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## **A BILL OF RIGHTS IN AN AGE OF FEAR**

Like many other countries, Australia has responded to the September 11, 2001 attacks upon New York and Washington by passing a raft of legislation.<sup>1</sup> The details of this ‘anti-terrorism’ legislation are extremely varied, ranging from the introduction of new offences, many with quite serious penalties;<sup>2</sup> to the modification of existing offences,

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<sup>1</sup> A chronology of developments in ‘anti-terrorism’ legislation from 11 September 2001 is maintained by the Australian Parliamentary Library, <<http://www.aph.gov.au/library/intguide/law/terrorism.htm>> at September 27, 2006.

<sup>2</sup> The most significant of the new offences are found in the Commonwealth *Criminal Code*:

Item 1 of Schedule 1 of the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth) inserted Division 72 into the *Criminal Code* (Cth) (‘*Criminal Code*’), establishing a new offence of bombing a public place, government facility or transport or other infrastructure, with a maximum penalty of life imprisonment.

Schedule 1 of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) inserted Divisions 80, 101 and 102 into the *Criminal Code*, creating 21 new criminal offences. Division 80 established two offences relating to treason, each with a maximum penalty of life imprisonment. Division 101 established eight offences relating to engagement in ‘terrorist acts’ and conduct ancillary to such acts, two having a maximum penalty of life imprisonment, one having a maximum penalty of 25 years imprisonment, and three having a maximum penalty of 15 years imprisonment. Division 102 established 11 offences of involvement with ‘terrorist organisation’, five having a maximum penalty of 25 years imprisonment, and five having a maximum penalty of 15 years imprisonment. Divisions 101 and 102 were repealed, but re-enacted in identical form (with the exception of s 102.1, which underwent some clarificatory amendments) by the *Criminal Code Amendment (Terrorism) Act 2003* (Cth). Schedule 3 of the *Anti-Terrorism Act (No 2) 2004* (Cth) subsequently introduced into Division 102 an offence of meeting or communicating with a member or director of a listed ‘terrorist organisation’.

A suite of so-called ‘sedition’ offences was inserted into Division 80 of the *Criminal Code* by Schedule 7 of the *Anti-Terrorism Act (No 2) 2005* (Cth). These offences have recently been the subject of an inquiry and report by the Australian Law Reform Commission, *Fighting Words: A review of sedition laws in Australia*, Report No 104, (2006), recommending a number of amendments to these offences.

Item 3 of Schedule 1 of the *Suppression of the Financing of Terrorism Act 2002* (Cth) inserted Division 103 into the *Criminal Code*, establishing an offence of financing ‘terrorist acts’ punishable by up to life imprisonment. A further financing offence, likewise with a maximum penalty of imprisonment for life, was introduced by Schedule 3 of the *Anti-Terrorism Act (No 2) 2005* (Cth).

including frequent amendments pertaining to the new offences introduced;<sup>3</sup> to the authorisation of new investigative techniques;<sup>4</sup> to changes in aspects of investigative and trial procedure.<sup>5</sup>

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<sup>3</sup> One example of the former is schedule 1 of the *Anti-Terrorism Act 2004* (Cth), which widens the scope for liability under s 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (the offence of engaging in hostilities in a foreign state) and increases the maximum penalty for the offence from 14 to 20 years imprisonment.

Examples of the latter are found primarily in the *Criminal Code*. Schedule 1 of the *Anti-Terrorism Act 2004* (Cth) amended the training offences under Division 102 of the *Criminal Code* to increase the maximum penalty from 15 to 25 years imprisonment, and to establish a quasi-reverse onus offence in the case of a person accused of training with a listed organisation: for a discussion of this offence, see Patrick Emerton, 'Paving the Way for Conviction Without Evidence' (2004) 4 *QUTLJ* 129-66. The same legislation also increased the scope of liability for the membership offence under Division 102.

The *Anti-Terrorism Act 2005* (Cth), with its widely reported change of 'the' to 'a', arguably increased the scope of liability under many of the offences in Divisions 101 and 103: see the discussion in the *Report of the Security Legislation Review Committee* (2006) [11.7]-[11.11] <[http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Security\\_Legislation\\_Review\\_Committee\\_Security\\_Legislation\\_Review\\_Committee\\_Homepage](http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Security_Legislation_Review_Committee_Security_Legislation_Review_Committee_Homepage)> at September 27, 2006, and Andrew Lynch, Edwina MacDonald and George Williams, *Submission 4 to the Review of Security and Counter Terrorism Legislation by the Joint Parliamentary Committee on Intelligence and Security, Parliament of Australia*, 4-5 <<http://www.aph.gov.au/house/committee/pjicis/securityleg/subs.htm>> at September 27, 2006. The New South Wales Court of Criminal Appeal has taken a different view: *Lodhi v Regina* [2006] NSWCCA 121 [60]-[70]. This appears to be consistent with Parliamentary intention: Explanatory Memorandum, *Anti-Terrorism Bill 2005* (Cth) (2005), 3.

<sup>4</sup> The most significant example is the authorisation of compulsory questioning and detention of persons by the Australian Security Intelligence Organisation, whether or not the person is a suspect, for the purposes of collecting information relevant to an offence under Division 72 or Part 5.3 (which includes Divisions 101, 102 and 103) of the *Criminal Code*: see Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*'). These provisions were introduced into the legislation by a series of acts: the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth), the *ASIO Legislation Amendment Act 2003* (Cth), Schedule 2 of the *Anti-Terrorism Act (No 3) 2004* (Cth) and the *ASIO Legislation Amendment Act 2006* (Cth).

Other examples of legislation authorising new investigative powers are Schedule 4 of the *Anti-Terrorism Act (No 2) 2006* (Cth), which inserted Division 105, including s 105.4(6), into the *Criminal Code*, permitting the quasi-incommunicado detention of persons, whether or not they are suspects, to preserve evidence pertaining to a 'terrorist act' that occurred within the past 28 days; Schedule 6 of the same statute, which establishes a 'notice to produce' regime applying not only to offences under Division 72 or Part 5.3 of the *Criminal Code* but to other offences punishable by at least 2 years imprisonment; the *Surveillance Devices Act 2004* (Cth); and the *Telecommunications (Interception and Access) Act 1979* (Cth), the latter having been substantially amended since 2001, and also renamed – it was formerly known as the *Telecommunications (Interception) Act 1979* (Cth).

<sup>5</sup> Items 1A to 7 of Schedule 1 of the *Anti-Terrorism Act 2004* (Cth) amended the *Crimes Act 1914* (Cth) ('*Crimes Act*') to establish a presumption against bail for those charged with offences under Division 72, Division 80 or Part 5.3 of the *Criminal Code* (s 15AA), to establish minimum non-parole periods for those convicted of such offences (s 19 AG), and to increase the period for which those arrested on suspicion of having committed offences under Division 72 or Part 5.3 may be held by police without being charged (ss 23C-23DA).

Division 105 of the *Criminal Code*, inserted by Schedule 4 of the *Anti-Terrorism Act (No 2) 2005* (Cth), allows the quasi-incommunicado detention of a person without charge, where the Australian Federal Police suspect that the person will commit a 'terrorist act', or possesses a thing connected with engagement in or preparation for a 'terrorist act', or has prepared or planned for a 'terrorist act':

Much of this legislation has been subject to criticism, on the grounds that it threatens the enjoyment, by Australians and others, of their civil and political rights.<sup>6</sup> Particular attention has been paid to the various departures from the traditional *habeas corpus* approach to criminal investigation and prosecution, arising from the right of ASIO to question and detain non-suspects,<sup>7</sup> and the regime of so-called ‘preventative detention’,<sup>8</sup> which allows suspects to be held quasi-incommunicado without being charged.<sup>9</sup>

The focus of this presentation, however, will be the new offences that have been created. Some of these new offences are unremarkable from a human rights point of view: few would be surprised or outraged to learn that it is now an offence punishable by life imprisonment to place an explosive device in a public place with the intention of causing death or life-threatening injury.<sup>10</sup> But other new offences appear excessive: it is now a crime under Australian law, punishable by up to 25 years imprisonment, to train the Tamil Tigers in techniques of tsunami relief,<sup>11</sup> to train Lashkar-e-Tayyiba in

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s 105.4(4). While detained under such an order a person cannot be questioned (s 105.42), but can be rendered into ASIO custody, or into ordinary criminal custody pursuant to the *Crimes Act* (s 105.26(4)).

The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) establishes a complex regime whereby certain evidence may be excluded from a trial upon the urging of the Attorney-General, on the basis that its admission would prejudice Australia’s national security, with the court instead approving the substitution in its place of redacted documents, summaries, or statements of the facts that such evidence would be likely to prove. For a discussion of the implications of this legislation in relation to criminal matters, see Emerton, above n 3. For a discussion of its implications in relation to civil matters, see Patrick Emerton, *Submission 8 to the Inquiry into the provisions of the National Security Information Legislation Amendment Bill 2005 by the Senate Legal and Constitutional Affairs Committee, Parliament of Australia* (2005) <[http://www.aph.gov.au/Senate/committee/legcon\\_ctte/national\\_sec/submissions/sublist.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/national_sec/submissions/sublist.htm)> at September 27, 2006.

<sup>6</sup> See, for example, Michael Head, ‘Counter-Terrorism’ Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights’ (2002) 26 *Melbourne University Law Review* 666-82; Joo-Cheong Tham, ‘Casualties of the domestic ‘War on Terror’: A review of recent counter-terrorism laws’ (2004) 28 *Melbourne University Law Review* 512.

<sup>7</sup> See above n 4.

<sup>8</sup> See above n 5.

<sup>9</sup> For an example of such criticism see the Stephen Murray-Smith Memorial Lecture delivered on October 19, 2005 by Prime Minister Malcolm Fraser at the State Library of Victoria <<http://www.smh.com.au/news/opinion/laws-for-a-secret-state-without-any-safeguards/2005/10/19/1129401313470.html>> at September 27, 2006.

<sup>10</sup> *Criminal Code* s 72.3(1); ‘serious harm’ is defined in the *Criminal Code* Dictionary as including harm that endangers a person’s life.

<sup>11</sup> *Criminal Code* s 102.5(1). The Tamil Tigers satisfy paragraph (a) of the definition of ‘terrorist organisation’ in s 102.1(1).

first-aid techniques,<sup>12</sup> or to receive a plane ticket from Al Qa'ida.<sup>13</sup> Twenty-five years imprisonment is the most serious maximum penalty, short of life imprisonment, found in the *Criminal Code*; it applies, for example, to the war crime of rape.<sup>14</sup> Training people – even wicked criminals, if we suppose that all members of the above-mentioned group fit that description – in the rebuilding of washed-away houses, or in first-aid techniques, does not seem to belong to the same category of culpability; nor does the receipt of a plane ticket for no terrorist purpose.

### **The structure of 'terrorism offences' under the *Criminal Code***

This excessive reach of some of the new offences arises from the structure of the principal new regime of criminal law established since 2001, namely, Divisions 100, 101 and 102 of the *Criminal Code*. The structure is this:

- Section 100.1 of the *Criminal Code* defines the concept of a 'terrorist act';
- Division 101 establishes a range of offences, of engaging in a 'terrorist act', or preparing or planning for such acts, of training for such acts, or of making documents or possessing things connected to such acts;<sup>15</sup>
- Section 102.1 defines as 'terrorist organisations' all organisations that are directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of 'terrorist acts';<sup>16</sup>

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<sup>12</sup> *Criminal Code* s 102.5(2). Lashkar-e-Tayyiba has been listed under s 102.1 of the *Criminal Code: Criminal Code Regulations 2002* (Cth) s 4B.

<sup>13</sup> *Criminal Code* s 102.6(1),(2), together with the definition of 'funds' in s 100.1(1). Al Qa'ida has been listed under s 102.1 of the *Criminal Code: Criminal Code Regulations 2002* (Cth) s 4A. Jack Thomas was found guilty of this offence, and sentenced to five years imprisonment in respect of it, before subsequently having his conviction quashed upon appeal on grounds that key evidence was inadmissible: *DPP v Thomas* [2006] VSC 120; *R v Thomas* [2006] VSCA 165.

<sup>14</sup> *Criminal Code* ss 268.14(1), 268.59(1), 268.82(1).

<sup>15</sup> *Criminal Code* ss 101.1, 101.2, 101.4, 101.5, 101.6.

<sup>16</sup> *Criminal Code* s 102.1(1), para (a) of the definition of 'terrorist organisation'.

- Section 102.1 also gives the Attorney-General the power to list an organisation as a ‘terrorist organisation’, on the grounds that it fits the above definition, or on the grounds that it directly or indirectly counsels, urges or provides instruction on the doing of a ‘terrorist act’, or directly praises the doing of such an act (the listing of an organisation removes the burden on the prosecution, in the event of a prosecution of an offence under Division 102, to prove beyond reasonable doubt that the organisation satisfies the definition above<sup>17</sup>);<sup>18</sup>
- Division 102 criminalises membership of, directing, recruiting for, training with, receiving funds from, providing funds to, or supporting a ‘terrorist organisation’.<sup>19</sup>

The particular crimes mentioned above, of teaching tsunami relief and first aid to, and of receiving plane tickets from, certain organisations, fall under these Division 102 offences.

With this structure set out, it is possible to explain why these offences have an excessive reach. First, the definition of ‘terrorist act’ encompasses virtually all politically, religiously or ideologically motivated acts causing, or threats that would cause, serious harm, if those acts or threats are intended to intimidate any government or public wheresoever in the world. It extends well beyond such acts of catastrophic violence as bombing or hijackings. No distinction is drawn between threats and acts intended to intimidate a democratic government, and threats and acts intended to intimidate an authoritarian or tyrannical government. No distinction is drawn between violence against civilians and violence against soldiers, police and other non-civilian targets. No distinction is drawn between acts perpetrated by soldiers or other agents of government, and acts perpetrated by civilians and non-state actors. Thus, under

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<sup>17</sup> Listing also activates two offences under Division 102: the quasi-reverse onus training offence of s 102.5(2), and the s 102.8 offence of communicating or meeting with the member or director of a listed organisation.

<sup>18</sup> *Criminal Code* s 102.1(1), para (b) of the definition of ‘terrorist organisation’, together with the definition of ‘advocates’ in s 102.1(1A) and the grounds for listing set forth in 102.1(2).

<sup>19</sup> *Criminal Code* ss 102.2, 102.3, 102.4, 102.5, 102.6, 102.7.

Australian law all foreign soldiers engaged in military action are terrorists, as are members of national resistance movements, and even dissidents and protestors who are prepared to meet repressive force with force of their own.

This breadth of the definition of ‘terrorist act’ then infects the definition of ‘terrorist organisation’, and also the grounds on which organisations can be listed. The fact that the definition of ‘terrorist act’ extends to acts or threats against foreign governments<sup>20</sup> also means that organisations are classified as ‘terrorist organisation’ regardless of the nature of the government, their political motivation and purposes, and the circumstances of their operation. No distinction is drawn in the legislation between criminal organisations and various sorts of revolutionary and national liberation movements, many of which may well have a legitimate cause. Had these laws been in force in Australia in the 1980s, then such groups as the African National Congress and the South-West Africa People’s Organisation would undoubtedly have constituted ‘terrorist organisations’. Australian anti-apartheid organisations may also have fallen under the definition of ‘terrorist organisation’, because of their role in indirectly fostering the political violence being undertaken by the ANC and SWAPO. Individual members who gave support or funding to those organisations would certainly have been committing offences under Division 102.

A further reason for excessive breadth is that the *Criminal Code*, in criminalising membership of and other forms of involvement with ‘terrorist organisations’, does not distinguish between involvement with those organisation for terrorist purposes, and other sorts of involvement:<sup>21</sup> thus, the crime of training certain organisations in techniques of first-aid or tsunami relief.

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<sup>20</sup> *Criminal Code* s 100.1(1), sub-paragraph (c)(i) of the definition of ‘terrorist act’; see also s 100.1(4).

<sup>21</sup> A possible exception applies in the case of s 102.7, which creates an offence with the following principal elements:

the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of **terrorist organisation** in this Division [that is, directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a ‘terrorist act’].

However, even here the grammar of the paragraph leaves room for doubt that the requirement that the support or resources ‘would help’ must be within the scope of the accused person’s intention; and even were this narrower reading of the offence adopted, activity described in paragraph (a) need not itself be activity that is terroristic in nature or intent, as will be discussed below.

## **Excessive breadth as a threat to political freedoms**

This extreme breadth of these offences itself poses a threat to freedom of association. Furthermore, it means that their investigation and prosecution, and the exercise of the power to list organisations, will inevitably be highly discretionary. Excessive discretion in policing and prosecution is always undesirable, because it opens the door to discriminatory application of the law, and to the potential for undermining the independence of the police and prosecuting authorities. When the key concept at the heart of the discretion – ‘terrorist act’ – is defined by reference to political, religious or ideological motivation, added to the potential for discriminatory application is the potential for that discrimination to be politically or ideologically motivated. That it is possible to criminalise terrorist activity without having laws of such breadth is shown by the examples of Division 72 of the *Criminal Code*, already referred to above, and by the *Crimes (Aviation) Act 1991*, which makes it an offence punishable by up to life imprisonment to hijack an aircraft.<sup>22</sup> Neither offence raises the same issues of discretion and politicisation as do those under Divisions 100, 101 and 102.

The connections between terrorism, as statutorily defined, and political and ideological motivation, make the investigation of such offences a particular challenge for a democracy. While a democracy must protect the lives and well-being of its people, it is also committed to political openness and political pluralism. Indeed, if sufficiently many members of a democracy come to hold a particular political view, a democracy must be open to the possibility that that view will become part of its mainstream, even if that view has at one time been associated with political violence (in this regard one can think of the ANC, or of the leaders of the American Revolution, or even of the more extreme abolitionists prior to the American Civil War). On the other hand, if a small group in a democracy poses a threat of violence to the rest, the policing of this threat must be undertaken in a way that is not seen simply to be an attack upon the dissent and diversity that is always a legitimate part of a democracy.

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<sup>22</sup> *Crimes (Aviation) Act 1991* s 13.

When it comes to the listing of organisations as ‘terrorist organisations’, the Attorney-General’s Department has stated that

It is in Australia’s national interest to be proactive and list any organisation which is directly or indirectly engaged in, preparing, planning or assisting in or fostering the doing of a terrorist act.<sup>23</sup>

But a moment’s thought indicates that only the tiniest fraction of organisations satisfying this description have been listed under the *Criminal Code*.<sup>24</sup> Of the many hundreds or thousands of organisations throughout the world which are liable to be listed, only 19 have been so far.<sup>25</sup> In all but one case, all these groups are self-identified Islamic groups. This consistent targeting of Islamic groups can easily create a perception of discriminatory application of the power to list organisations. In the absence of more detailed information being provided about why these particular groups have been listed, and how their listing relates to the needs, rights and interests of Australians, an impression is created that the purpose of these listings is primarily a political one, of supporting the foreign policy goal of targeting militant Islamic organisations as part of the so-called ‘war on terrorism’.

A government in a democracy of course has the right to pursue its foreign policy goals in accordance with its conception of the country’s national interest. But in a democracy the criminal law ought not to be used to enforce these foreign policy

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<sup>23</sup> Attorney-General’s Department, *Submission No 7 to the Parliamentary Joint Committee on ASIO, ASIS and DSD’s Inquiry into the listing of six terrorist organisations* (2005) 1 <[http://www.aph.gov.au/house/committee/pjcaad/terrorist\\_listingsa/subs/sub7.pdf](http://www.aph.gov.au/house/committee/pjcaad/terrorist_listingsa/subs/sub7.pdf)> at September 27, 2006.

<sup>24</sup> Since these remarks were made, Schedule 1 of the *Anti-Terrorism Act (No 2) 2005* (Cth) has expanded the grounds for listing to include those further grounds mentioned above. The breadth of such concepts as ‘directly or indirectly counselling’ or ‘directly praising’ means that an even wider range of groups is liable to be listed under this limb of the power. For example, Marx’s *Communist Manifesto* famously concludes with the following words:

The communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a communistic revolution. The proletarians have nothing to lose but their chains. They have a world to win. WORKINGMEN OF ALL COUNTRIES, UNITE!  
(Lewis S Feuer (ed), *Marx & Engels: Basic writings on politics and philosophy* (Fontana/Collins, 1984) 82).

These words counsel terrorism within the meaning of section 100.1 of the *Criminal Code*. Thus, any organisation that disseminates them (a publisher, a political party) is apparently liable to being listed, for such dissemination at least indirectly counsels terrorism. As an academic, I refer to the *Communist Manifesto* in the course of my teaching. Does this make Monash University liable to proscription, on the grounds that it is an organisation indirectly counselling ‘terrorist acts’?

<sup>25</sup> *Criminal Code Regulations 2002* (Cth), Part 2.

preferences, nor political preferences more generally, nor to make criminals of those whose opinions on matters of politics and foreign policy happen to differ from those of the government of the day. Yet precisely this possibility is enlivened by the *Criminal Code*'s definitions of 'terrorist act' and 'terrorist organisation', and the grounds for the listing of organisations. The definitions are so broad, the inevitable discretion therefore so great, that there is a real threat that political activity deemed undesirable by the government and the authorities will be made subject to investigation and prosecution, while other political activity, which satisfies the statutory definitions but is deemed acceptable, will go uninvestigated and unpunished.

Such extreme discretion in deciding who will be policed and who not, and in deciding the limits of legitimate political activity, threatens the freedom of political speech and of political organisation, which are the cornerstones of any democracy. In a democracy, political controversies are to be resolved through political activity, not through the application of the criminal law by way of executive fiat. This must be particularly true where the political preferences are foreign policy ones, and where the democracy in question is Australia, a multi-cultural community whose citizens have the most tremendous and diverse sorts of relationship with, and interests in, the people, places and politics of other countries. This threat to democracy posed by such, is exacerbated by the fact that many of the important decisions – which organisations are to be listed, which individuals investigated – are made in secret by ASIO, a covert security agency.

The apparently discriminatory application of highly discretionary laws can also contribute to the marginalisation and alienation of sections of the Australian community. The perception of discriminatory application does not result only from the inflammatory remarks of certain politicians.<sup>26</sup> It results in part from the experience

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<sup>26</sup> See, for example, the speech delivered on September 16, 2006 by Andrew Robb, Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, to the Conference of Australian Imams <[http://www.minister.immi.gov.au/parlsec/media/speeches/address\\_conference\\_australian\\_imams.htm](http://www.minister.immi.gov.au/parlsec/media/speeches/address_conference_australian_imams.htm)> at September 27, 2006, which argues that Australian Muslim leaders have a special duty to denounce terrorism, and the speech delivered on September 23, 2006 by the Treasurer Peter Costello to the Australian Christian Lobby National Conference <<http://www.treasurer.gov.au/tsr/content/speeches/2006/020.asp>> at September 27, 2006, which implies that Islam has a particular difficulty with the concept and politics of religious tolerance, and that this is a cause of terrorism.

in Islamic and Arab communities of surveillance and ‘over-policing’.<sup>27</sup> It is also apt to be compounded, for example, by the *Report of the Security Legislation Review Committee*, produced by an expert committee established as one part of the complex statutory review processes associated with Australia’s recent ‘anti-terrorism’ legislation.<sup>28</sup> The Committee, under the heading ‘The nature of terrorism’, cites in evident agreement certain remarks by the former Australian Human Rights Commissioner, Dr Sev Ozdowski, that

contemporary acts of terrorism [are] premised on an entirely unsustainable concept: namely the total subjugation of non-believers to a specific ‘religio-political’ ideology.<sup>29</sup>

This casual identification of terrorism with a certain type of Islamism ignores ‘terrorist acts’ undertaken by such nationalist organisations as the Tamil Tigers, or such secular insurrectionary groups as the Shining Path.<sup>30</sup> It is far from obviously true even as a description of the motivation of such listed Islamic organisations as Palestinian Islamic Jihad<sup>31</sup> or Hamas,<sup>32</sup> whose rhetoric and apparent goals seem to be far more tightly focused on conflict with Israel.<sup>33</sup> And it is in fact belied by the listing of the Kurdistan Workers Party as a ‘terrorist organisation’ pursuant to the *Criminal Code*.<sup>34</sup> Similar discriminatory characterisations of the nature of terrorism occur in the Committee’s apparent reference to the threat posed by ‘Islamist extremists’ as a principal justification for ‘anti-terrorism’ legislation,<sup>35</sup> and in their argument that one

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<sup>27</sup> This arose as an important issue for discussion at a workshop on the politics of human rights protection in the counter-terrorism context, held by the Castan Centre for Human Rights Law on August 25, 2006, as part of the research activities supported by the grant from the Chipp Foundation. It is intended that the proceedings of the workshop will be made available on the Castan Centre website in due course.

<sup>28</sup> Under *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s 4.

<sup>29</sup> *Report of the Security Legislation Review Committee*, above n 3, [5.8].

<sup>30</sup> Both these organisations have been listed under the *Charter of the United Nations Act 1945* (Cth), meaning that their assets are frozen: see the consolidated list <[http://www.dfat.gov.au/icat/freezing\\_terrorist\\_assets.html](http://www.dfat.gov.au/icat/freezing_terrorist_assets.html)> at September 27, 2006.

<sup>31</sup> *Criminal Code Regulations 2002* (Cth) s 4T.

<sup>32</sup> *Criminal Code Regulations 2002* (Cth) s 4U.

<sup>33</sup> On this point, see the views of Duncan Kerr, Member for Denison, noted in the Parliamentary Joint Committee on ASIO, ASIS and DSD’s *Report of the listing of four terrorist organisations* (2005) [3.89].

<sup>34</sup> *Criminal Code Regulations 2002* (Cth) s 4W.

<sup>35</sup> *Report of the Security Legislation Review Committee*, above n 3, [10.81].

reason to fund an education campaign for Muslim and Arab Australians is to help prevent so-called ‘homegrown terrorism’.<sup>36</sup>

If one actually looks to violent activity that has taken place in Australia, and which satisfies the *Criminal Code* definition of terrorism, there is no Islamist violence to be found. The most obvious example of such violence that has occurred is the fire bombings by white supremacists of Chinese restaurants in Perth.<sup>37</sup> But this activity – this ‘homegrown’ political violence that was actually undertaken (as opposed to merely anticipated) in Australia with the intention of intimidating a section of the public – is typically not described using the language of terrorism either by the media or by the authorities.<sup>38</sup> This selective use of the language of terrorism, the selective use of the power to list organisations, and the possibility (even, given the current political climate, the likelihood) of the selective investigation and prosecution of ‘terrorist offences’ constitute a real threat to the political freedom of Australians.

### **Protecting political freedoms**

Many critics of Australia’s recent ‘anti-terrorism’ legislation have argued that a bill or charter of rights would be an effective way to respond to the threat posed by these

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<sup>36</sup> *Report of the Security Legislation Review Committee*, above n 3, [10.97], and see also the Executive Summary.

<sup>37</sup> As per the definition in section 100.1 of the *Criminal Code*, these are ideologically-motivated acts of violence that threaten the safety of the public and are intended to intimidate a section of the public. Information on these acts is available on the website of the Australian Broadcasting Corporation <<http://www.abc.net.au/wa/news/200402/s1035658.htm>>, <<http://www.abc.net.au/pm/content/2004/s1157360.htm>> at September 28, 2006. The alleged role of white supremacists in fostering last year’s violence in Cronulla may also fall under the offence of acts preparatory to a terrorist act, set out in section 106 of the *Criminal Code*: these allegations by the police and government of New South Wales are reported by the Australian Broadcasting Corporation, ‘*White Supremacists’ involved in Sydney race riots*, December 12, 2005 <<http://www.abc.net.au/news/newsitems/200512/s1529041.htm>> at September 28, 2006, and by Jonathan Pearlman, Josh Paine and Jordan Baker ‘Police look for answers in text messages’, *Sydney Morning Herald*, December 14, 2005 <<http://www.smh.com.au/news/national/police-look-for-answers-in-text-messages/2005/12/13/1134236063896.html>> at September 28, 2005.

<sup>38</sup> For example, given his characterisation of terrorism in Australia as cited by the Security Legislation Review Committee, it is apparently not regarded as terrorism by the Director-General of ASIO: *Report of the Security Legislation Review Committee*, above n 3, [10.87]. An exception to this general trend is provided by Victoria Police, who at the Castan Centre workshop discussed above, n 27, instanced these white supremacist attacks as the only examples of terrorism that have taken place in Australia.

laws to civil and political rights.<sup>39</sup> For those laws which depart from traditional standards and safeguards relating to investigation and prosecution this may be so. But for those laws which confer excessive discretion in their application, due to the breadth of political activity criminalised, and therefore have a potentially politicised and even discriminatory application, a bill of rights may not be the best solution. The problem these laws pose is fundamentally one of culture – intelligence culture, policing culture, prosecutorial culture and political culture. A bill of rights can play a role in shaping institutional culture, by shaping the parameters of official decision-making,<sup>40</sup> – but a democratic political culture is perhaps best defended and extended not through the legal (or even legalistic) means of a bill of rights, but rather through active participation in the political process.

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<sup>39</sup> For one prominent example, see George Williams, 'Now, more than ever, we need a bill of rights', *The Age* (Melbourne), July 16, 2004 <<http://www.theage.com.au/articles/2004/07/15/1089694485943.html>> at September 27, 2006; 'Responding to Terrorism Without a Bill of Rights: The Australian experience', (2004) Issue 2 *AsiaRights* <<http://rspas.anu.edu.au/asiarightsjournal/Williams.pdf>> at September 27, 2006; 'Fragile freedom', *The Age* (Melbourne), July 8, 2006 <<http://www.theage.com.au/news/opinion/fragile-freedom/2006/07/07/1152240485688.html?page=fullpage>> at September 27, 2006.

<sup>40</sup> This idea is put forward in *Rights, Responsibilities and Respect: The report of the Human Rights Consultation Committee* (Department of Justice, Victoria, 2005), chapter 5.