup> Such derivative use of information elicited by legal compulsion may be a breach of art 14(3)(g) of the ICCPR. However, it may be noted that the HRC has not

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102 Michaelsen, above n 1, 285. Such partiality is less likely to come from a sitting judge with judicial tenure. Ironically, it is likely that the appointment of a sitting federal judge to the position of a prescribed authority would be unconstitutional in Australia because such an appointment might be deemed ‘incompatible’ with the judge’s judicial role. See generally, on this constitutional principle of incompatibility, Gerard Carney, ‘*Wilson and Kable: The Doctrine of Incompatibility: An Alternative to Separation of Powers?*’ (1997) 13 *Queensland University of Technology Law Journal* 175.

103 See *Criminal Code 1995* (Cth) s 13.3(3).

104 Michaelsen, above n 1, 285.

dealt with the issue of derivative use immunity, and the law on this issue in a number of jurisdictions is complex.<sup>105</sup>

### 3 *Rights of the Child*

Special rules pertain to juveniles under the legislation. Persons under the age of 16 may not be subjected to a warrant.<sup>106</sup> Persons between the ages of 16 and 18 may only be detained if they are themselves suspected of being likely to commit, be committing, or have committed a terrorist offence.<sup>107</sup> Minors must be permitted to contact a parent or guardian,<sup>108</sup> or another person able to represent his or her interests.<sup>109</sup> Minors may only be questioned in the presence of a parent, guardian, or other person able to represent his or her interests, for continuous periods of no more than two hours.<sup>110</sup> Minors can still be detained without charge, and without presentation before a judicial body, for seven days.

If the impact of the *ASIO Act* on adults breaches human rights standards, the parallel impact on juveniles breaches those same human rights in conjunction with art 24 of the ICCPR, which generally guarantees the protection of the rights of children, and a number of rights in the *Convention on the Rights of the Child* ('CRC').<sup>111</sup> The protection afforded to children under art 9(1) of the ICCPR is supplemented by art 37(b) of the CRC. In addition to specifically prohibiting the unlawful or arbitrary detention of children, art 37(b) adds: 'The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'.

On the other hand, juveniles detained under the *ASIO Act* are necessarily terrorist suspects. Therefore, such detention is less likely to be classified as 'arbitrary', contrary to art 9(1), notwithstanding the juvenile status of the detainees. Furthermore, it is arguable, given the constraints on the conditions in which a warrant is authorised,<sup>112</sup> that the detention of a juvenile will only be authorised 'as a last resort' and for the shortest appropriate time.<sup>113</sup> Indeed, it is debateable whether the qualifications of 'last resort' and 'shortest appropriate time' add much substance to the guarantee that detention not be 'arbitrary'.

105 See, eg, *R v S (RJ)* [1995] 1 SCR 451; *British Columbia (Securities Commission) v Branch* [1995] 2 SCR 3, regarding the law in Canada. In Canada, evidence may not be used against a person if that evidence would not have been discovered 'but for' that person's compelled testimony: see Peter W Hogg, *Constitutional Law of Canada* (3<sup>rd</sup> ed, 1997) [51]–[58]. The same principles would probably exclude evidence introduced against a person if it would not have been uncovered apart from that person's compelled statement under the *ASIO Act*. See also *US v Hubbell*, 530 US 27 (DC Cir, 2000), on the status of the law in the US, where the protection against derivative use immunity under the Constitution is very strong.

106 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34NA(1).

107 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34NA(2)(a).

108 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34NA(6)(a)(i).

109 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34NA(7).

110 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34NA(6)(b).

111 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1144 UNTS 123 (entered into force 2 September 1990). Australia became a party to the Convention on the Rights of the Child on 16 January 1991.

112 See above nn 92, 93.

113 Cf Michaelsen, above n 1, 286.

### III THE POSSIBILITY OF DEROGATION

The above commentary suggests that a number of provisions of the ICCPR have been breached by Australia's anti-terrorism legislation. It is likely that the following provisions have been breached: arts 9(1) (prohibiting arbitrary and unlawful detention) and 14(3)(g) (prohibiting compulsory self-incrimination). If such violations arise with respect to persons under 18, a concomitant violation of art 24, which provides for special protection for the rights of children, will arise. Article 22, regarding freedom of association, may be breached by the non-judicial proscription of organisations authorised under the *Criminal Code*, while the vague proscription therein of certain derivative offences could breach art 15, which requires that criminal laws be clear and precise. Finally, the future implementation and interpretation of the *Criminal Code* could breach arts 19 (regarding freedom of expression), and 26 (the right of non-discrimination).

Given these likely and potential breaches, this raises the question whether the provisions could be justified as a derogation from Australia's ICCPR obligations.

Under art 4 of the ICCPR, states parties are permitted to derogate from certain ICCPR obligations 'in times of public emergency which threaten the life of the nation ... to the extent strictly required by the exigencies of the situation'.

Article 4(1) requires that states officially proclaim the existence of the relevant emergency. This requirement ensures that a state's population is informed of the emergency, and the need for derogatory measures.<sup>114</sup> Article 4(3) requires that states parties formally derogate from the ICCPR by notifying the Secretary-General of the United Nations. Australia has not made such an official proclamation, nor has it formally derogated from the ICCPR under art 4(3). However, failure to comply with the formal requirements of art 4 does not deprive a state of 'its substantive right to take derogatory measures'.<sup>115</sup> Therefore, Australia can potentially attempt to justify its anti-terrorist measures as derogations in the absence of compliance with art 4(3).

Does the current terrorist threat to Australia constitute a 'public emergency threatening the life of the nation', given that there have been no major terrorist attacks in this country? Do the attacks of 11 September 2001 in the USA, the attacks in Bali on 12 October 2002, which killed 88 Australians, and/or the 11 March 2004 attacks in Madrid justify the perception of an 'emergency' within Australia?

Certainly, terrorist emergencies have in the past justified derogatory measures.<sup>116</sup> Terrorist threats have historically emanated from local groups, often with secessionist ambitions, with a history of intermittent attacks on civilians in the one state. 'Typical' terrorist threats include those currently posed by ETA to Spain, Palestinian terrorists against Israel, and Chechen terrorists against Russia,

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114 Ibid [2].

115 See *Landinelli Silva v Uruguay* (34/1978), *Selected Decisions under the Optional Protocol* (1985) [9.3].

116 See *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539.

and once posed by the IRA to the UK. However, the threat posed by al Qaeda and its affiliates is distinguishable from the terrorist emergencies that have historically justified derogations.<sup>117</sup> Their attacks are not so constant, their demands are neither clear nor consistent and they are more decentralised in their organisational structure. Most alarmingly, they have manifested a new level of ruthlessness – a desire to kill and maim as many people and destroy as much infrastructure as possible. Finally, their targets are more random, and less easily ascertainable. Therefore, it is submitted that the fact that Australia's intelligence organisations have not identified a specific threat is not necessarily decisive of the matter, given that Australia has been identified as a 'target' in various communiqués issued by terrorist leaders.<sup>118</sup>

On the other hand, governments – assisted by the media – have tended to overestimate and even exaggerate the global terrorist threat. There is a big difference between the threat that terrorists aspire to represent, the threat they would like us to believe that they represent, and the threat that they actually represent.

Given the distinguishing features of modern global Islamic terrorism, few precedents can assist in determining whether the current terrorist threat is serious enough to justify derogation by Australia.<sup>119</sup> The issue was recently considered by the Court of Appeal in the UK in *A v Secretary of State for the Home Department*.<sup>120</sup> The case concerned the validity of a UK derogation from the ECHR. The derogatory law concerned the detention of alien terrorist suspects, and the relevant emergency was the threat posed by international terrorism since September 11. The Court of Appeal grappled with the requirement, gleaned from the previous jurisprudence of the European Commission on Human Rights<sup>121</sup> in *The Greek Case*, that an emergency must be 'actual or imminent' before derogation is permitted.<sup>122</sup> The Court confirmed that the requirement of 'imminence' referred to the imminence of an emergency rather than the imminence of an actual attack, a distinction that is 'by no means an unreal one'.<sup>123</sup> Lord Justice Brooke quoted, with approval, from the first instance decision of the Special Immigration Appeals Commission ('SIAC'):

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117 See also Michaelsen, above n 1, 292–3.

118 Cf Michaelsen, above n 1, 300. Most recently, an al Qaeda-affiliated organisation explicitly singled out Australia and Italy in a threat to commit major terrorist attacks unless those countries withdrew their troops from Iraq: see, eg, Ross Peake, 'We Won't Bow to Terrorism: "Pools of Blood" Threat to Australia', *Canberra Times* (Canberra), 26 July 2004, 1.

119 See Alex Conte, 'Terror Meets Tyranny? The Interface between Counter Terrorism and Human Rights' (2002) 9(3) *Murdoch University Electronic Journal of Law* [37]–[39], <<http://www.murdoch.edu.au/elaw/issues/v9n3/cont93.html>> at 15 November 2004, arguing that art 4 of the ICCPR only applies 'during the period of terrorist activity itself'.

120 [2004] QB 335.

121 The European Commission was a quasi-judicial organ which handled complaints at first instance until it was abolished by the 11<sup>th</sup> Protocol to the ECHR.

122 See *The Greek Case* (1969) 12 *Yearbook of the European Convention on Human Rights* 1, [153]. See also Richard B Lillich, 'Paris Minimum Standards of Human Rights Norms in a State of Emergency' (1985) 79 *American Journal of International Law* 1072, 1073 [A(1)(b)].

123 Paragraph 24 of the decision of the Special Immigration Appeals Commission at first instance, cited in *A v Secretary of State for the Home Department* [2004] QB 335, [83].

The measures which involve the need to derogate [in the UK instance] are required to try to prevent the outrages which would have a disastrous effect if they occurred. It would be absurd to require to authorities to wait until they were aware of an imminent attack before taking the necessary steps to avoid such an attack ... What is required is a real risk that an attack will take place unless the necessary measures are taken to prevent it ... An emergency can exist and certainly can be imminent if there is an intention and a capacity to carry out serious terrorist violence even if nothing has yet been done, and even if plans have not reached the stage where an attack is actually about to happen.<sup>124</sup>

The SIAC had also noted that 'if one attack were to take place it could well occur without warning and be on such a scale as to threaten the life of the nation'.<sup>125</sup> The Court of Appeal confirmed the SIAC's decision that the post-September 11 threat of terrorism constituted a public emergency that enabled a right of derogation by the UK under the ECHR.

The decision in *A v Secretary of State for the Home Department* indicates that the present terrorist threat could be classified as a public emergency for the purposes of an Australian derogation. On the other hand, it may be noted that the Parliamentary Assembly of the Council of Europe in 2002 expressly called on all states parties to the ECHR to refrain from derogation in relation to any measures taken in the post-September 11 'war on terror'.<sup>126</sup> To date, only the UK has derogated in this respect under the ECHR. If other European nations feel able to refrain from derogation, it may be that a relevant emergency does not exist for Australia – it is perhaps unlikely that Australia faces a greater terrorist threat than most European countries.<sup>127</sup> Still, the Madrid bombings demonstrated that European countries are at risk of major terrorist attacks. Further, the Bali bombings killed more Australians than the people of any other single nation. Though that atrocity was committed on foreign soil, it is possible that Australians, who have historically dominated tourism in Kuta (the site of the bomb blast), were a prime target of those bombs. Furthermore, Australia's prominent role as a member of the 'Coalition of the Willing' in Iraq has probably raised its profile as a terrorist target significantly relative to other countries, including major European powers such as France and Germany.

The following commentary will proceed on the presumption that the present terrorist threat does constitute an 'emergency' under art 4 for Australia. Whilst the characterisation of such a vague threat as a public emergency for such purposes may seem to unduly threaten the enjoyment of human rights, it is important to note that derogation measures must satisfy various substantive criteria in order to be valid.

They must be proportionate, that is 'justified by the exigencies of the [relevant emergency] situation'. As noted above, proportionality is a slippery concept, particularly so when a certain derogatory measure must be 'balanced' against such a vague threat as that currently posed by global fundamentalist terrorism. It

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124 Ibid.

125 As quoted by Lord Woolf CJ: *ibid* [33].

126 See *Combating Terrorism and Respect for Human Rights*, Resolution 1271 (2002) Council of Europe <[http://assembly.coe.int/Documents/AdoptedText/ta02/eres1271.htm#\\_ftn1](http://assembly.coe.int/Documents/AdoptedText/ta02/eres1271.htm#_ftn1)> at 15 November 2004.

127 See Michaelsen, above n 1, 293.

is difficult to envisage how a 'proportionate' response to terrorism could encompass the authorisation of 'arbitrary' detention. If the relevant detention, for example of a non-suspect believed to possess intelligence about terrorism, is indeed a proportionate derogation, surely it cannot be classified as 'arbitrary' and therefore contrary to art 9(1).<sup>128</sup> If the measure does not contravene art 9(1), derogation is irrelevant. Similarly, if the 'listing' provisions constitute a breach of art 22, and are therefore not measures that are 'necessary' to protect 'national security', it seems that such a measure cannot pass muster under art 4, as it does not authorise 'unnecessary' measures.<sup>129</sup> It is submitted that derogations can only satisfy a proportionality test if they concern unqualified rights, such as the freedom from self-incrimination in art 14(3)(g), which are not otherwise qualified by concepts such as proportionality or reasonableness.

Article 4(2) specifies that certain rights are non-derogable, including art 15.<sup>130</sup> In its recent General Comment 29 on art 4, the HRC, perhaps controversially,<sup>131</sup> suggested that there are more non-derogable rights in the ICCPR beyond those expressly identified in art 4(2). For example, it has noted that certain procedural safeguards must be non-derogable, as their derogability would threaten the sanctity of the express non-derogable rights, such as the art 7 right to be free from torture, inhuman and degrading treatment or punishment.<sup>132</sup> Such rights arguably include art 14(3)(g) (which prohibits forced self-incrimination), the breach of which could threaten the right to be free from torture, inhuman and degrading treatment.<sup>133</sup>

Australia's right of derogation is further limited by the prohibition within art 4 of certain types of discrimination. Derogatory measures may not discriminate 'solely' on number of enumerated grounds, including 'religion'. Therefore, any

128 See Sarah Joseph, 'Human Rights Committee: General Comment 29' (2002) 2 *Human Rights Law Review* 81, 97.

129 See also Joseph, Schultz and Castan, above n 15, [25.55].

130 The following rights are non-derogable under art 4(2):

article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paras 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law, ie the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion)

See 'General Comment 29' in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 187, [7], UN Doc HRI/GEN/1/Rev.6 (1994).

131 It is beyond the scope of this article to analyse this General Comment in detail. See generally Joseph, above n 128.

132 'General Comment 29' in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty bodies*, 190, [15], UN Doc HRI/GEN/1/Rev.6 (1994).

133 See 'General Comment 13' in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 138, [14], UN Doc HRI/GEN/1/Rev.6 (1994); 'General Comment 20' in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 152, [12], UN Doc HRI/GEN/1/Rev.6 (1994), drawing the link between art 7 and art 14(3)(g). The Australian legislation arguably compels self-incrimination, but it must be noted that it does not authorise breaches of art 7 in order to prompt self-incrimination.

invidious discrimination against Muslims, if it should arise in the implementation of the counter-terrorist laws, could not be justified as a derogation from the ICCPR.

Derogatory measures must not, under art 4(1), be 'inconsistent with [the state's] other obligations under international law'. Therefore, it does not in any way absolve Australia from possible breaches of other human rights treaties, such as the CRC, which does not contain a derogation provision.<sup>134</sup> Furthermore, it does not authorise derogation from norms protected under customary international law. The HRC, for example, has stated that the prohibition on 'arbitrary deprivations of liberty' in art 9(1), is a 'peremptory norm of international law' that cannot therefore be subjected to derogation.<sup>135</sup>

Therefore, few if any of the breaches of Australia's ICCPR obligations made by the anti-terrorism laws are likely to be potentially 'saved' by the possibility of derogation.<sup>136</sup>

#### IV CONCLUSION

This author concludes that Australia's counter-terrorism laws breach international human rights standards. Nevertheless, many Australians undoubtedly feel that anti-terrorism laws, regardless of their international human rights compatibility, are desirable given the positive impact they may have on Australia's engagement in the 'war on terror'. This reaction is typical of a population where the majority perceives itself to be under no threat from the new laws, and under a great threat from terrorists.

This may not however be a realistic assessment of the present situation. While it is probably true that Australia is under greater threat of terrorist attack than at any previous time in its history, the popular perception of the level of that threat is amplified by an occasionally hysterical press,<sup>137</sup> and the atmosphere of moral panic which dictates that opponents of counter-terrorism laws are unpatriotic and for 'them' against 'us',<sup>138</sup> or for evil against good.<sup>139</sup> Furthermore, the enforcement of these laws may provoke hostile reactions, which sabotage the possibility of cooperation with certain communities in uncovering terrorist plots,

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134 See Joseph, Schultz and Castan, above n 15, [25.59].

135 'General Comment 29' in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 189, [11], UN Doc HRI/GEN/1/Rev.6 (1994).

136 The ECHR has suggested in its jurisprudence that States have a wide margin of appreciation when adopting derogatory measures under the ECHR. See *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539, [43]. Thus, under the ECHR, States are given a strong 'benefit of the doubt' when the human rights compatibility of their derogations is examined by the Court. However, the HRC has indicated in General Comment 29 that 'it will scrutinize a State's justification for derogation carefully': Joseph, Schultz and Castan, above n 15, [25.74]. Indeed, the Committee has indicated that the doctrine of the margin of appreciation does not operate under the ICCPR: Joseph, Schultz and Castan, above n 15, [18.23]–[18.24], [24.32].

137 Rowe, above n 2, 10.

138 Ibid; see also Ricketts above n 28, 149.

139 See Charlesworth, above n 7, 14; Hocking, above n 8, 359.

and may also inspire recruitment for the terrorist cause. They are also extremely unlikely to deter those already committed to terrorism.

The sacrifice of human rights values is not likely to result in any great improvements to our security. It is a mistake to conclude that liberty and security are somehow mutually exclusive;<sup>140</sup> the ‘paring back of liberties’ has rarely contributed to ‘the successful prosecution’ of relevant conflicts.<sup>141</sup> Indeed, since September 11 (and beforehand), Islamist terrorists have struck with greater success in undemocratic countries or fledgling democracies, including the Russian Federation, Turkey, Pakistan, Morocco, Indonesia, Saudi Arabia and Kenya. Oppressive laws in those countries have not been more successful in thwarting terrorism than the laws in liberal democracies. Similarly, the crackdown on Communism in the 1950s in the US did not hasten the end of the Cold War. The internment of Japanese Americans did not help to bring about US victory over Japan in World War II.<sup>142</sup> Internment policies in the early 1970s, designed to contain sectarian violence in Northern Ireland, probably inflamed ‘the troubles’ throughout the UK.<sup>143</sup> Israel has submitted in international forums that the use of certain interrogation techniques, classified in international law as ‘torture’, on terrorist suspects has prevented a large number of terrorist attacks.<sup>144</sup> However, the use of such techniques has done little to deter the seemingly inexhaustible number of persons volunteering to be Palestinian suicide bombers, nor is an end to Israel’s terrorist emergency in sight.

It is inevitable that in the future more lives will be lost to terrorist attacks across the world. It is not hysterical to believe that such an attack could occur in Australia. However, the anguish that will be caused by terrorists in the future should not be supplemented by the impulsive and perhaps pointless sacrifice of fundamental principles and values, such as respect for human rights, pluralism and the rule of law.<sup>145</sup>

## V POSTSCRIPT

On 1 July 2004, the *Anti-Terrorism Act 2004* (Cth) came into force. This Act amends the *Crimes Act 1914* (Cth) to reverse the presumption in favour of bail for terrorist suspects. Section 15AA(1) of the *Crimes Act 1914* (Cth) now provides that ‘a bail authority must not grant bail to a person (the defendant)

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140 Wright-Neville, above n 5, 65–6. See also Charlesworth, above n 11, 62; Rowe, above n 2, 7.

141 Wright-Neville, above n 5, 67.

142 Aryeh Neier, ‘Introduction’ in Cynthia Brown (ed), *Lost Liberties: Ashcroft and the Assault on Personal Freedom* (2003) 2.

143 See Paul Bew and Gordon Gillespie, *Northern Ireland: A Chronology of the Troubles 1969–1993* (1994) 37.

144 See Joseph, Schultz and Castan, above n 15, [9.31]. Some of the relevant techniques have since been found unconstitutional in Israel in *Public Committee against Torture in Israel v State of Israel* [1999] HC 5100/94 (Supreme Court of Israel, sitting as the High Court of Justice, 6 Sept 1999); *Judgment Concerning the Legality of the General Security Service’s Interrogation Methods* (1999) 38 ILM 1471 (Supreme Court of Israel).

145 See also Williams, above n 17, 199; Rowe, above n 2, 12; Michaelsen, above n 1, 276.

charged with, or convicted of, an offence covered by subsection (2) unless the bail authority is satisfied that exceptional circumstances exist to justify bail’.

Section 15AA(2) includes terrorism offences as offences covered by sub-s (1). This provision was probably enacted in response to a NSW court’s decision to grant bail to one of the first terrorist suspects to be charged under Australia’s new anti-terrorism legislation.<sup>146</sup>

Article 9(3) of the ICCPR provides, inter alia: ‘It shall not be the general rule that persons awaiting trial shall be detained in custody ...’. Certainly, the ICCPR permits states to refuse bail in certain instances.<sup>147</sup> However, a legislative reversal of the onus of proof for all cases of a certain kind is likely to breach art 9(3),<sup>148</sup> especially given that the current definition of ‘terrorism offences’ is so broad as to encompass minor offences.

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146 See, eg, Martin Chulov, ‘Terror Suspects to Remain Free on Bail’, *The Australian* (Sydney), 23 June 2004, 4, detailing the NSW Supreme Court’s decision to grant bail to Bilal Khazal, who has been accused of inciting terrorism through a website.

147 For example, the pre-trial detention of the complainant in *WBE v Netherlands*, UN Doc CCPR/C/46/D/432/1990 (1992), did not breach art 9(3). The HRC found that there was a reasonable fear that the complainant, if granted bail, would interfere with evidence against him.

148 For example, a violation of art 9(3) was found in *Hill and Hill v Spain*, UN Doc CCPR/C/59/D/526/1993 (1997), entailed in the State’s failure to grant the complainants bail. The HRC did not accept the State’s contention that bail was justifiably refused due to a fear that the complainant defendants would flee the jurisdiction had they been granted bail. See also *Concluding Observations on Argentina*, [14], UN Doc CCPR/C/79/Add.46 (1995); *Concluding Observations on Ecuador*, [13], UN Doc CCPR/C/79/Add.92 (1998).