



# What price 'freedom'?

# The legacy of 9/11

By Julian Burnside QC

The events of September 11 brought out the very worst and the very best in us.

**T**he terrorist attack on the US was shocking. It transfixed the world as the Twin Towers exploded and collapsed in a giant cloud. Those responsible were undoubtedly sincere but their acts put them beyond redemption in the collective mind of western democracies. Those directly affected showed great courage and fortitude; millions of people around the

world responded with genuine compassion. There was a moment – repeated over and over on television sets around the globe – when all of mankind held its breath in horror. The nightmare image of the second plane finding its target may yet be the defining image of this new century.

The consequences of the attack on America might also be the defining characteristic of western democracy in the 21st century.

But before compassion had cooled, before the victims had been counted, the ancient human instinct for retribution asserted itself. The USA attacked Afghanistan to purge it of the Taliban – a regime it had installed at leisure but repented in haste. The

conflict in Afghanistan, ostensibly successful but not yet completed, brought great suffering to many: not just members of the Taliban, but civilians caught in the cross-fire, or left without homes or fields, or victims of landmines, or just celebrating a wedding in the traditional way. For these people, the war on the Taliban must have seemed an incomprehensible wave of violence visited on them from a distant land.

The US government, and the Australian government also, introduced sweeping legislation to combat terrorism. The legislation seems to be based on two premises:

- that terrorism began on 11 September 2001 at 9.30am east coast



time; and

- that the scale of the threat of terrorism is so great that we must sacrifice some basic liberties until the 'war on terror' is won.

Both premises are wrong, but fear drives us to strange measures.

Terrorism is not new. The whole of the 20th century was marked by terrorism. It opened with the rise of the anarchists in England and America; then came the Easter Rebellion in Ireland in 1916, and decades of sporadic terrorist attacks by the IRA; the Baader-Meinhof gang were painfully visible from 1968 to 1977; the Red Brigade blighted Italian politics in the 1970s and 1980s. And don't forget Algeria, the Congo, Central America.

The scale of the threat posed recently by terrorism has been exaggerated by media coverage. The standard justification for anti-terrorist measures is the need to protect us from terrorism: but the response must be proportionate to the threat. Each year the US Secretary of State tables in Congress a report entitled *Patterns of Global Terrorism*. This includes the annual toll of death and injury caused by terrorist acts worldwide during the previous calendar year. Here are the figures for the past nine years for which the report has been completed:

Year	Acts	Killed	Wounded
2003	208	625	3,646
2002	199	725	2,013
2001	346	3,547	1,080
2000	423	405	791
1999	392	233	706
1998	273	741	5,952
1997	304	221	693
1996	296	311	2,652
1995	440	165	6,291

Note that these are global totals. By contrast, millions die of AIDS each year. In the US alone, 250,000 die each year of smoking-related disease and 30,000 die each year by use of handguns. The US *Patriot Act* has narrowed the protections offered by the US Bill of Rights (in particular, the 4th 5th and 6th amendments<sup>1</sup>) but, paradoxically, has not affected the 2nd amendment.<sup>2</sup>

(Since this article was written, the 2004 figures have been revealed. The State Department initially tried to avoid producing them. They show a significant increase in deaths caused by terrorism, mostly in Iraq where the US invasion appears to have provoked a significant level of terrorist activity.)

Section 216 of the *Patriot Act* allows the government to tap phones and computers without probable cause. This violates the probable cause provision of the 4th Amendment. Section 218 allows the government to carry out secret searches and wiretaps without showing probable cause. This also weakens the 4th Amendment protection. Section 412 of the *Patriot Act* permits the government to arrest and detain immigrants indefinitely for nothing more than a visa violation. This appears to compromise the 6th Amendment.

The equivalent Australian legislation (The *Australian Security Intelligence Organisation Legislation Amendment Act 2002*) has many shortcomings. Chief among them are:

1. It is difficult to interpret because it depends on key expressions that contain important value assumptions; and
2. It reaches into the realm of ideology and inevitably involves significant erosion of ordinary civil liberties.

### THE KEY DEFINITIONS

The most important definition is that of 'terrorist act' (for the full text of the definition, see Appendix 3). A 'terrorist act' requires a guilty act and two states of mind. Stated broadly, the act is an act that causes harm to people or property. Such acts would generally attract criminal liability if done intentionally or recklessly. Depending on circumstances, and leaving aside acts causing death or serious injury, the acts described would not normally attract lengthy terms of imprisonment. The definition then superimposes two states of mind:

1. the intention of advancing a political, religious or ideological cause; and
2. the intention of coercing or intimidating a government (local or foreign) or a section of the public (in Australia or overseas).

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Then there is an important exemption: if the act in question answers the definition so far, it is taken outside the definition again if it is no more than advocacy, protest, dissent or industrial action and is not intended to cause death, serious injury or danger to the health or safety of the public.

These, then, are the acts that constitute a 'terrorist act'. In a nice piece of legal circularity, a threat to commit a terrorist act is itself a terrorist act. When Dick says to Jack Cade (Henry VI part I): "The first thing we do, let's kill all the lawyers", he committed a terrorist act within the meaning of the definition.

The penalty is life imprisonment.

So far as I am aware, this is the first time in Australia that a criminal act has been defined by reference to an ideological purpose. While conduct causing death, damage or injury is never acceptable, it is a dangerous development when the penalty attracted by that conduct depends on whether the conduct has an ideological purpose. One consequence is that mindless violence attracts a lower penalty than the same violence impelled by a sincere ideological belief. Inevitably, this takes ideas – some ideas at least – into the territory of the criminal law. In the calculus of sentencing, a sincere belief might otherwise operate to reduce the penalty: in this new offence, it will effectively operate to increase the penalty substantially.

The other key definition is 'terrorist organisation'.

*Terrorist organisation* means:

- (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); ...
- (b) (it also includes organisations declared by regulation to be terrorist organisations).

There are several offences associated with terrorist organisations. It is an offence to direct the activities of a terrorist organisation; to recruit for a terrorist organisation or to provide funds to or receive funds from a terrorist organisation. It is an offence to provide to an organisation support



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or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of *terrorist organisation*.

The penalties are graded: life imprisonment if the defendant knows that the relevant organisation is a terrorist organisation; 15 years if the defendant is reckless about whether or not it is a terrorist organisation; and 10 years if the defendant is negligent about whether or not it is a terrorist organisation. What guilty act is sufficient to constitute the offence? Take the offence of recruiting. To 'recruit' is defined as including 'to induce, incite or encourage'. So, if the defendant intentionally induces or encourages a person to join an organisation, and is negligent about whether or not the organisation is indirectly engaged in 'assisting in or fostering' the doing of a terrorist act, s/he is guilty of an offence that attracts 10 years' gaol. The offence is complete whether or not a terrorist act actually takes place.

Of course, many Acts of Parliament give rise to difficulties of interpretation, but there are two specific problems with these measures. First, they make serious criminal offences out of otherwise innocent acts, depending on states of knowledge and ideology. Second, they are likely to be deployed in a highly charged atmosphere in which the ideology or ethnic background of the defendants is a key to the perceived offence.

Let me illustrate this with a true story. Early in 2002, a married couple from Iraq gained refugee status in Australia. A friend of mine offered to house them in his terrace house in

Armadale. One morning, while the Iraqi woman was at home alone, there was a knock on the door. At the door was an official of the Immigration Department. He had seven colleagues with him, and a search warrant. She showed her protection visa, but the officers searched the house for the next half-hour. The woman was eight months pregnant, and was very distressed by the affair. The warrant had been issued on the basis of an anonymous phonecall from a person who said that there were some 'middle eastern' people in this leafy street in Armadale.

Ambiguities in the proposed legislation will operate harshly against the unpopular group of the moment: the very group whose civil liberties most need protection.

There is a deeper problem with these measures. The legislation makes it an offence to be a member of a terrorist organisation. Generally speaking, the law hitherto has confined its attention to bad deeds rather than bad ideas. Often the criminal quality of an act will depend on the state of mind of the actor, but a guilty mind alone does not constitute a punishable offence.

The power to stigmatise an organisation, and to punish membership of it, is a radical departure from this historical pattern. This legislation amounts to punishing ideas. It criminalises ideology, even when that ideology is not coupled with any outward activity. The history of the world is littered with examples of ideas that first seemed dangerous and outrageous but which ultimately commanded acceptance and respect. Tom Paine's writings were considered seditious, as was the American Declaration of Independence which his writings inspired; the ideas of the French Revolutionaries were likewise regarded with horror, but now inform the social and constitutional arrangements of most western democracies. Socrates, too, was unpopular for his ideas and was killed because of them.

No people should sacrifice the right to entertain ideas, however shocking or bizarre those ideas may seem to the majority. Governments have a proper

role in guiding behaviour and punishing misbehaviour: they have no business in the territory of the mind. Freedom of thought is one of the most fundamental of all human rights; cutting back that right is one of the most radical measures imaginable in a free society.

### ASIO POWERS

The *Australian Security Intelligence Organisation Legislation Amendment Act 2002* enables ASIO to detain innocent people incommunicado and without access to family or friends. This form of detention could last up to a week. While a person may nominate their own legal representation, the government retains the right to veto that person or evict them at any time should the interrogator feel that they are interfering in the questioning process (for example, perhaps, by trying to give their client advice). The only requirement for this form of detention is that you be a person who, according to ASIO's belief, has information regarding terrorism. In principle, anyone who watches the Al Jazeera television channel might fall within reach of these provisions.

There is no right to silence and no privilege against self-incrimination. Withholding information is punishable by five years' imprisonment.

Initially, detention is limited to seven days, although a further warrant may be obtained, extending the detention for a further seven days. The latest change under the *Anti-terrorism Act 2004* extends the time allowable for holding a person by disregarding any time spent on ancillary matters such as resting, receiving medical attention, being transported, receiving legal advice, etc.

The person detained need not be suspected of anything at all. The conditions for issue of a warrant are set out in s34C of the *Australian Security Intelligence Organisation Act (1979)*.<sup>3</sup> Briefly stated, the Minister may authorise a request for a warrant if satisfied that this will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and that other methods of collecting that intelligence would be >>

ineffective. There are also powers that authorise taking the person into custody immediately.

These measures, coupled with the breadth and vagueness of the anti-terrorism measures, are a recipe for the destruction of ordinary civil liberties as we know them. It is difficult to imagine a time in Australia's history when a government could have hoped to pass such legislation. But these are not normal times. The terrified responses to September 11 suggest that the ground rules have changed, at least for the time being.

### CHARTER OF RIGHTS

The response of the Australian Democrats to the government's anti-terrorism legislation was to propose, by way of amendment, a Parliamentary Charter of Rights and Freedoms. It lacks the grand rhetorical sweep of the Universal Declaration of Human Rights: it is cast in prosaic, matter-of-fact language, consistent with the climate of the times. But its purpose and substance are good. Here are its main provisions:

- Every person is entitled to equality before the law and to the human rights and fundamental freedoms set out in this Charter without discrimination.
- Every person has the right without any discrimination to the equal protection of the law.
- Persons who belong to an ethnic, religious or linguistic minority have the right, in community with other members of their own group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.
- Every Australian citizen has the right and shall have the opportunity to take part in the conduct of public affairs, to vote, and to have access on general terms of equality to public employment.
- Every person has the right to freedom of expression, including the freedom of the press and other media.
- Every person has the right to freedom of thought and conscience, including the right to hold opinions without interference.
- Every person has the right to have or adopt a religion or belief of that person's

choice.

- Every person has the right of peaceful assembly.
- Every person has the right to freedom of association with others, including the right to form and join trade unions.
- Every person has the fundamental right to the protection from arbitrary or unlawful interference with their dignity, their privacy, the integrity of their person, their reputation and the security of their residence and any other premises.
- Every person lawfully in Australia has the right to freedom of movement and choice of residence.
- Every human being has the inherent right to life and no person shall be arbitrarily deprived of life.
- No law shall authorise the arbitrary arrest, detention or imprisonment of any person: no person shall be deprived of liberty except on such grounds, and in accordance with such procedures, as are established by law.
- No person shall be held in slavery or servitude or be required to perform forced or compulsory labour.
- Any person who is arrested or detained shall be informed at the time of the arrest or detention of the reasons for it, and shall be informed promptly and in detail of any charges in a language which that person understands.
- Any person detained in custody has the right to remain silent and the right to have access to a lawyer before and during questioning.
- Any person arrested or detained on a criminal charge shall be brought promptly before a judge, magistrate or justice of the peace.
- Any person deprived of liberty has the right to take proceedings before a court for the determination of the lawfulness of the detention and to be released if the court finds that the detention is not lawful.
- Any person charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- Every person has the right to a fair and public hearing by a competent, independent and impartial tribunal.
- Every person deprived of liberty has the right to be treated with humanity and with respect for the inherent dignity of the human person.

- No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The most disturbing thing about this simple list of rights and freedoms is that they are so uncontroversial, yet now more than ever it seems necessary to entrench them in law. These are the basic assumptions of our society; they should be the things that go without saying. Recognition of these rights and freedoms has been the objective of the common law since the time of Cromwell. We had thought they were won.

But in the aftermath of September 11, the old certainties have been destroyed. Without any attempt to show how 9/11 could have been prevented had these laws already existed, the government has swept away liberties that have come to be the bedrock of western democracy over the course of four centuries.

### GOOD AND EVIL

The anti-terrorist legislation proceeds from the assumption that we live in a world of evil, and that we can only be safe if we give government the greatest powers.

The Democrats' proposed Charter of Rights proceeds from the assumption that society can survive only if we retain and entrench certain basic freedoms: freedoms which will operate to the benefit of good people and bad equally.

### WHO IS RIGHT?

The government points to the evil some men do and promises protection from the perils and dangers of the night, but we must make sacrifices. What does it matter, except to the evil-doers themselves? Surely, they argue, there is no need for privacy unless you have something to hide; no need to fear arrest or detention unless you have committed a crime; no need to fear interrogation unless you are protecting criminals.

The government's approach has one major flaw: it will destroy democracy in order to preserve it. No one with an instinct for democracy would wish to live in a state where incommunicado detention is possible, where joining an



organisation is dangerous, where the right to silence has been abrogated, where the privilege against self-incrimination is gone.

Justice Kirby said in 2004:

“The countries that have done best against terrorism are those that have kept their cool, retained a sense of proportion, questioned and addressed the causes, and adhered steadfastly to constitutionalism.”

Democracy is a risky way to live: it encourages us to be good and virtuous, but allows the possibility of evil; it acknowledges that liberties are enjoyed by all, not just the good and the virtuous. Totalitarianism removes the risk for the virtuous (although conceptions of virtue may prove to be changeable), but it demands a terrible price. And the price is not paid by wrong-doers alone: it is paid every day by every citizen. From the zealous strictures of Jacobean England to the crushing oppression of the Stasi in East Germany and the NKVD in Stalinist Russia, history shows that the

price is too high and the benefit is an illusion. ■

**APPENDIX 1: EXTRACTS FROM US BILL OF RIGHTS**

**Amendment II:** A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

**Amendment IV:** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**Amendment IV:** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**Amendment V:** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Amendment VI:** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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Barrister-at-Law and an APLA/ALA member of long standing, who has been invited to speak at the last seven APLA/ALA National Conferences, is a former teacher, school principal, TAFE teacher, university lecturer, solicitor and Associate Professor of Education. He assists numerous Australian law firms in educational litigation involving personal injuries, discrimination, bullying, sex abuse, breaches of contract, and TPA matters. Dr Tronc appears frequently in court in several States providing independent expert opinion on matters concerning education and the law. Dr Tronc has published four national textbooks and looseleaf services on schools, teachers and legal issues.

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### APPENDIX 2: DEFINITION OF 'TERRORIST ACT'

**TERRORIST ACT** means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (2A); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of:
  - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
  - (ii) intimidating the public or a section of the public.
- (2) Action falls within this subsection if it:
  - (a) involves serious harm that is physical harm to a person; or
  - (b) involves serious damage to property; or
  - (ba) causes a person's death; or
  - (c) endangers a person's 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
  - (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.
- (2A) Action falls within this subsection if it:
  - (a) is advocacy, protest, dissent or industrial action; and
  - (b) is not intended:
    - (i) to cause serious harm that is physical harm to a person; or
    - (ii) to cause a person's death; or
    - (iii) to endanger the life of a person, other than the person taking the action; or
    - (iv) to create a serious risk to the health or safety of the public or a section of the public.
- (3) In this Division:
  - (a) a reference to any person or property is a reference to any person or property wherever situated, within or outside

- Australia; and
- (b) a reference to the public includes a reference to the public of a country other than Australia.

### APPENDIX 3: ASIO ACT SECTION 34C

34C (3) The Minister may, by writing, consent to the making of the request, but only if the Minister is satisfied:

- (a) that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and
- (b) that relying on other methods of collecting that intelligence would be ineffective; and
- (ba) that all of the acts (the adopting acts) described in subsection (3A) in relation to a written statement of procedures to be followed in the exercise of authority under warrants issued under section 34D have been done; and
- (c) if the warrant to be requested is to authorise the person to be taken into custody immediately, brought before a prescribed authority immediately for questioning and detained—that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:
  - (i) may alert a person involved in a terrorism offence that the offence is being investigated; or
  - (ii) may not appear before the prescribed authority; or
  - (iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

**Notes:** **1** See Appendix 1. **2** See Appendix 1. **3** See Appendix 3.

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