

# New counter terrorism laws law international essay

Law



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Research Essay Since 9/11 the Australian Government has introduced an expansive range of new counter-terrorism laws. With reference to specific examples, discuss how such laws have or might impact Australia's obligations under international human rights law. Annabel Pang Z3235002

## **Introduction**

Today we live in an unpeaceful world full of uncertainties. Some may say it is a time of crisis and danger and we should therefore protect ourselves from these uncertainties as much as we can. The fear of terrorism has intensified since 11 September 2001. Lawmakers around the world endeavour to create and strengthen counter-terrorism laws in response to terrorist threats. The need for strong counter-terrorism laws has been controversial and at the forefront of public debate: on the one hand, counter-terrorism laws are necessary to protect public safety; on the other hand, aspects of the laws appear discriminatory, unjust, and disproportionate. Concerns of certain human rights being violated by counter-terrorism measures are raised, but they have been refuted with an argument that the primary purpose of the laws is to protect the right to life of the population. In Australia, the rapid pace of law-making is alarming and may seem an overreaction to terrorist threats. As a nation without a bill of rights, it is vital that Australia's counter-terrorism laws are in line with international human rights standards. Born in the minds of lawmakers should be the legitimacy, necessity, justification, and objectiveness of the counter-terrorism laws. In protecting the right to life of the public at large, are counter-terrorism measures in effect also restricting the entitlement to rights of certain individuals? Are they an overreaction? Are they one-sided? Do they target a particular group of

individuals or particular organisations? Do they suggest guilt? Ultimately, is national security being prioritised over fundamental freedoms? This essay attempts to find out the answers.

## **Background**

Terrorism is not a new concept; its threats have always existed. It is the September 11 attacks that have given us a 'wake-up call'[1] in reminding ourselves of the serious consequences terrorism could bring in modern age. Meanwhile, the escalation of security measures have been seen as excessively broad, as a result jeopardising certain rights and freedoms. However, one might ask, '[w]ill there be a "war on terror" exception to the international human rights framework?'[2] Article 4 of the International Covenant on Civil and Political Rights (ICCPR) specifies that states are allowed to derogate from certain obligations under international human rights standards in time of public emergency which threatens the life of the nation and when the state of emergency is proclaimed. Nevertheless, such derogations must not discriminate on the bases of race, colour, sex, language, religion or social origin; and some rights are obligatory and non-derogable even in times of emergency. The first wave of anti-terrorism laws started in 2002. However, it was not a good start - the first counter-terrorism Bill was introduced and passed through the House of Representatives on the same day, although it was subsequently debated at the Senate for three months.[3] The rapid pace of introducing new legislations allowed only minimal scrutiny and debate, resulting in broad and expansive definitions. [4] The incentives for passing the unprecedented laws in great speed include the belief that terrorist threats are exceptional, and that current criminal

laws are inadequate in deterring terrorist acts.[5]The 'reactive'[6]law-making process which Australia engaged in to respond to 9/11 and other bombings thereafter has been heavily criticised: 'There has been so much law over such a short time - much of it amending and broadening what was passed just months earlier - as to render the overall impact impenetrable for the interested citizen'.[7]Bills have been passed hastily without in-depth discussions and evaluation of their impact; there has also been limited opportunity for public comment on the Bills.[8]

### **An overreaction?**

Since 9/11, fifty-four anti-terrorism laws have been enacted. Thirty-eight men have been charged. While no terrorist attack has yet occurred on Australian soil since 9/11, our prosecution rate per capita is higher than that of the United States; and some of our laws are more intrusive and more restrictive than laws in the United States. The over-reaction seems to be the product of Australia's inexperience in drafting counter-terrorism laws, as there were no terrorism laws prior to 9/11. It could be said that the anti-terrorism laws are necessary to protect the country and the people from terrorist attacks; to make our position clear that such violence is not accepted; as well as to fulfil our international obligations as a member of the United Nations to take 'the necessary steps to prevent the commission of terrorist acts'.[9]The laws, although 'unusual', were necessary because of the 'extraordinary' threats:[10]'[t]hese measures are extraordinary, but so too is the evil at which they are directed'.[11]Undeniably, it is evident that there is some level of threat which we should not turn a blind eye to. Former Director-General of the Australian Security Intelligence Organisation, Dennis <https://assignbuster.com/new-counter-terrorism-laws-law-international-essay/>

Richardson, has disclosed that we have been a target of al-Qaida, who has an interest in committing a terrorist act in Australia well before 9/11.

[12]Hence, in realising the seriousness of the crimes committed in the name of terrorism, the creation of new offences and the grant of power to intelligence and law-enforcement agencies are necessary protection.

[13]However, as Lynch and Williams point out, these measures cannot be the only approach to confronting terrorism.[14]The impact on fundamental freedoms must be assessed carefully so that our position remains consistent as a democratic state.[15]In combating the threat of terrorism, there would inevitably be give and take between the full enjoyment of freedoms and the need of protection from terrorist acts. What needs to be done is to determine where to draw the line.

### **Prioritisation of national security over human rights?**

In reaction to terrorist threats, a potential danger would be to place security law over human rights law. This is a danger because the respect for human rights should never be overlooked. As Kofi Annan said in 2005, ' respect for human rights [is] not only compatible with a successful counter-terrorism strategy, but [is] an essential element of it'.[16]The Australian government has asserted that, in protecting the right to life - ' the greatest human right of all',[17]Australian counter-terrorism laws are consistent with international human rights obligations. The former Prime Minister, John Howard, has stated that'[w]hen people talk about civil liberties, they sometimes forget that action taken to protect the citizen against physical violence and attack is a blow of favour, and not a blow against, civil liberties'.[18]In rationalising the potentially excessive counter-terrorism measures by saying that our lives

are threatened, it creates fear in the minds of the citizens.[19]The fear is then relied on to form the basis of further 'coercive and discriminatory measures',[20]which restrict the full enjoyment of human rights. Even though arguably international human rights law allows the derogation of human rights in genuine emergency situations, this cannot be used as a 'blanket suspension of rights'[21]. The requirement of appropriateness and proportionality must be adhered to in order to achieve the preferred outcome, so that measures would be 'least intrusive' to the protected interests.[22]Besides, if the Australian counter-terrorism laws are suspected to have the tendencies to be discriminatory, then the requirements of derogation have not been fulfilled, as Article 4 of the ICCPR prohibits derogation to discriminate against peoples of race, colour, sex, language, religion or social origin. As such, the flexibility provided from the derogation of rights must not be exploited by states to allow security to eradicate certain rights.[23]Australia's counter-terrorism laws, apart from introducing new offences with heavy penalties, also increased the scope of power to detain without charge by police and security agencies.[24]This raises the question of whether domestic and international criminal laws would have sufficed.[25]Despite the need to promptly adopt and implement measures to prevent harm to innocent citizens, confronting terrorism is never a simple mission.[26]Lynch and Williams argue that new laws are only short-term solutions as they do not target the causes of terrorism, therefore having no deterrence effect.[27]In addition, the law itself might 'become part of the problem' because, as the law-making process focuses on the debate rather than on other effective measures, extreme actions will be taken in response

to the repressiveness of the law.[28]This creates a vicious cycle: our fear of terrorism leads to overreaction and repressive laws, which stimulate hostility from terrorists, who create fear in our minds.[29]In this manner, we are partly subjecting ourselves to become vulnerable to terrorist attacks.[30]The use of coercion in battling violence is a temporary, short-sighted move that is never going to work effectively, as it does not target the root cause of the problem. In fact, many of the United Nations human rights bodies have laid emphasis on the need of non-coercive measures, as well as precise criminal offences, with the focus on the promotion of tolerance and respect for diversity; the appreciation of human rights; the alleviation of poverty; and the attention to social injustice and inequality.[31]

### **Disregarding human rights standards?**

Many commentators have criticised on the disregard of human rights standards in the adoption of counter-terrorism measures. Paul Hoffman claims that 'to abandon human rights norms in times of fear and crisis is short-sighted and self-defeating'.[32]On the other hand, it is often argued that acting in accordance with the human rights framework inevitably interrupts the exercise of power and authority that is essential in the execution of counter-terrorism measures, for example, in the prohibition against torture, international human rights law limits the use of executive power.[33]Lynch and Williams believe that the Australian Parliament often departs from human rights values because of the lack of an Australian charter to provide legality and political force.[34]In spite of this, there is still no justification to deviate from human rights principles, for 'the world will not easily accept inhumane treatment in any context'.[35]The use of force

must be legitimate and must adhere to international human rights laws, otherwise the 'war on terror' would 'undermine our security more than any terrorist bombing'.<sup>[36]</sup> It should be stressed that following the human rights framework does not hinder the legitimacy and effectiveness of the efforts used in the confrontation of terrorism. Human rights law are capable of operating closely and jointly with security measures in achieving public safety. After all, human rights law aims at ensuring the safeguard of fundamental rights as well as security interests.<sup>[37]</sup>

## **Legitimacy of counter-terrorism laws and violation of human rights**

Preparatory offences Article 11 of the Universal Declaration of Human Rights clearly specifies that there is no right to condemn or punish a person for something that person has not done, yet a substantial proportion of the terrorism laws are criminalising on preparatory acts. In normal criminal law context, preparatory acts are not often made into criminal offences. When it comes to criminalising terrorists, however, preparatory acts have become part of the legislative regime, as seen in Divisions 101. 2 and 101. 6 of the Criminal Code Act 1995 (Cth). The preparatory offences criminalise acts that go beyond the inchoate offences of 'attempt', 'incitement' or 'conspiracy', and do not require the prosecution to prove the accused has planned to commit a specific terrorist act.<sup>[38]</sup> To date, seven persons in Australia have been convicted of commission of preparatory acts; and eight persons have been convicted of extended preparatory offences. Preparatory offences are essentially advancing prospective prosecution and criminalisation of something that the suspect has not done. It is allowing the prosecution to



predict the likelihood of the execution of terrorist acts by the suspect. Preparatory offences also come with heavy penalties that are in effect the same as the penalties of the substantive act itself. In Australia, the maximum penalty for many preparatory offences is life imprisonment. The seriousness of the penalties have undoubtedly raised the question of whether the measures are too excessive. *R v Mullah* The motive element, namely, advancing a political, religious or ideological cause, is inserted into Division 100. 1 of the Criminal Code Act 1995 (Cth). Usually in criminal law, the focus is merely on the fact that the act is done with intention and the motive is not considered. In contrast, motive is an element in terrorism laws because the reason of committing a terrorist act is important. *R v Mullah* was the first terrorism case since the adoption of the new laws in Division 101 of the Criminal Code. Mullah was charged of 'doing an act in the preparation for a terrorist act' under Division 101. 6(1). Despite having a genuine plan to enter a government building and kill staff, Mullah was eventually acquitted due to the prosecution's failure to satisfy the motive element. Lynch and Williams commented that 'Mullah may have been many things, but it was questionable that he posed such a threat to Australia's national security that he should be charged under several of the Criminal Code's strongest terrorism offences'.<sup>[39]</sup> It is often claimed that the inclusion of the motive element encourages racial, religious or political profiling, which in turn causes infringement of the right to be free from discrimination and the right to freedom of expression, association and religion.<sup>[40]</sup> It follows that the intent element, namely the intention to coerce or influence by intimidation, may more precisely target the unlawful terrorist act.<sup>[41]</sup> Financing and

organisational offences. Also subject to prosecution are financing (Division 103) and organisational offences (Divisions 102), of which three and nine persons have been convicted respectively. It may appear that there is no direct, necessary connection between providing funds to a terrorist organisation and the commission of a terrorist act itself. Similarly, organisational offences impose criminal liability on the entire group of individuals associated with the organisation, which is based on the belief that terrorists commit acts as a group. Such laws clearly restrict the right to freedom of peaceful assembly and association, which is set out in Article 20 of the Universal Declaration of Human Rights and Article 22 of the International Covenant on Civil and Political Rights, and the right to freedom of thought, conscience, and religion under Article 18 of the UDHR and Article 18 of the ICCPR. Article 4(2) of the ICCPR specifically states that no derogation from the right to freedom of thought, conscience, and religion may be made. In relation to organisational offences, terrorist organisations are loosely defined by newly introduced censorship laws, sedition offences, and powers conferred on the executive.<sup>[42]</sup> Accordingly, terrorist organisations are not limited to organisations that mainly focus on the promotion or commission of acts of ideological, religious or political causes. <sup>[43]</sup> Furthermore, there is no requirement under Division 102 of the Criminal Code that the defendant's association with the organisation be intended to advance terrorist aims or cause criminal consequences.<sup>[44]</sup> Interestingly, out of the nineteen organisations that are being listed as 'terrorist organisations' under the Criminal Code, it was found that there was 'no evidence' that six organisations posed 'any threat' to Australian interests.

[45] Diane Otto notes that fear has been created in the minds of the Australian Muslim and Arab communities, with the fear being that, by supporting religious charities or socialising with friends or relatives who may or may not be members of proscribed organisations, an offence would be committed.[46] In this regard, the right to freedom of manifesting one's religion and the right to freedom of association with others have been challenged. The right to freedom from arbitrary detention and the right to fair trial inevitably, counter-terrorism measures necessitate the conferral of powers upon security and intelligence agencies. A wide range of arrest and detention powers have been conferred, including the power to detain persons 'suspected to having information' related to a 'terrorism' offence for up to a week.[47] The broad nature of detention powers has led the Human Rights Committee to raise concerns, such as the private detention of persons without granting access to a lawyer for up to seven-day renewal periods, that Australia may have violated obligations under the ICCPR.[48] It could be said that preventive detentions violate the non-derogable right to liberty and security of a person under Article 9 of the UDHR and ICCPR, which states that no one shall be subject to arbitrary arrest or detention. Concerns have also been raised by the Committee Against Torture in relation to the lack of judicial review on Australian counter-terrorism laws and the practice of secrecy in measures such as preventive detention and control orders.

[49] Understandably, the 'instinctive' response originates from the desire to promptly detain suspects of terrorism in order to protect public safety.

[50] However, it is largely discriminatory and biased to arbitrarily detain or imprison persons without evidence of criminal guilt being led and proved,

[51]which undermines the fundamental principle that an accused is innocent until proven guilty. As Emerton strongly argues, laws of such kind, '[i]f they are ever necessary, they are necessary evils, of which the scope and consequences should be kept to a minimum; and the burden therefore falls on the proponents of such laws to show that the evil is indeed necessary'.

[52]Moreover, the Human Rights Committee has warned that it is a non-derogable right of persons being detained to be treated humanely, even in times of emergency.[53]Likewise, the right to a fair trial under article 14 of the ICCPR is obligatory and must be respected even in times of emergency.

[54]The notion to be free of arbitrary detention and unfair trials, according to Emerton, is a result of 'political considerations' and 'a necessary incidence of liberal democratic government'.[55]The impact of counter-terrorism laws on the right to fair trial is evidence in two aspects. Firstly, the burden of proof is placed onto the defence, thus in effect creating a presumption of state of mind in the accused and subsequently requiring the accused to rebut the presumption by proving his or her innocence in order to avoid conviction.[56]Emerton argues that this increases the likelihood of miscarriages of justice, and hence undermines the right to a fair trial.

[57]Secondly, even if the accused is able to produce evidence to prove the absence of state of mind, it is still unlikely the witness will be available.[58]In short, it cannot be ensured that the innocent will not be wrongfully convicted.

## **Balance between national security and human rights**

As a nation that is lacking a bill of rights, it is exceptionally important for Australia to strike a balance between national security and human rights

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when adopting counter-terrorism laws. Whilst other nations do so by providing legal protections for human rights, George Williams observes that Australia has 'relied on the willingness of political leaders to exercise good judgment and self-restraint when enacting anti-terror legislation'.<sup>[59]</sup> Rights should be given more weight in the law-making process, as they provide guidelines as to where the boundaries of the law should be.<sup>[60]</sup> Additionally, the need for justification and proportion in drafting counter-terrorism laws should be recognised - while the laws should effectively respond to the threats to national security, they should have 'as little impact as possible on fundamental freedoms'.<sup>[61]</sup> For laws to be proportionate, derogation of human rights must be temporary and only in time of genuine emergency.<sup>[62]</sup> The laws should also be regularly reviewed to evaluate whether they are justified by terrorist threats<sup>[63]</sup> to the degree that is sufficient to protect rights. Recognising the need to follow human rights standards should not necessarily entail a soft approach to the 'war on terror'.<sup>[64]</sup> Lynch and Williams point out that the emphasis on maintaining Australia's democratic status was recognised even during the second world war<sup>[65]</sup> when the then Prime Minister, Robert Menzies, announced that 'there must be as little interference with individual rights as is consistent with concerted national effort... [T]he greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and to lose its own liberty in the process'.<sup>[66]</sup> It seems that there is no reason to not continue adhering to what we have promised seventy years ago. Balance between national security and human rights is achievable - what needs to be done is to ensure

that divergence from established civil rights must be justified and proportionate to the harm of terrorism.[67]

## **Conclusion**

The United Nations Security Council has reminded states that it must be ensured that counter-terrorism measures comply with obligations under international human rights law.[68]According to the International Commission of Jurists , ' the odious nature of terrorist acts cannot serve as a basis or pretext for States to disregard their international obligations, in particular in the protection of fundamental human rights'.[69]Lynch and Williams believe that the terrorist threats have always existed and can never be removed by new laws because, no matter how stringent the law is, it cannot guarantee our security.[70]Moreover, ' history shows that when societies trade human rights for security, most often they get neither'. [71]Therefore we should be realistic when enacting new laws,[72]and should always respect the principles of legality, necessity, proportionality and non-discrimination.[73]Perhaps there will not be an ultimately right way to fight the war on terror, but the protection of human rights should still remain in consideration when creating new measures to counter terrorism. What we need are laws that have a minimal effect on rights, so that in fighting the war on terror we do not subject ourselves to become the victims of our own fears.[74]