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FEAR OF FREEDOM: ANTI-TERRORISM LAWS AND THE CHALLENGE TO AUSTRALIAN DEMOCRACY

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The nature of the Australian government's proposed legislative response to terrorism is discussed in this article. The authors highlight the stifling impact of the proposed legislation on rights of peaceful protest and civil liberties in Australia. The proposed legislation creates a wide range of new offences with draconian penalties, despite the adequacy of existing criminal law. It also raises a number of significant constitutional issues.

I. INTRODUCTION

In March 2002, the Australian Commonwealth government[1] introduced a package of Bills in response to perceived security concerns following the September 11 terrorist attacks in the United States. These sweeping "anti-terrorism" laws exceed their stated purpose of providing enhanced protection from violent acts of terrorism and represent a much broader attack upon existing civil liberties and rights of meaningful protest in Australia.

In posing a substantial threat to existing rights of political protest in Australia, the proposed anti-terrorism laws are symptomatic of the steady decline in civil liberties which has been taking place in Australia over the past thirty years. Popular resistance to the Vietnam War in the early 1970's triggered a legislative response from both Commonwealth and State governments under which general rights of assembly and protest became

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1 The term "Commonwealth government" can be misleading for readers outside Australia. Australia has a federal Constitution under which the national government shares power with the constituent states. The national government is referred to in Australia as "the Commonwealth government" or more simply as "the Commonwealth".

increasingly restricted.[2] More recently, the successful use of non-violent direct action in the battle over the logging of native forests has resulted in the introduction of increasingly draconian laws in the Australian states.[3] Regulations which were introduced to outlaw protests in New South Wales forests became a template for similar laws which were designed to prevent protests at the site of the Olympic Games in Sydney in 2000.[4] The staging of the Olympic Games in Sydney also provided an opportunity for the Commonwealth Government to introduce legislation which specifically empowers the government to utilise the military to quell civil disturbance.[5] Michael Head argues that the nature of the legislation "makes it apparent that the authorities are preparing not simply for terrorism, but for wider civil unrest that the police forces may prove unable to quell."[6]

The proposed anti-terrorism legislation is framed in such broad terms that its potential impact extends well beyond the control of terrorism and terrorist groups. The legislation could be used against domestic political activists engaged in legitimate non-violent protests and conscientious acts of civil disobedience. The legislation is framed so as to include both street level activism as well as non-violent computer-based activism within its reach. In the case of computer-based activism, the legislation does not even require any connection with violence, property damage or threats to public health and safety to constitute a terrorist act.[7]

Critics of the proposed legislation have not only highlighted the broad scope of the proposed legislation, but have also questioned the need for new laws. Acts of terrorism of the kind which occurred in the United States last year would be adequately covered under existing Australian criminal law. The substantive effect of the extra powers and new offences created under

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

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

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

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

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

7 See the definition of a terrorist act provided later in this article, in particular Security Legislation Amendment (Terrorism) Bill 2002 s 3 (proposed: Criminal Code, s 100.1 subs (2)(e)), available at http://www.aph.gov.au/bills/index.htm.

the proposed legislation will be to criminalise activities which have hitherto been allowable forms of political activity. Further concerns have been raised about the constitutional validity of the proposed legislation. These will be considered later in this article.

The package of bills has been extensively criticised by the Senate Legal and Constitutional Committee, and the Parliamentary Joint Committee on the Australian Security Intelligence Organisation (ASIO), the Australian Security Intelligence Service (ASIS) and the Defence Services Directorate (DSD).[8] The government has indicated that it is prepared to consider changes to the Bills to take into account the concerns of the Senate and the Parliamentary Committee, but at the time of writing, no revised Bills have been presented. Consequently, this article analyses the government's response as currently reflected in the Bills, even though the content of the final legislation remains uncertain.

II. AN EXAMINATION OF THE PROPOSED LEGISLATION IN THE CONTEXT OF EXISTING CRIMINAL LAW

A. *Existing Criminal Law Provisions for Dealing with Terrorist Offences*

Whilst the Commonwealth government has consistently argued that new laws are urgently required as weapons in the "war against terrorism," an analysis of existing State and Commonwealth criminal law suggests otherwise.

Within Australia's federal system of government, legislative powers are divided between the Commonwealth and State governments. Since none of the specific heads of power which are conferred on the Commonwealth government under the Australian Constitution refer directly to criminal matters, the States have traditionally legislated in this area, and continue to do so in the absence of a comprehensively applicable system of Commonwealth criminal law. The "Crimes Acts" or "Criminal Codes" of the several States provide the familiar offences of homicide, assault,

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[8] All of the anti-terrorism Bills, with the exception of the Australian Security Intelligence Organisation Amendment (Terrorism) Bill, were referred to the Senate Legal and Constitutional Committee which delivered its report on 8th May 2002. The Australian Security Intelligence Organisation Amendment (Terrorism) Bill was referred to the Parliamentary Joint Committee on ASIO, ASIS and DSD, which delivered its report in early June, 2002. The reports can be found at http://www.aph.gov.au/senate/committee/legcon_ctte/terrorism/report/Security.pdf and at http://www.aph.gov.au/house/committee/pjcaad/reports.htm. The transcript of the hearings of the Senate Legal and Constitutional Committee is available at http://www.aph.gov.au/hansard/senate/committee/s-lc.htm and the transcript of the hearings of the Parliamentary Joint Committee at http://www.aph.gov.au/hansard/joint/committee/J-ASIO%20ASIS%20and%20DSD.htm.

kidnapping, and destruction of property,[9] and there also exists, at the State level, more specific legislation dealing with firearms and other weapons offences, dangerous goods, and general public order offences.[10]

Existing criminal law within NSW, for example, is sufficient to provide sanctions against any acts which are knowingly directed towards a violent act of terrorism. The combined effects of the legislative prohibitions upon the possession, without reasonable excuse, of knives, weapons, explosives, firearms and dangerous goods generally, and the older common law based offences of murder, manslaughter, assault, and kidnapping, are clearly broad enough to cover any terrorist attack involving violence, and any attempted attack, or any preparatory activity, involving weapons of any kind. Section 357 of the Crimes Act 1900 (NSW) provides police with a general power of search and seizure of any person, vessel or vehicle in any public place under both the Firearms Act 1996 and the Weapons Prohibition Act 1998 wherever there are reasonable grounds to suspect a breach of either of those Acts. Even where no weapons are involved, and there is no actual assault, the offence of intimidation[11] covers any situation where an attempt is made, by the use of violence, intimidation, hiding of tools, or following a person from place to place, to prevent that person from performing any act which they have a lawful right to do.

Liability for terrorist acts, attempted acts of terrorism and planned acts of terrorism (where two or more persons are involved) which may constitute incomplete offences under specific legislation is extended by the common law offence of conspiracy. The law of conspiracy provides a means whereby all participants in a planned attack can be held responsible, before or after the event or even if the event fails to eventuate.[12] Precedents already exist for the successful use of this charge against political activists in

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

10 In NSW for example there is prohibition of the possession of firearms, Firearms Act 1996 (NSW) s 7; prohibition of the possession of explosives, Weapons Prohibition Act 1998 (NSW), s 7, sched 1; prohibition of the possession of knives, Weapons Prohibition Act 1998 (NSW), s 7, sched 1; and a general prohibition upon the possession of dangerous goods generally, Dangerous Goods Act 1975 (NSW), s 26. There are also specific offences relating to trespass and obstruction in the Summary Offences Act 1988 (NSW), and criminal sanctions for the use of intimidation to hinder any person from doing any act which they have a lawful right to do: Crimes Act 1900 (NSW), s 545B.

11 Crimes Act 1900 (NSW) s 545B.

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

Australia in circumstances where the alleged criminal acts were never completed.[13]

Commonwealth jurisdiction over criminal law matters has thus far been restricted to offences committed on Commonwealth lands, or in relation to Commonwealth property or having a connection with other Commonwealth heads of power such as importing, exporting, or external affairs,[14] but State criminal legislation outlined above is also enforceable in relation to Commonwealth places where enforcement is not inconsistent with Commonwealth law.[15]

At the Commonwealth level, the two most significant pieces of general criminal legislation are the Crimes Act 1914 (Cth) and the Criminal Code Act 1999 (Cth). The Crimes Act includes provisions outlawing acts of treason,[16] treachery,[17] sabotage,[18] and offences relating to postal services.[19] The Crimes Act also provides the Commonwealth government with specific powers to outlaw associations which encourage, *inter alia*, "the destruction or injury of property of the Commonwealth".[20] Chapter 4 of the Criminal Code, which is entitled "The Integrity and Security of the International Community and Foreign Governments", creates a number of offences in relation to the United Nations and other foreign personnel.[21] Other Commonwealth legislation which criminalises acts of terrorism include the Crime (Aviation Act) 1991, the Crime (Hostages) Act 1989, the Crime (Biological Weapons) Act 1976, the Crime (Internationally Protected Persons) Act 1976 and the Public Order (Protection of Persons and Property) Act 1971.

During the Senate Committee inquiry into the proposed new anti-terrorism legislation,[22] the Attorney-General's department could only identify one area in which, arguably, there were deficiencies in the existing criminal law in the context of acts of terrorism. Under existing criminal law, in order to be guilty of attempting, aiding and abetting or conspiring in relation to murder or property damage, the accused must be aware of the specific murder or property damage. Under the proposed legislation, those who assist or fund terrorist activity are liable even if they are not aware of

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13 See *Alister v R* (1984) 58 ALJR 97 (Aust High Ct) and the discussion of the use of the charge of conspiracy in politically motivated prosecutions in Brown *et al*, *supra* note 2 at 1307–10.

14 s 51(i), (xxix) Commonwealth of Australia Constitution.

15 Commonwealth Places (Application of Laws) Act 1970 (Cth).

16 Crimes Act 1914 (Cth), s 24.

17 *Ibid*,s 24AA.

18 *Ibid*, Part VII.

19 *Ibid*, Part VIIA.

20 *Ibid*, s 30A.

21 Criminal Code Act 1999 (Cth), Chapter 4.

22 Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, *Proof Committee Hansard*, reference: Security Legislation Amendment (Terrorism) Bill 2002 and related bills; available at http://www.aph.gov.au/hansard/senate/committee/s-lc.htm.

the specific activity.[23] The department further justified its departure from existing criminal law provisions by alluding to the perceived appropriateness of dealing with major incidents as terrorist offences rather than as murders or property offences, and to international obligations.[24] Clearly, however, in existing criminal law there are no major lacunae which would impede or prevent the prosecution of those involved in terrorist activity.[25]

To the extent that there are specific gaps in existing criminal law identified by the government then appropriate legislation could be enacted to deal with those gaps. The extremely wide scope of the proposed legislation not only threatens existing rights of political participation in Australia but also represents a major usurpation of jurisdiction by the Commonwealth government over matters formerly controlled at a State level.

B. *The Australian Government's Response*

The Australian government's proposed anti-terrorism legislation has been presented as a package of inter-related Bills rather than as a single statute. The package includes the following key Bills:

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

This Bill was introduced after the other Bills and was the subject of a separate Inquiry by the Parliamentary Joint Committee on the Australian Security Intelligence Organisation (ASIO), the Australian Security Intelligence Service (ASIS) and the Defence Services Directorate (DSD). The Bill is primarily concerned with increasing the powers currently available to police and security personnel to detain and interrogate "terrorist" suspects. The controversial aspects of the Bill include powers for extended periods of detention of suspects,[26] removal of the common law right to silence,[27] and denial of access to legal representation during interrogation.[28]

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23 *Ibid,* April 19 2002 at 204.

24 *Ibid.*

25 This view was taken in the Senate Committee inquiry by, *inter alia*, Julian Barnside QC from Liberty Victoria, the Law Council of Australia and the Federation of Community Legal Centres (Victoria) Inc. See *ibid*, April 17 2002 at 82, and April 18 2002 at 102 and 150.

26 Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 s 24 (Proposed: s 34D Australian Security Intelligence Organisation Act 1979), available at http://www.aph.gov.au/bills/index.htm.

27 *Ibid,* s 24 and s 34G respectively.

28 *Ibid.*

The Joint Committee handed down its recommendations in early June 2002. This Committee was critical of the impact of the proposed legislation on civil liberties, and recommended sweeping changes. Recommendations included providing persons detained under the Bill with access to legal representation, and protection against self-incrimination. Other recommendations included the need for all warrants to be issued by a Federal Magistrate, and in cases where detention will exceed 96 hours, by a Federal Court judge, a maximum period of detention of seven days after which a person must be charged or released, and the provision of a sunset clause of three years' duration.[29]

(ii) Security Legislation Amendment (Terrorism) Bill 2002

This Bill contains the overarching definition of "terrorist act",[30] which is applied uniformly across the different Bills in the package. In addition, this Bill provides powers to the Attorney-General to proscribe organisations on the basis of a reasonable belief that they engage in "terrorist" activities, or that a member of the organisation has committed, or is committing, such activities on behalf of the organisation, or where the declaration is reasonably appropriate to give effect to a decision of the Security Council of the United Nations that the organisation is an international terrorist organisation, and finally, if the Attorney-General believes that the organisation has endangered, or is likely to endanger, the security or integrity of the Commonwealth or another country.[31] The Bill also creates a range of secondary offences for persons associated directly or indirectly with proscribed organisations.[32]

This Bill, together with the other Bills in the package with the exception of the Australian Security Intelligence Organisation Amendment (Terrorism) Bill, were criticised by the Senate Legal and Constitutional Committee. In particular, the Committee recommended that the absolute liability element of the ancillary offences connected with terrorist acts should be removed, that the sections dealing with the Attorney-General's proscription powers should not be enacted, and that the definition of a "terrorist act" be amended to include a third element, such that the action or threat of action must be designed to influence government by undue intimidation or coercion or to unduly intimidate the public or a section of the public.[33]

At the time of writing, the Attorney-General has announced that the Government intends to make key changes to the Bills, and in particular to

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29 See http://www.aph.gov.au/house/committee/pjcaad/reports.htm.

30 Security Legislation Amendment (Terrorism) Bill 2002 s 3 (Proposed: Criminal Code (Cth) div 100.1).

31 *Ibid*, s 4 and div 102.2 respectively.

32 *Ibid*, s 4 and divs 101, 102 respectively.

33 See report at http://www.aph.gov.au/senate/committee/legcon_ctte/terrorism/report/Security.pdf.

the proscription provisions. The key changes included the amendment of the definition of "terrorist act" to include the element of intent, the removal of the reversal of the onus of proof, the replacement of a terrorist training offence with three different levels of offence with different ranges of penalties, the replacement of the proscription provision with a new definition of terrorist organisation, and the inclusion of an attempt to withdraw from a terrorist organisation after becoming aware that it was a terrorist organisation as a defence. Furthermore, the government has agreed to a review of the legislation after three years. If these amendments take place, the Bills may well win the support of the opposition, in which case the amended Bills could pass through the Senate in mid-June.

(iii) Criminal Code (Suppression of Terrorist Bombings) Bill 2002

This Bill is strictly limited in its operation, containing only one offence-creating provision. Under this Bill, an offence is committed where a person delivers or places an explosive or other lethal device in a public place (or other listed place) with the intention of causing death or serious harm or extensive destruction.[34] This Bill does not represent a significant challenge to existing civil liberties in Australia, as the offence-creating provision is limited to the actual use of explosive and lethal devices, and the section requires an element of intention or at least criminal recklessness to be successfully prosecuted.

(iv) Suppression of Financing of Terrorism Bill 2002

Under this Bill, it is an offence to provide or collect funds in circumstances in which a person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act.[35] On its face the provision is wide enough to impose a legal duty upon members of the public who may provide funding to foreign aid organisations to ascertain exactly how the funds will be expended.[36]

The Senate Legal and Constitutional Committee recommended amendment of the Suppression of the Financing of Terrorism Bill 2002 such that the financing of terrorism would now require an element of intent.

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[34] Criminal Code (Suppression of Terrorist Bombings) Bill 2002 s 1 (Proposed: Criminal Code (Cth) 72.3), available at http://www.aph.gov.au/bills/index.htm.

[35] Suppression of Financing of Terrorism Bill 2002 s 3 (Proposed: Criminal Code (Cth) 103.1), available at http://www.aph.gov.au/bills/index.htm.

[36] This specific concern also arises in relation to Security Legislation Amendment (Terrorism) Bill 2002 s 4 (Proposed: Criminal Code (Cth) div 102.4), as discussed in section C(v) below, although in the context of Suppression of Financing of Terrorism Bill 2002 s 3 (Proposed: Criminal Code (Cth) div 103.1) the issue of providing funds is more directly addressed.

C. *Criticisms of the "Package"*

At the Senate Committee hearings, this legislative package was criticised by a large number of organisations including the NSW Council for Civil Liberties, the Ethnic Communities Council of Victoria, the Australian Council of Trade Unions, Liberty Victoria, the Islamic Council of Victoria, the Law Council of Australia, Amnesty International, the Uniting Church in Australia, the Victorian Council of Social Services, People Against Repressive Legislation and the Federation of Community Legal Centres (Victoria) Inc. According to media reports, those making submissions referred to the Bills as "panic-stricken", "extraordinarily bad" and "the worst legislation ever seen".[37] The principal concern with the government's proposals from a civil libertarian perspective lies in the extremely wide reach of the definition of a "terrorist act".

(i) Definition of "Terrorist Act"

A pivotal concept throughout all the Bills is the definition of a "terrorist act". This definition underlies most of the increased powers of security agencies and most of the new offences which are created. A chief concern is that the definition is so wide as to encompass a broad range of otherwise legitimate and largely non-violent political activities which are currently part of the everyday practice of Australian democracy.
A "terrorist act" is defined in the Security Legislation Amendment (Terrorism) Bill 2002 s 3 as follows:

> (1) A terrorist act means action or threat of action where:
> (a) the action falls within subsection (2); and
> (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause;
> but does not include:
> (c) lawful advocacy, protest or dissent; or
> (d) industrial action.
>
> (2) Action falls within this subsection if it:
> (a) involves serious harm to a person; or
> (b) involves serious damage to property; or
> (c) endangers a persons life, other than the life of the person taking the action; or
> (d) creates a serious risk to the health or safety of the public or a section of the public; or

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[37] L Glendinning, "Terrorism legislation 'worst legislation ever seen'" *Sydney Morning Herald* (9 April 2002) at 3.

(e) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:

(i) an information system; or

(ii) a telecommunications system; or

(iii) a financial system; or

(iv) a system used for the delivery of essential government services; or

(v) a system used for, or by, an essential public utility; or

(vi) a system used for, or by, a transport system.

"Terrorist acts", and a number of related offences, such as providing or receiving training connected with terrorist acts, directing organisations concerned with terrorist acts, possessing things connected with terrorist acts, collecting or making documents likely to facilitate terrorist acts, and other acts done in preparation for or planning terrorist acts, incur the penalty of life imprisonment.[38]

(ii) *Definition Wide Enough to Include Non-violent Direct Action*

The statutory definition of a "terrorist act" includes any act or threat which involves serious damage to persons or property or which creates a serious risk to public safety. Personal and property damage sometimes do occur as a part of legitimate public protests even where the vast bulk of the participants are behaving in a non-violent way.[39] Existing criminal law provides ample opportunities for the control of public assemblies and specific offences for those situations where violence or property damage does occur. The effect of the proposed legislation would be to create a situation where almost any form of non-violent direct protest, such as those in which many Australians have participated at the Franklin dam, Daintree rainforests or the Jabiluka mine site, could be inappropriately classified as a terrorist act, and the organisations supporting those protests could also be caught by anti-terrorist measures. Under the proposed legislation, unlawful activity undertaken for political, ideological and religious causes will be penalised far more severely than will identical actions performed for greed, revenge and other base personal motives, which will be dealt with under existing criminal law provisions.[40]

Picketing could also be classified as a terrorist act since the definition of "industrial action" for the purposes of the Workplace Relations Act 1996

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[38] Security Legislation Amendment (Terrorism) Bill 2002 s 4 (Proposed: Criminal Code (Cth) div 101).

[39] See examples discussed *supra* note 22, April 8 2002, at 13.

[40] This was discussed at the Committee hearings. See *ibid* at 20, 38; *supra* note 22, April 17 2002, at 50, 90.

(Cth) excludes all form of picketing.[41] Picketing information technology engineers and picketing bank tellers, who would disrupt information systems, could be caught by the legislative definition, as could picketing nurses, who could potentially pose a serious risk to public health.[42] The Attorney-General's department has conceded that assisting in the cutting down of fences at the Woomera Detention Centre in an attempt to liberate asylum seekers and draw public attention to their predicament, such as occurred on 29 March 2002, would fall within the scope of the definition.[43] Even passive civil disobedience without property damage could be considered a terrorist act, given that protesters know that the police will remove them and in so doing, could inflict physical injury or serious harm to the protesters.[44] Indeed, the prospect of serious harm to protesters is often part of direct action. Protesters frequently confront the possibility of serious injury.[45] Conventional and safer forms of protest are far less likely to appeal to the public imagination or to convey the urgency of the protesters' message.

The Attorney-General's department has provided reassurances in relation to the construction of the legislation and its enforcement in the context of protest and public order offences.[46] However, as Cameron Murphy from the NSW Council for Civil Liberties has pointed out, no one can predict who will be in power or when the legislation will be used.[47] Many participants in the Senate Committee Inquiry expressed concerns that the legislation would be applied in a racially discriminatory manner[48] and that politically unpopular movements would be targeted.[49]

(iii) *Definition Includes Non-violent Computer Based Activism*

Subsection 2(e) of the definition specifically includes as a terrorist act any threat to seriously interfere with an information system or telecommunication system. This is wide enough to cover on-line political activism, and according to the definition does not require any personal or property damage or even any risk to public health and safety in order to

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41 Picketing is discussed *supra* note 22, April 17 2002, at 50; April 18 2002, at 116, 117, although the Attorney-General's department stated that this construction was incorrect (*Supra* note 22, April 19 2002, at 204).

42 *Supra* note 22, April 18 2002, at 117.

43 See *supra* note 22, April 8 2002, at 18-19.

44 *Supra* note 22, April 18 2002, at 117.

45 See, for example, a protester's account of an incident in the South East forests of NSW in September 1989, when his tripod was pushed over by police and loggers and he ended up in hospital, in N Rogers ed, *Green Paradigms and the Law* (Southern Cross University Press, Lismore, 1998) at 166-8.

46 *Supra* note 22, April 19 2002, at 195, 204.

47 *Supra* note 22, April 8 2002, at 32.

48 *Supra* note 22, April 17 2002, at 77, 79; April 18 2002, at 135, 139, 150.

49 *Supra* note 22, April 17 2002, at 86, 89.

constitute an act of terrorism. Clearly this covers non-violent forms of computer activism, such as electronic mail-ins, provided that they seriously interfere with an information system, such as a corporate website. This aspect of the definition goes well beyond any arguably necessary response to specifically violent or life-threatening forms of terrorism, and indicates a manifest legislative intention to use anti-terrorism laws as a vehicle for clamping down on political activism generally, whether or not it is associated with significant personal or property damage.

(iv) *Creation of a Wide Range of Related Offences*

Concerns at the extraordinary width of the definition of a "terrorist act" are compounded by the fact that a number of serious offences are created which impose life sentences on people who may only be remotely connected with activities or organisations defined as terrorist.[50]

For instance, a business proprietor who sold fertiliser to a customer could be guilty of at least five offences under the proposed legislation, despite his or her ignorance concerning the customer's intention to use the fertiliser to make a bomb for use in a terrorist context.[51] If the proprietor failed to ask the customer about the intended use of the fertiliser, he or she may find it difficult to establish that there was no recklessness.[52] Even knowingly downloading a document dealing with the activities of terrorist organisations such as Al Qaeda for the purposes of research would be in breach of the legislation.[53]

The provisions of the Security Legislation Amendment (Terrorism) Bill 2002 which give the Attorney-General powers to proscribe organisations do not even require proof that such organisations are involved in "terrorist acts", but merely a reasonable belief to that effect on the part of the Attorney-General.[54] Even in the absence of any terrorist act, the Attorney-General is empowered to proscribe political organisations, on such nebulous considerations as a perceived threat to the security or integrity of the Commonwealth or of another country.[55]

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50 Security Legislation Amendment (Terrorism) Bill 2002 s 4 (Proposed: Criminal Code (Cth) 102.4).

51 These include: possessing a thing connected with the terrorist act (the fertilizer prior to purchase); possessing a document connected with the terrorist act (a piece of paper handed over by the customer describing the type of fertilizer required); collecting a document connected with the terrorist act; making a document connected with the terrorist act (the invoice for the purchase); and directing an organization indirectly concerned with the preparation of the terrorist act (the business). See *supra* note 22, April 18 2002, at 117-8.

52 *Ibid* at 121.

53 *Ibid* at 123.

54 Security Legislation Amendment (Terrorism) Bill 2002 s 4 (Proposed: Criminal Code (Cth) 102.2).

55 *Ibid.*

The powers given to the Attorney-General open up the future possibility of the manipulation of the powers to outlaw rival political organisations on spurious grounds. Once an organisation is proscribed, a further range of related offences come into operation under which members, directors, or any person who makes funds available to such an organisation may be imprisoned for 25 years.[56]

The extension of liability to informal members of proscribed organisations[57] was criticised in the Senate Committee inquiry. It was pointed out that this category was not clearly defined[58] and, in addition, it was not clear how individuals could remove themselves from this category.[59] The Law Council of Australia raised a further concern that members of an organisation which was the subject of an inappropriate declaration could be convicted and sentenced before the declaration was successfully appealed.[60]

Not only members, but also people who are only indirectly associated with organisations are caught by these provisions. Representatives from the NSW Council for Civil Liberties suggested that bank tellers who processed the funds of proscribed organisations, people who dropped off sandwiches and even lawyers who represented these organisations in an attempt to have the declaration revoked could all face conviction under the proposed legislation.[61]

(v) *Proscription of Political Groups*

It is not unrealistic to posit a scenario under which an organisation like Greenpeace, or a trade union such as the Maritime Union of Australia could be proscribed and all members or financial contributors could become liable to a 25 year prison term. Furthermore, fundamental difficulties arise from the retrospective nature of the power to proscribe, which can be exercised by the Attorney-General in relation to acts or omissions committed before *or* after the commencement of the section.[62]

Donations for the benefit of independence movements such as the Free Papua Movement (OPM), or the Zapatistas in Mexico could attract a penalty of 25 years imprisonment in Australia if the Australian government yielded to pressure by a foreign regime to proscribe their political opponents. These penalties could apply even if the donations were intended

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56 *Ibid*, s 4 and s 102.4 respectively; Suppression of Financing of Terrorism Bill 2002 s 3 (Proposed: Criminal Code (Cth) 103.1).

57 Security Legislation Amendment (Terrorism) Bill 2002 s4 (Proposed: Criminal Code (Cth) 102.1).

58 *Supra* note 22, April 17 2002, at 66.

59 *Supra* note 22, April 8 2002, at 36.

60 *Supra* note 22, April 18 2002, at 107.

61 *Supra* note 22, April 8 2002, at 34.

62 Security Legislation Amendment (Terrorism) Bill 2002 s4 (Proposed Criminal Code (Cth) 102.2).

for food or medicine only and such provisions would operate as an impediment to the activities of organisations which provide overseas aid.[63] Participants in the public hearings reiterated that it was difficult to distinguish between freedom fighters and terrorists, and that the classification of individuals and groups can change with time.[64] Amnesty International has pointed out that there is no provision for compensation nor are statutory remedies available for organisations which are incorrectly proscribed.[65]

An Australian business has already experienced the punitive consequences associated with unwittingly sharing the name of an organisation gazetted as a terrorist organisation. The Shining Path is a Peruvian organisation with terrorist associations, and was gazetted under the Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001.[66] The Shining Path is also a music shop in Collingwood, Melbourne, which found its assets frozen as a consequence of the gazettal.[67] This incident, described by the Australian Federal Police as "unfortunate" and "highly regrettable"[68] and by the Attorney-General's department as an "unfortunate coincidence",[69] highlights the potential for error in the proscription of organisations.

(vi) *Removal of Common Law Protection for Suspects*

In addition to concerns at the wide range of new substantive offences created by the Bills in the anti-terrorism package, are concerns at the increased surveillance and interrogation powers given to Australian security forces in the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002.

The Bill provides for extended periods of detention of suspects initially up to 48 hours[70] but with powers to issue further warrants beyond 48 hours. This contrasts markedly to the current maximum period of detention under existing NSW law which is four hours, and which can only be renewed to a maximum of twelve hours.[71] During interrogations suspects can be denied

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63 See *supra* note 22, April 8, 2002, at 4, 6.

64 *Ibid* at 32, 45; *supra* note 22, April 18 2002, at 189.

65 *Ibid* at 112.

66 These Regulations were hastily enacted in October 2002 as an immediate response to United Nations Security Council Resolution 1373 of 28 September 2001 and are intended to prevent dealings with the financial assets of people and entities which engage in or support terrorism.

67 See B Toohey, "A-G's war swings from tragedy to farce," *Australian Financial Review* (9 March 2002) at 51.

68 *Supra* note 22, April 19 2002, at 197.

69 *Ibid* at 208.

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

71 Crimes Act 1900 (NSW) s 356D, s 356G.

access to legal representation,[72] and the common law right to silence has been abrogated by the creation of an offence of failure to answer a question. The penalty for failure to answer questions or provide information is five years' imprisonment.[73]

These new powers breach traditional common law protections of the rights of accused persons, and also breach Australia's obligations under the International Covenant on Civil and Political Rights.[74]

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

III. CONSTITUTIONALITY OF PROPOSED LEGISLATION

Three major constitutional issues arise in relation to the proposed legislation.

Firstly, the question of whether the Commonwealth government has the legislative power to enact the provisions, and in particular, the provisions in relation to the proscription of organisations, must be considered.

Secondly, the provision which allows the Attorney-General to declare organisations to be proscribed organisations appears to violate the doctrine of the separation of powers, which requires that Federal judicial power should be exercised only by Chapter III federal courts.

Thirdly, the legislation clearly jeopardises the rights of individuals to exercise fundamental democratic freedoms, including the freedom of

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[72] Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 s 24 (Proposed: Australian Security Intelligence Organisation Act 1979 s 34F).

[73] *Ibid*, s 24 and s 34G respectively.

[74] The Bill contravenes articles 9 and 14 of the International Covenant on Civil and Political Rights, in particular, Article 9(3): "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement." Also Article 14(3)(g): "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … not to be compelled to testify against himself or to confess guilt." The privilege against self-incrimination is also currently a common law right applicable to all natural persons in Australia. See *Environment Protection Authority* v *Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 (Aust HC).

political communication, the freedom of association and the freedom of assembly. To a limited extent, the Australian Constitution protects political discourse, protest and dissent. It is possible that parts of the legislation, in going far beyond what is reasonably appropriate and adapted to achieving the public interest goal of preventing terrorism, might be struck down as invalid due to the deleterious impact on the various constitutional freedoms which can be implied from our democratic system of government.

A. *Legislative Heads of Power*

It is widely recognised that the Commonwealth has the legislative power to implement obligations under international conventions or treaties under the external affairs head of power[75]and the Attorney-General has clearly stated that the intention of the Government in proposing this legislative package is to comply with Australia's international obligations. Two Bills are intended to meet the requirements of two of the twelve major multilateral conventions on terrorism. The Suppression of the Financing of Terrorism Bill supposedly implements Australia's obligations under the International Convention for the Suppression of the Financing of Terrorism 1999, and the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 is designed to implement the International Convention for the Suppression of Terrorist Bombings 1997.[76]

Australia has not yet ratified the International Convention for the Suppression of the Financing of Terrorism nor acceded to the International Convention for the Suppression of Terrorist Bombings, but has announced its intention to do so once the legislation is in place.

Whilst Australia can implement its obligations under these Conventions, once ratified, any legislation so enacted must conform to the international obligations. The Suppression of Financing of Terrorism Bill 2002 goes far beyond the requirements of the 1999 Convention. The Bill penalises the provision or collection of funds in circumstances in which the accused is reckless as to whether the funds will be used to facilitate or engage in a terrorist act, even if the terrorist act does not occur.[77] The Convention, however stipulates that there must be intent or knowledge on the part of the accused.[78] Since the proposed penalty (imprisonment for life) is so stringent, the ramifications of removing the requirement for intention are extremely serious.

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75 Section 51(xxix) of the Commonwealth Constitution.

76 *Hansard*, House of Representatives, March 13 2002 at 1140.

77 See proposed section 103.1 of the Criminal Code, in the Suppression of the Financing of Terrorism Bill 2002.

78 Article 2. This discrepancy is discussed by Mr Abbott from the Law Council of Australia, *supra* note 22, April 18 2002, at 104.

The requirement of conformity to the provisions of international Conventions has been clearly stated in a number of cases;[79] the degree of conformity which is required is not, however, clear. Parliament has some degree of discretion in carrying out its international obligations.[80] The most recent restatement of legal principle appears in *Victoria v Commonwealth*.[81] In that case, the majority stated:

> To be a law with respect to "external affairs", the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty. Thus it is for the legislature to choose the means by which it carries into or gives effect to the treaty provided that the means chosen are reasonably capable of being considered appropriate and adapted to that end.[82]

Legislative provisions which have a wide application in such inappropriate scenarios as those discussed in the Senate committee hearings[83] may well be considered as going beyond what might be appropriate and adapted to implementing the Convention.

The Attorney-General's department has argued that the legislative package not only implements Australia's international obligations under Conventions, but also is mandated by the United Nations Security Council Resolution 1373,[84] which was adopted on 28 September 2001 and contains a number of strategies to combat international terrorism. The Resolution is broad and far-reaching, with provisions such as paragraph 2(b) which requires all States to take the necessary steps to prevent the commission of terrorist acts. However, the High Court has not clearly established the ambit of the external affairs head of legislative power in the context of implementing United Nations Resolutions or other international documents which do not have the status of treaties or conventions.

There are judicial statements in a number of cases to the effect that the Commonwealth can legislate on matters of international concern, even in

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79 See for example *Commonwealth v Tasmania* (1983) 158 CLR 1 (Aust HC), at 131 *per* Mason J; at 259 *per* Deane J; at 158 *per* Brennan J.

80 *Richardson v Forestry Commission* (1988) 164 CLR 261 (Aust HC), *per* Mason CJ and Brennan J at 295-6; *per* Wilson J at 304; *per* Dawson J at 327; *per* Toohey J at 336; *per* Gaudron J at 345-8; *per* Deane J at 310-1.

81 *Victoria v Commonwealth* (1996) 187 CLR 416 (Aust HC).

82 *Victoria v Commonwealth* (1996) 187 CLR 426 (Aust HC), *per* Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at 486.

83 For instance, contributing $20 at a fundraising function in a school hall in order to raise money for wounded Tamil people could lead to life imprisonment. See *supra* note 22, April 8 2002, at 6.

84 *Ibid* at 10.

the absence of specific treaty obligations.[85] In *Polyukhovich v Commonwealth*,[86] Brennan J stated that the observation of international standards might fall within section 51(xxix), provided that the standards are broadly adhered to or likely to be broadly adhered to in international practice, and expressed in terms which clearly state the expectation of the community of nations.[87] More recently, the Court has considered the validity of amendments to the Industrial Relations Act 1988 (Cth) not only in the context of international obligations in conventions but also in light of recommendations of the International Labour Organisation.[88] However, the majority judges did not reach any firm conclusion on whether the recommendations could be used as an alternative basis for domestic legislation.[89]

It is therefore unclear as to whether the acknowledged existence of a matter of international concern, such as terrorism, and/or the General Assembly and United Nations Security Council Resolutions on terrorism, in particular Resolution 1373, would enable the Commonwealth, under the external affairs head of power, to enact detailed domestic legislation on terrorism and terrorist offences such as that currently proposed by the Commonwealth.[90] Even if the High Court were to conclude that the Commonwealth could legislate to implement its obligations under Resolution 1373, the Court would presumably still apply the legal principle from *Victoria v Commonwealth* extracted above. Again, given the punitive effect of the legislative provisions upon the civil liberties of people only tangentially, if at all, connected with terrorism, it is probable that the High Court would hold that many of the legislative provisions go far beyond what is reasonably appropriate and adapted to the goal of eliminating terrorism.

Other heads of legislative power may support specific provisions in the proposed legislation.[91] In the Security Legislation Amendment (Terrorism)

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85 See *R v Burgess: Ex Parte Henry* (1936) 55 CLR 608 (Aust HC), *per* Evatt and McTiernan JJ at 687; *Koowarta v Bjelke-Petersen* 91982) 153 CLR 168 (Aust HC), 217; *Commonwealth v Tasmania* (1983) 158 CLR 1 (Aust HC), *per* Mason J at 131-2 and Murphy J at 171-2.

86 (1991) 172 CLR 501 (Aust HC).

87 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (Aust HC).

88 *Victoria v Commonwealth* (1996) 187 CLR 416 (Aust HC).

89 See discussion in A Blackshield and G Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, 3rd ed (Sydney: Federation Press, 2002) at 797.

90 Note that the States, which have general legislative power, could enact provisions of this nature.

91 For instance, amendments to the *Customs Act* in the Border Security Legislation Amendment Bill 2002 may be supported by s 51(i), the trade and commerce head of power; the Telecommunications Interception Legislation Amendment Bill may be supported by s 51(v), which empowers the Commonwealth to legislate with respect to postal, telegraphic, telephonic and other like services.

Bill 2002[92] the Commonwealth draws upon a number of different heads of power[93] in order to support its broad range of terrorist offences. However, it is difficult to find a supporting head of power for the proposed section 102.2 in the Criminal Code,[94] which permits the Attorney-General to proscribe organisations and which, according to Professor George Williams, bears a "disturbing similarity" with provisions in the Communist Party Dissolution Act 1950.[95] Indeed, the section does closely resembles provisions of the Communist Party Dissolution Act 1950 (Cth) which declared the Australian Communist Party to be an unlawful association, and also empowered the Governor-General to declare various organisations to be unlawful, on the basis not only of their association with the Party but also because the continued existence of the organisation was prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth. Since the parallels between the proposed legislation and the Communist Party Dissolution Act have been widely noted by academic commentators and in the media, it is worth examining the *Community Party* case,[96] where that legislation was struck down by the High Court on the basis that there was no supporting head of power.

(i) *The Communist Party case*

It is easy to draw an analogy between the moral panic surrounding Communists and Communism in Australia in the 1950s, and the moral panic surrounding terrorists and terrorism today. The strong rhetoric used by the Menzies government in the 1950s is reproduced in a modern context. More than fifty years ago communists were described as "the most unscrupulous opponents of religion, of civilised government, of law and order, of national security", and communism was depicted as "an alien and destructive pest".[97] In March this year, Daryl Williams, the Federal Attorney-General, stated that "terrorism has the potential to destroy lives, devastate communities and threaten the national and global economy"[98] and

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92 Security Legislation Amendment (Terrorism) Bill 2002 s 3 (proposed Criminal Code (Cth) 100.2).

93 Including s 51(xx) the corporations head of power, s 51(v) the postal, telegraphic, telephonic and other like services head of power, s 51(i) the trade and commerce head of power, s 51(xiii) the copyrights, patents of invention and designs and trademarks head of power, s 51(xiv) the insurance head of power, s 51(xxix) the external affairs head of power, and s 52(i), the head of power in relation to Commonwealth places.

94 Security Legislation Amendment (Terrorism) Bill 2002 s 4 (proposed Criminal Code (Cth) 102.2).

95 *Supra* note 22, April 8 2002, at 42.

96 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (Aust HC).

97 G Winterton, "The Significance of the *Communist Party Case*" (1992) 18 Melbourne University Law Review 630 at 635.

98 *Hansard*, House of Representatives, March 13 2002 at 1140.

described terrorist forces as "actively working to undermine democracy and the rights of people throughout the world."[99] In a climate of fear in 1950, a "vaguely worded draconian statute"[100] was enacted which "imperilled many citizens whose only offence might have been a concern for the oppressed or sympathy for the causes of world peace or a radical view of social policy at home."[101] The proposed anti-terrorism legislation similarly threatens the civil liberties and democratic freedoms of citizens who feel no sympathy for terrorist causes.

Sentiments expressed by the opponents of the Communist Party Dissolution Act also bear an uncanny resemblance to the concerns expressed by critics of the proposed legislation at the Senate committee hearings. Prime Minister Chifley urged in 1948, "Let me emphasise that never is liberty more easily lost than when we think we are defending it";[102] Eva Maria Cox has argued this year that "…we (should) not kill off democratic processes by trying to protect democratic processes against terrorism."[103]

The High Court's reasoning in the *Communist Party* case focused on the scope of Commonwealth powers, rather than on constitutional rights and freedoms,[104] although an analysis of the transcripts of the case has revealed that the judges were aware of the impact of the impugned legislation on civil liberties.[105] The judges looked at the scope of the defence head of power[106] and at what is now the "nationhood" power,[107] the power to defend the existing system of government. The majority judges concluded that neither head of power supported legislative provisions which imposed penalties on individuals and bodies before they actually engaged in a particular course of conduct, or in particular activities.

Some of the majority judges suggested that in time of actual war, the defence head of power might support legislation which authorised such an exercise of power by the Executive.[108] However, in 1950 Australia was not at war, despite Australian participation in a war in Korea. Nor, presumably, is Australia currently at war, although the government has stated that "we

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99 *Ibid* at 1141-2.

100 M Kirby, "H V Evatt, the Anti-Communist Referendum and Liberty in Australia" (1990) 7 Australian Bar Review 93 at 116.

101 *Ibid* at 118.

102 Quoted from G Winterton, *supra* note 97 at 636.

103 *Supra* note 22, April 8 2002, at 25.

104 See S Bronitt and G Williams, "Political Freedom as an Outlaw: Republican Theory and Political Protest" (1996) 18 Adelaide Law Review 289 at 295.

105 See G Williams, "Reading the Judicial Mind: Appellate Argument in the *Communist Party Case*" (1992) 18 Melbourne University Law Review 630.

106 Section 51(vi) of the Commonwealth Constitution.

107 This head of power arises from the operation of s 51(xxxix) upon s 61 of the Commonwealth Constitution.

108 See for instance *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (Aust HC), *per* Dixon J at 202; *per* Fullagar J at 258.

are actively involved in the war against terrorism."[109] The judgments in the *Communist Party* case would indicate that, in times of peace, the defence and implied nationhood heads of power cannot support legislation which operates on the opinion of the Executive and which "does not take the course of forbidding descriptions of conduct or of establishing objective standards or tests of liability upon the subject, but proceeds directly against particular bodies or persons by name or classification or characterisation … and does so not tentatively or provisionally but so as to affect adversely their status, rights and liabilities once and for all."[110]

On this authority, despite some differences between the Communist Party Dissolution Act and the proposed sections 102.2 and 102.4 of the Criminal Code,[111] it would appear that the latter sections would not be supported by a Commonwealth head of power.

B. *The Separation of Powers Doctrine*

Another constitutional issue which arises in relation to proposed sections 102.2 and 102.4 of the Criminal Code is the doctrine of the separation of powers, which prevents the vesting of judicial power in a member of the executive government. The principle that judicial power can *only* be exercised by courts established under Chapter III of the Constitution is well established.[112] It is arguable that the Attorney-General, in exercising the power to declare an organisation to be a proscribed organisation, is thereby determining criminality[113] and exercising "undue unfettered power" in so doing.[114] By virtue of his declaration, people who direct the activities of proscribed organisations, have financial dealings with such organisations, are members of such organisations, provide training to such organisations, or, even more broadly, assist such organisations, are guilty of an offence.[115] Thus the Attorney-General's declarations have serious punitive consequences for those directly and indirectly connected with organisations

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[109] *Hansard*, House of Representatives, March 13 2002, at 1142.

[110] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (Aust HC), *per* Dixon J at 192.

[111] For example, Dixon J was concerned about the unreviewable nature of the Governor-General's discretion to proscribe organizations and persons: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, *per* Dixon J at 178-9. The Attorney-General's decision is subject to review (although not a review as to the merits) under the Administrative Decisions (Judicial Review) Act 1977 (Cth).

[112] See cases such as *NSW v Commonwealth* (1915) 20 CLR 54 (Aust HC), *Waterside Workers' Federation of Australia v J W Alexander* (1918) 25 CLR 434 (Aust HC) and *Brandy v Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245 (Aust HC).

[113] *Supra* note 22, April 17 2002, at 65.

[114] *Supra* note 22, April 8 2002, at 43.

[115] Security Legislation Amendment (Terrorism) Bill 2002 s 4 (Proposed: Criminal Code (Cth) 102.4).

thus proscribed. The central issue here is whether the effect of the relevant provisions amounts to a usurpation of judicial power.

It is indisputable that the adjudication of criminal guilt is an exclusively judicial function.[116] Gaudron J, as a minority judge in *Polyukhovich v Commonwealth*, has held that:

> The usurpation of judicial power by a law which declares a person guilty of an offence produces the consequence that the application of that law by a court would involve it in an exercise repugnant to the judicial process. It is repugnant to the judicial process because the detection of guilt or innocence is foreshadowed by the law. The only issue is whether the person concerned was a person declared guilty by the law.

In *Polyukhovich*, the issue for the minority judges was whether the relevant legislation constituted a usurpation of judicial power by the legislature. The relevant issue for the purposes of the Security Legislation Amendment (Terrorism) Bill is whether the relevant legislation invalidly confers judicial power upon the executive arm of government. However, it is unclear whether the current High Court bench would strike down the proscription provisions on the basis that they infringed the doctrine of strict separation of judicial power. Although the tendency in recent years has been for members of the High Court to treat Chapter III and the principle of strict separation of judicial power as a source of individual rights,[117] the strongest statements about the ambit of the principle of strict separation of judicial power have been made by minority rather than by majority judges.

Nor does the *Communist Party* case provide any guidance. The argument that similar provisions in the Communist Party Dissolution Act infringed the doctrine of separation of judicial power was dealt with in a cursory fashion by the three justices who considered it, although Professor Zines has argued that the "stream and the source" doctrine, which is derived from that case, is associated with the separation of powers principle and "indeed it is scarcely intelligible without that notion."[118] He maintained that "it is difficult to imagine that an Act similar to the Communist Party Dissolution Act would have been invalidated if it had referred to organisations which 'in the opinion of the court' were a threat to security or defence."[119] Nevertheless, there is no clear legal principle which can be derived from the case in relation to the separation of powers.

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[116] See, for instance, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (Aust HC), *per* Brennan, Deane and Dawson JJ at 114 and *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (Aust HC), *per* Deane J at 608-9.

[117] See the judgments of Deane and Gaudron JJ in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (Aust HC), and the judgments of Deane, Toohey and Gaudron JJ in *Leeth v Commonwealth* (1992) 174 CLR 455 (Aust HC).

[118] L Zines, *The High Court and the Constitution*, 3rd ed (Sydney: Butterworths, 1992) at 203.

[119] *Ibid*, at 204.

The retrospective nature of the power to proscribe, which can be exercised in relation to acts or omissions committed before or after the commencement of that section,[120] perhaps strengthens the argument that the legislation requires a usurpation of judicial power by the executive. In *Polyukhovich* two minority judges, Deane and Gaudron JJ, held that retrospective criminal law amounted to a usurpation of judicial power by the legislature. Deane J held that "a law which declares that a person 'is guilty' of a crime against a law of the Commonwealth if he has done an act which did not, when done, in fact contravene any such law is inconsistent with Chapter III of the Constitution."[121] Although Toohey J expressed some sympathy for the position taken by Deane and Gaudron JJ,[122] the majority judges rejected this argument. It is unclear, therefore, as to whether the High Court would strike down the sections which give the legislation its retrospective effect on the basis that a retrospective criminal law infringes the principle of the strict separation of judicial power.

C. *Implied Freedoms*

The impact of the proposed legislation upon non-violent direct action is one of the main causes for concern. Non-violent direct action has proved to be one of the more effective political tools available to the general public in Australia, and has been used extensively and successfully by the environmental movement in particular in the last thirty years.[123] Other groups who have utilised such techniques include peace activists, anti-corporate globalisation activists, some farmers' groups and, at times, the timber industry. Direct action is the means by which activists capture the media's attention and the public's imagination. Lacking the formidable resources of their governmental and corporate opponents, and contending with a corporate stranglehold on the media, they promote a political agenda through the sheer audacity of their actions.

Direct action remains a potent political tool, designed to create a sense of urgency and to engender public debate.[124] In the words of Martin Luther King, it "seeks to create such a crisis and establish such creative tension, that a community which has constantly refused to negotiate is forced to confront the issue."[125] The effectiveness of direct action as a means of political expression, and the fact that it can be utilised effectively by groups

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120 Discussed *supra* note 22, April 18 2002 at 118.

121 See *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (Aust HC), *per* Deane J at 631-2; see also Gaudron J at 704-6.

122 *Ibid per* Toohey J at 689.

123 See T Bonyhady, *Places Worth Keeping. Conservationists, Politics and Law* (Sydney: Allen and Unwin, 1993).

124 S Beder, "Activism versus Negotiation: Strategies for the Environmental Movement" (1991) 10 Social Alternatives 53 at 53.

125 Martin Luther King, "Letter from a Birmingham Jail", written on April 16 1963.

with few material resources, has been a source of irritation for governments for some time. Legislation which is intended to silence activists, either directly or indirectly, or to restrict their capacity to attract media interest, is increasingly commonplace.[126] The future of non-violent direct action in Australia is threatened most dramatically by the proposed enactment of the anti-terrorism legislation.

In recent years the High Court has recognised a number of implied constitutional rights and freedoms which derive by implication from the nature of the representative government which is established by the Constitution.[127] These implied rights and freedoms include an implied freedom of political communication, and possibly implied freedoms of movement and association. The proposed legislation clearly impacts on the freedom of political communication, assembly and association. Although the High Court largely disregarded such considerations in invalidating similar legislation in the *Communist Party* case, there has been, in recent years, a number of cases in which the High Court has relied upon an implied freedom of political communication[128] in order to invalidate legislation. Unfortunately, "the ideological constraints of constitutionalism"[129] ensure that the implied freedom of political communication is of little relevance for marginalised groups who lack the financial, social and political power to be heard. Critics have highlighted the corporate bias of the implied freedom of political communication case law and its failure to ensure that "wealth and power will not drown out those voices which … popular elections may stifle."[130] The practical outcome of the implied freedom of political communication jurisprudence is that the large corporations, particularly the media corporations, have acquired a new weapon in their battle against State regulation of their activities, whilst "the people", despite their symbolic importance in High Court rhetoric, have failed to benefit at all.

There have been only two cases in which the High Court has considered the application of the implied freedom of political communication to legislation which curtailed the political communications of activists.

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[126] See Bonyhady, *supra* note 123at 55.

[127] See *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 (Aust HC) and *Nationwide News v Wills* (1992) 177 CLR 1 (Aust HC).

[128] There have also been suggestions that in addition, freedom of movement and association may be implied by our constitutional system of representative democracy. See *Kruger v Commonwealth* (1997) 190 CLR 1 (Aust HC), *per* Gaudron J at 115-6, 121,126-7; *per* Toohey J at 91-92.

[129] G Anderson, "Corporations, Democracy and the Implied Freedom of Political Communication: Towards a Pluralistic Analysis of Constitutional Law" (1998) 22 Melbourne University Law Review 1 at 20.

[130] *Ibid.* See also A Fraser, "False Hopes, Implied Rights and Popular Sovereignty in the Australian Constitution" (1994) 16 Sydney Law Review 213 at 222-25 and D Cass, "Through the Looking Glass: The High Court and the Right to Free Speech" (1993) 4 Public Law Review 229.

Unsurprisingly, given the High Court's preference for "form over substance",[131] in both instances the political activists who challenged the relevant legislative provisions were unsuccessful.

(i) *The Langer case*[132]

Mr Langer, a well-known political activist whose goal is to undermine the two party political system, was charged under section 329A of the Commonwealth Electoral Act 1918. His crime was to distribute leaflets in which he urged voters to exhaust their preferences rather than to vote indirectly for one of the major political parties. Section 329A made such political activity an offence. In considering the validity of section 329A, the Court looked, *inter alia*, at the application of the implied freedom of political communication.

The outcome of the *Langer* case suggests that the High Court is prepared to condone the silencing of dissident voices by the legislature. As Graeme Orr has commented, it could not be expected that the High Court would share Langer's political goals. Nevertheless, given the clear intention of section 329A to prevent political communications to voters on their political options, one would have expected "on classical liberal reasoning" that section 329A would have been struck down as infringing the implied freedom.[133] This did not occur. It is difficult to avoid the conclusion that the High Court, whilst sheltering behind abstract principle, was reluctant to protect subversive challenges to the dominant political discourse by "critics of the system who are without substantial wealth and influence."[134]

(ii) *The Levy case*[135]

Shortly after the *Langer* case, the High Court was again confronted with the predicament of an activist whose political activities were restricted by legislation. In the *Levy* case, the Court considered, *inter alia*, the importance of the media to activists and the extent to which activists can rely on the implied freedom in carrying out direct action protest in defiance of the law. The Court's lack of sympathy for the marginalised voices of activists was consistent with its stance in earlier cases.

The intention of activist Laurence Levy was to attract the television cameras when he breached Regulation 5 of the Victorian Wildlife (Game Hunting Season) Regulations 1994 and entered a permitted duck hunting

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131 K Walker and K Dunn, "Mr Langer is Not Entitled to be an Agitator" (1996) 20 Melbourne University Law Review 909 at 910.

132 *Langer v the Commonwealth* (1996) 186 CLR 302 (Aust HC).

133 G Orr, "The Choice Not to Choose: Commonwealth Electoral Law and the Withholding of Preferences" (1997) 23 Monash University Law Review 285 at 307.

134 Walker and Dunn, *supra* note 131at 910.

135 *Levy v Victoria* (1997) 189 CLR 579 (Aust HC).

area during the first weekend of the 1994 open season without a game licence. When Levy was charged under Regulation 5(1), he argued that the Regulation was invalid because it impeded his protest and thereby infringed the implied freedom of political communication.

In the *Levy* case, the Court was prepared to recognise that direct action and other types of non-verbal conduct constitute forms of political communication.[136] Three judges also acknowledged that many forms of political communication may involve appeals to emotion rather than to reason.[137] Yet none of the judges in the *Levy* case displayed any inclination to protect direct action as a form of political communication from legislative interference. According to Brennan CJ, non-verbal conduct may by its very nature require more legislative regulation than the speaking of words, which is not "inherently dangerous".[138]

All the judges agreed that the Regulations, whilst effectively preventing the protesters from putting their message in a way that they believed would have the greatest impact on public opinion,[139] or at the very least, diminishing the effectiveness of the protest,[140] were valid, on the basis that the Regulations were appropriate and adapted to the legitimate purpose of protecting public safety. However, the phrase "public safety" misrepresents the true effect of the Regulations, which had little impact on the safety of members of the wider public and in reality applied only to the protesters. As Gaudron J commented, "it seems unlikely that persons other than protesters and licensed duck shooters would wish to be in those areas at the times specified in the Regulation."[141] Their risky and dangerous forays into duck shooting areas enabled activists to convey a powerful political message to television's captive audience. Safer forms of protest would have received scant media coverage.

Although in *Levy*, the Court displayed little sympathy for those involved in direct action, it is clear that any legislation which has a restrictive effect on forms of political communication, including direct action, must be reasonably appropriate and adapted to a legitimate public purpose. Laurence Levy did not face life imprisonment, or twenty-five years imprisonment for his political activities. Surely it is doubtful that the Court would hold that the anti-terrorism legislation, with its excessive penalties and its potential to stifle all forms of non-violent as well as violent protest, is appropriate and adapted to its objective of ending terrorism. In particular, the draconian

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[136] *Levy v Victoria* (1997) 189 CLR 579, *per* Brennan CJ at 594-595, *per* Toohey and Gummow JJ at 613, *per* McHugh J at 622-623 and *per* Kirby J at 637-641. Dawson J does not expressly acknowledge this. Gaudron J focuses on the impact of the Regulations on freedom of movement rather than on their impact on freedom of political communication.

[137] *Ibid per* Toohey and Gummow JJ at 613, *per* McHugh J at 623.

[138] *Ibid per* Brennan CJ at 595.

[139] *Ibid per* McHugh J at 625, *per* Dawson J at 609.

[140] *Ibid per* Kirby J at 648.

[141] *Ibid per* Gaudron J at 620.

penalties which attach to non-violent forms of computer activism cannot be justified in the interests of legitimate public goals such as public safety. It may well be that the legislation would not survive a constitutional challenge on the basis of its impact on the implied freedom of political communication.

IV. CONCLUSION

While few would contest the need to review our laws to fill any gaps which may exist in relation to genuinely violent terrorist attacks of the kind witnessed last year in the United States, there is no demonstrated need to define terrorism so widely as to introduce legislation which strikes at the heart of democratic rights of protest, removes common law rights, and infringes basic freedoms of association and communication via the internet.

A key failing of the legislation is its failure to distinguish between "terrorism" and legitimate domestic dissent and the tradition in Australia of the use of effective non-violent direct protest (both physically and more recently on-line) as a means of highlighting public concerns. Social movements in Australia such as the peace, disarmament and environmental movements have a long history of undertaking bold acts of defiance and dissent but within a strict framework of non-violence and respect for the rule of law. There already exists abundant criminal law at both the State and Commonwealth level which specifically deals with protests, riots, assault, public safety, property damage, trespass, kidnapping, intimidation, as well as offences such as treason, espionage, hijacking, taking of hostages, development of biological weapons or offences against internationally protected persons.[142]

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

There are virtually no safeguards against cynical political use of such powers by future regimes. These laws make Australia indistinguishable from repressive regimes in other parts of the world, and would seriously undermine our capacity to pressure other repressive regimes to safeguard human rights in their own legal systems.

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[142] See *supra* section IIA.