

HIJACKING PUBLIC DISCOURSE: RELIGIOUS MOTIVE IN THE AUSTRALIAN DEFINITION OF A TERRORIST ACT

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I INTRODUCTION

On 23 February 1998, an Arabic newspaper in London published the text of a declaration issued against ‘the Jews and the Crusaders’ by Osama bin Laden and the leaders of other extremist groups in Egypt, Pakistan and Bangladesh.¹ This fatwa listed three main crimes committed by the United States (‘US’) against ‘God, the Prophet, and the Muslims’: (1) occupation of the Holy Lands of Arabia;² (2) the blockading of the Iraqi people after the first Gulf War; and (3) support of Israel, ‘the petty state of the Jews’, to divert attention from the occupation of Jerusalem and the killing of Muslims in the Holy City. For the authors of the fatwa, these three crimes amounted to a ‘clear declaration of war by the United States’; thus it became every Muslim’s personal duty to attack the Americans and their allies. While the three crimes listed in the fatwa seemingly required political solutions, bin Laden’s call for action was couched in patently religious language:

By God’s leave, we call on every Muslim who believes in God and hopes for reward to obey God’s command to kill the Americans and plunder their possessions wherever he finds them and whenever he can. Likewise we call on the Muslim *ulema* and leaders and youth and soldiers to launch attacks against the armies of the American devils and against those who are allied with them from among the helpers of Satan.³

Bin Laden’s 1998 fatwa was ‘duly executed’⁴ six months later with the simultaneous bombings of the US embassies in Nairobi, Kenya and Dar es

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1 Quoted in Bernard Lewis, ‘License to Kill: Usama bin Ladin’s Declaration of Jihad’ (1998) 77(6) *Foreign Affairs* 14, 15. See also Bruce Hoffman, *Inside Terrorism* (Columbia University Press, revised ed, 2006) 93–7.

2 The Holy Lands of Arabia comprise Mecca, where the Prophet was born; Medina, where the Prophet established the first Muslim state, and the Hijaz, whose people were the first to rally to the new Islamic faith: Lewis, above n 1, 16.

3 Lewis translates *ulema* as ‘authorities on theology and Islamic law’: *ibid* 15.

4 Hoffman, above n 1, 95.

Salaam, Tanzania. It was then followed by statements to similar effect⁵ before three hijacked airliners flew into the World Trade Centre and the Pentagon, and a fourth was brought to ground, on 11 September 2001 ('9/11'). On 9 December, two months after the hijackings, bin Laden reminded the Muslim youth that they should continue this jihad until the *kufir* – nonbelievers – are 'crushed to naught'.⁶

The fact that the 9/11 attacks were committed by Muslim men under an umbrella of religious rhetoric has had no small impact on media, popular and political discourse. Nearly 10 years on from 9/11, 'jihad', 'martyrdom', 'extremist', 'fundamentalism' and 'holy war' have all become terms of common parlance and the subjects of frequent debate. When attacks are made on Westerners at home and abroad, these kinds of religious labels are among the most popular and available explanations for what would otherwise be incomprehensible man-made destruction.

Perhaps less obviously, a strong causal link between religion and terrorism is also commonly made in domestic criminal legislation. Five of the most economically developed Commonwealth parliamentary democracies – the United Kingdom ('UK'), Australia, Canada, New Zealand and the Republic of South Africa – all include religious motive as a key element in their statutory definitions of terrorism.⁷ This paper examines how religion has influenced the development of Australian anti-terrorism law. In particular, it focuses on the 'political, religious or ideological' motive requirement in subsection (1)(b) of the Australian definition of a terrorist act. Arguments about *whether* this tripartite motive requirement should have been included in the definition have already been covered in depth elsewhere.⁸ This paper critiques the reasons *why* a specific reference to religious motive was included in subsection (1)(b), and the reasons why it still remains, when the Howard Government was departing from existing criminal and international law, and risked alienating sections of the Australian Muslim community.

Part A below outlines the definition of a terrorist act in section 100.1 of the *Criminal Code*, and positions its enactment within existing criminal and international law. Part B critiques the reasons why a reference to religious motive was included in section 100.1, and Part C critiques the reasons why religious motive is likely to remain as a key element of the federal terrorism offences for the foreseeable future. Whether or not a religious motive requirement is likely to

5 Ibid.

6 Ibid 96.

7 *Terrorism Act 2000* (UK) c 11, s 1(1)(b); *Criminal Code Act 1995* (Cth) s 100.1 ('*Criminal Code*'); *Criminal Code*, RSC 1985 c 46, s 83.01(1)(b)(i)(A); *Terrorism Suppression Act 2002* (NZ) s 5(2); *Protecting Constitutional Democracy Against Terrorism and Related Activities Act 2004* (South Africa) s 1(1)(xxv)(c).

8 For opposing sides of this argument see Ben Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?' in Andrew Lynch, Edwina Macdonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 28; Kent Roach, 'The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive' in Andrew Lynch, Edwina Macdonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 39.

reinforce popular stereotypes linking Islam and terrorism, it is likely that subsection (1)(b) is now here to stay – not because there *is* a necessary causal link between Islam and terrorism, but because Islamist terrorism has ‘taken jihad as its hostage’⁹ by invoking the language of a religion followed by some 1.6 billion of the world’s population.

II ‘POLITICAL, RELIGIOUS OR IDEOLOGICAL’ MOTIVE AS A REQUIREMENT OF FEDERAL TERRORISM OFFENCES

A Departing From Criminal and International Law

Australia’s definition of a ‘terrorist act’ in section 100.1 of the *Criminal Code* was introduced by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) (*SLAT Act*). The *SLAT Act* was the main piece of legislation in a package of five government bills which formed the Howard Government’s core legislative response to the events of 9/11.¹⁰ The *SLAT Act* inserted into the *Criminal Code* a maximum penalty of life imprisonment¹¹ for ‘terrorist acts’ committed in any jurisdiction.¹² It also introduced a range of preparatory and group-based offences, such as possessing a ‘thing’ that is connected with preparation for a terrorist act,¹³ or being a member of an organisation that is engaged in preparing or planning terrorist acts.¹⁴ Later, in 2005, the Howard Government also introduced a scheme of ‘control orders’, which may be imposed upon any person where an issuing court is satisfied on the balance of probabilities that ‘each of the obligations, prohibitions and restrictions to be imposed on the person ... is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act’.¹⁵ The availability of each of these offences and restrictions depends upon the definition of a ‘terrorist act’, which is outlined in section 100.1(1) in the following terms (emphasis added):

9 Waleed Aly, *People Like Us: How Arrogance is Dividing Islam and the West* (Pan MacMillan, 2007) 150.

10 The other four Bills under the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) package were later enacted as the *Suppression of the Financing of Terrorism Act 2002* (Cth), the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth), the *Border Security Legislation Amendment Act 2002* (Cth), and the *Telecommunications Interception Legislation Amendment Act 2002* (Cth).

11 *Criminal Code* s 101.1(1).

12 *Criminal Code* s 101.1(2), which applies Category D (extended geographical) jurisdiction (s 15.4) to the offence of committing a terrorist act.

13 *Criminal Code* s 101.4.

14 *Criminal Code* s 102.3.

15 *Criminal Code* s 104.4(1)(d); *Thomas v Mowbray* (2007) 233 CLR 307. ‘Issuing Court’ is defined as the Federal Court, Family Court or Federal Magistrates Court of Australia: *Criminal Code* s 100.1(1).

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

Subsection (2) then lists the possible harm requirements of a terrorist act:

- (2) Action falls within this subsection if it:
- (a) causes serious harm that is physical harm to a person; or
 - (b) causes serious damage to property; or
 - (c) causes a person's death; or
 - (d) endangers a person's life, other than the life of the person taking the action; or
 - (e) creates a serious risk to the health or safety of the public or a section of the public; or
 - (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunication 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.

Subsection (3) then provides an exception for acts of political protest which only intend to cause property damage:

- (3) Action falls within this subsection if it:
- (a) is advocacy, protest, dissent or industrial action; and
 - is not intended:
 - (i) to cause serious harm that is physical harm to a person;
 - (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.¹⁶

When an individual is prosecuted for a terrorism offence, each limb of the section 100.1 definition is an essential element of that offence and must therefore

16 Subsection (4) provides that '(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'.

be pleaded by the prosecution and proved beyond reasonable doubt.¹⁷ This means that a key requirement of all federal terrorism offences is that they be committed ‘with the intention of advancing a political, religious or ideological cause’ (emphasis added) as outlined in subsection (1)(b). It is clear that this tripartite ‘political, religious or ideological cause’ requirement is a physical – and not a fault – element of the offence.¹⁸ This is consistent with the commonly held view that subsection (1)(b) is a ‘motive’ and not a true ‘intention’ requirement.¹⁹ Whilst subsection (1)(b) ostensibly requires the prosecution to prove the ‘intention’ of the accused, it is really directed towards the emotional reasons why the accused engaged in the prohibited conduct, as opposed to his or her desire to bring about a particular set of consequences.

When subsection (1)(b) was introduced by the *SLAT Act*, it signalled a notable departure from the ordinary criminal law, which has traditionally focussed on intention – and not motive – as the ‘cornerstone’ of criminal responsibility.²⁰ In *Hyam v Director of Public Prosecutions*,²¹ for example, a defendant appealed to the House of Lords against her murder conviction, arguing that she had set fire to a family home merely for the purpose of frightening the mother of the two deceased into leaving the neighbourhood. Lord Hailsham dismissed the appeal by drawing a distinction between motive and intention. He emphasised that the emotional reason for committing the crime was irrelevant to whether or not the accused had subjectively intended to expose the family to grievous bodily harm:

The motive for murder in this sense may be jealousy, fear, hatred, desire for money, perverted lust, or even, as in so called ‘mercy killings’, compassion or love. In this sense motive is entirely distinct from intention or purpose. It is the emotion which gives rise to the intention and it is the latter and not the former which converts an *actus reus* into a criminal act.²²

Subsection (1)(b) blurs this traditional distinction between intention and motive because it requires the prosecution to prove that the accused intended to engage in the prohibited conduct for a particular reason (namely, for the purpose of advancing a political, religious or ideological cause), and not merely that he or she intended to commit the act itself. Indeed, the list of actual harms in section 100.1(2) makes no explicit reference to intention, and so the prosecution would only be required to prove recklessness for each of the subsections proscribing a

17 See *Lodhi v The Queen* (2006) 199 FLR 303, 323 [89]–[90], 324 [93].

18 *Ibid* 323 [90].

19 See Saul, above n 8, 28.

20 Bernadette McSherry, ‘Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws’ (2004) 27 *University of New South Wales Law Journal* 354, 360.

21 [1975] AC 55.

22 *Ibid* 73, cited in McSherry, above n 20, 360.

‘circumstance or result’.²³ For McSherry, section 100.1(1)(b) thereby ‘significantly broaden[s] the scope of the substantive criminal law’.²⁴

Aside from this blurring of motive and intention, section 100.1(1)(b) was also remarkable in the sense that there was no international law precedent for referring to religious motive in the definition of a terrorism offence. While there was some precedent for distinguishing political and public motives from private violence,²⁵ neither the *International Convention for the Suppression of Terrorist Bombings* nor the *International Convention for the Suppression of the Financing of Terrorism* refers to religious motive, even though both were drafted in response to earlier al-Qaeda attacks.²⁶ These were the only two international conventions existing at the time of 9/11 which were directed explicitly at acts of ‘terrorism’, as negotiated by the United Nations Ad Hoc Committee on Measures to Eliminate International Terrorism (‘Ad Hoc Committee’). Other relevant treaties existing at the time of 9/11 were directed at more specific acts of violence, such as hostage-taking or the hijacking of aircraft.²⁷ An offence under article 2 of the *International Convention for the Suppression of Terrorist Bombings* (‘*Bombings Convention*’) is defined as follows:

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

- (a) With the intent to cause death or serious bodily injury; or
- (b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.²⁸

Article 2(b) of the *International Convention for the Suppression of the Financing of Terrorism* includes a similar requirement to the Australian

23 This would include paras (a) – (e), and para (f) at least where an act ‘destroys’ an electronic system. See *Criminal Code* s 5.6; Keiran Hardy, ‘Operation Titstorm: Hacktivism or Cyber-Terrorism?’ (2010) 33 *University of New South Wales Law Journal* 474, 483–4.

24 McSherry, above n 20, 361.

25 Saul, above n 8, cites the *Declaration on Measures to Eliminate International Terrorism*, GA Res 49/60, UN GAOR, 49th sess, 84th plen mtg, UN Doc A/RES/49/60 (9 December 1994), which distinguished terrorism from other violence because of its motivation ‘for political purposes’, and the Council of the European Union’s *Framework Decision of 13 June 2002 on Combating Terrorism* [2002] OJ L 164/3, which distinguishes terrorism because ‘the motivation of the offender is different’ from ordinary crimes, but otherwise makes no specific reference to religious motive: at 30.

26 The 1993 bombing of the World Trade Centre in New York and the 1998 bombings of the US Embassies in Kenya and Tanzania.

27 A range of other relevant international conventions existed at the time of the 9/11 attacks, but these were directed towards specific acts of violence and were not acts of ‘terrorism’ per se. See, eg, *International Convention Against the Taking of Hostages*, opened for signature 18 December 1979, 1316 UNTS 205 (entered into force 3 June 1983); *Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971). See sch 3 of the *Terrorism Suppression Act 2002* (NZ) for a longer list. See also Ben Golder and George Williams, ‘What is “Terrorism”? Problems of Legal Definition’ (2004) 27 *University of New South Wales Law Journal* 270, 273–4.

28 *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 2149 UNTS 284 (entered into force 23 May 2001) art 2(1).

subsection (1)(c) – of intending to compel a government or international organisation, which might broadly be described as a political or perhaps an ideological motive – but otherwise makes no reference to advancing a religious cause:

Any person commits an offence within the meaning of this Convention if that person ... provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

...

- (b) Any ... act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.²⁹

By the time Ad Hoc Committee finalised the 2005 *International Convention for the Suppression of Nuclear Acts of Terrorism*, a reference to religious motive had still not crept into the United Nations conventions on terrorism.³⁰ At the regional level, neither the League of Arab States' *Arab Convention on the Suppression of Terrorism*³¹ nor the Council of the European Union's *Framework Decision on Combating Terrorism* definitions refer to religious motive.³² Even the US' own domestic legislative response to the 9/11 attacks – the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001* ('USA Patriot Act') – did not direct its criminal offences by referring to the religious aims of suspected terrorists.³³

B Targeting Religious Terrorism – But Which Kind?

Given that the religious motive requirement in section 100.1(1)(b) signalled a notable departure from existing criminal and international law, and other definitions of terrorism in the international community, why then did the Australian Government include it in the *Criminal Code* definition of a terrorist act?

The Howard Government at the time offered remarkably little explanation for the departure. The Explanatory Memorandum to the Bill does no more than paraphrase the definition itself,³⁴ and the Minister's second reading speech was

29 *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2178 UNTS 197 (entered into force 10 April 2002) art 2.

30 *International Convention for the Suppression of Nuclear Acts of Terrorism*, opened for signature 14 September 2005, 2445 UNTS 89 (entered into force 7 July 2007) art 2(1).

31 League of Arab States, *Arab Convention for the Suppression of Terrorism*, 22 April 1998 art 1(2).

32 Council of the European Union, *Council Framework Decision of 13 June 2002 on Combating Terrorism* [2002] OJ L 164/3, 3.

33 See definitions of 'international terrorism' and 'domestic terrorism' in 18 USC § 2331 'Definitions', as amended by *USA Patriot Act*, Pub L No 107-56, § 802, 115 Stat 272 (2001). See also the federal crimes of terrorism in 18 USC § 2332b 'Acts of terrorism transcending national boundaries', as amended by *USA Patriot Act*, Pub L No 107-56, § 808, 115 Stat 272 (2001).

34 Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill (No 2) 2002 (Cth).

no more enlightening.³⁵ The only real justification of the time, and even then an indirect one, was given by Liberal MP Peter King. Citing President Bush's observations on the religious goals of al-Qaeda, King supported the *SLAT* proposals on two main grounds: (1) that al-Qaeda's goal is not to make money but to 'remak[e] the world and impos[e] a set of radical beliefs on people everywhere', and (2) that al-Qaeda 'is linked to organisations in many other countries ... that support the Islamic religion'.³⁶

These kinds of blanket statements linking Islam and al-Qaeda sounded warning bells for some Opposition and minority senators, who recognised the dangers that a religious motive requirement might pose for sections of the Australian Muslim community. Senator Greig, for example, acknowledged the realities of contemporary Islamist terrorism, but warned against the dangers of equating the Islamic religion with terrorism in particular, and with extremism more generally:

[n]ot since the early 1970s ... has terrorism swung around into the sharp global focus that it has today. It has a particular emphasis on extremism emanating from the Middle East and a religious flavour. Regrettably, this stereotyping has caused all people of Middle Eastern background and Islamic faith to become the target of suspicion, mistrust and occasional abuse. As a nation, we need to take great care not to equate Islam with terrorism or Islam with religious extremism.³⁷

Senator Cooney also recounted his experience when speaking about the new legislation to Muslim communities in the northern suburbs of Melbourne. At the old Preston Town Hall, a young Australian-born Muslim woman of 17 or 18 years of age attended the discussion, and lamented that the legislation was 'part of an overall package of things that made her feel ... unwanted in her own land'.³⁸

The absence of international precedent, and of an independent explanation for risking this alienation of the Australian Muslim community, makes it clear that the Howard Government had only one real source for subsection (1)(b): the UK definition of terrorism in section 1 of the *Terrorism Act 2000* (UK) ('TA2000'). The TA2000 definition included, in section 101.1(1)(b), the exact phrase 'political, religious or ideological cause'. At least across international conventions, the League of Arab States and Council of the European Union instruments, and domestic law in western nations, this was the only reference to religious motive in a criminal law definition of terrorism on 9/11.

This original UK wording was not, however, drafted for the purpose of targeting extremist Muslim organisations. It was enacted some 14 months before

35 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 March 2002, 1041 (Daryl Williams, Attorney-General). The final Bill (No 2) was re-introduced due to procedural problems, with the Attorney-General's second reading being repeated by the Parliamentary Secretary to the Minister for Finance and Administration the following day: see Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1140 (Peter Slipper). The lack of an explanation for sub-s (1)(b) was also noted by the Security Legislation Review Committee ('Sheller Committee'), Parliament of Australia, *Report of the Security Legislation Review Committee* (2006) 56 [6.22].

36 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1156 (Peter King).

37 Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2355 (Brian Greig). See also Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2369 (Steve Hutchins).

38 Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2455 (Barney Cooney).

al-Qaeda came to worldwide prominence on 9/11, and was justified on the basis that the UK security forces needed broader powers to target violent religious cults. Then Home Secretary Jack Straw gave the example of the apocalyptic Aum Shinrikyo, which launched a sarin gas attack on the Tokyo subway system in 1995, killing 12 and seriously injuring some 50 more commuters in order to hasten the coming of a new millennium.³⁹

In Japan, a religious cult released nerve gas on the Tokyo underground: I hope nothing similar ever happens here, but, if it does, we need powers to deal with it. If the security forces were to obtain information that such an organisation was plotting such an outrage in this country, the security forces would need the powers provided in the Bill to prevent the outrage from occurring. That is the principal justification for introducing powers ... whose scope are wider than those covered in existing anti-terrorism legislation and in the normal criminal law.⁴⁰

At the time, Opposition members in the UK challenged the definition on the grounds that it was broad enough to include lone religious zealots, and that it would condemn religiously motivated criminals to higher penalties than those motivated by the prospect of private gain.⁴¹ Only *after* 9/11 did the political debate begin to focus on the problem of Muslim extremism. Prime Minister Tony Blair first addressed the House on the war in Afghanistan, reiterating that the UK pursues terrorists simply because they are terrorists, and not because they are Muslim.⁴² But these kinds of assurances did not satisfy one Muslim member of the House of Lords, who expressed similar concerns to the Australian Opposition and minority senators:

The British Muslims are wary that they will be segregated from society because of their religious beliefs, especially in light of recent world events. If we are to include religion under the same umbrella as terrorism, then it is inevitable that some people may consider certain religious beliefs to be a form of terrorism. We do not want to see that happen.⁴³

Despite these warnings, the Blair Government did not amend the original TA2000 definition when it enacted its own legislative response to the 9/11 attacks in the *Anti-Terrorism, Crime and Security Act 2001* (UK) ('ATCSA'). ATCSA contained a variety of new measures for countering the threat of international terrorism, including the freezing of terrorist assets and the indefinite detention of international terrorist suspects associated with al-Qaeda.⁴⁴ It also inserted a range of 'religiously aggravated offences' – including assault,

39 See Hoffman, above n 1, 119–27.

40 United Kingdom, *Parliamentary Debates*, House of Commons, 14 December 1999, vol 341, col 159 (Jack Straw).

41 United Kingdom, *Parliamentary Debates*, House of Commons, 14 December 1999, vol 341, cols 186–7 (Simon Hughes), 207 (Steve McCabe).

42 United Kingdom, *Parliamentary Debates*, House of Commons, 14 November 2001, vol 374, col 869 (Tony Blair, Prime Minister).

43 United Kingdom, *Parliamentary Debates*, House of Lords, 27 November 2001, vol 629, col 194 (Lord Ahmed).

44 Later held contrary to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) in *A v Secretary of State for the Home Department* [2005] 2 AC 68 ('Belmarsh Case').

harassment and criminal damage – into Part II of the *Crime and Disorder Act 1998* (UK).⁴⁵

It seems that little explanation was given in either jurisdiction as to why the risks of alienating Muslim communities were worth the security benefits of targeting Islamist terrorist organisations with a religious motive requirement in criminal legislation. The UK and Australian governments might have thought it self-evident that acts of terrorism after 9/11 were likely to be religiously motivated, but no convincing argument was offered as to why their police and security services were more likely to catch suspected terrorists if they gathered intelligence on the belief systems underlying any prospective attack, or why their prosecutors were more likely to convict suspected terrorists by collecting evidence of the same. In the absence of any such benefits, the risks that a religious motive requirement might have for human rights take on much greater weight. As set out by Rutherford J in the Canadian *R v Khawaja* trial, these risks include a potential chilling effect on the freedoms of speech, thought, belief, expression and association; increased fear and suspicion of targeted religious groups; and racial or ethnic profiling by governmental authorities.⁴⁶

It is clear that the Howard Government included a reference to ‘political, religious or ideological cause’ in its post-9/11 legislative response for the purpose of being consistent with existing UK legislation, because this wording did not appear anywhere else in existing law. But this UK provision was originally designed to target relatively small religious cults, and only *later* came to be applied by default to the much larger international problem of Islamist terrorist organisations. Considering that these organisations claim to rely on the religious beliefs of some 1.6 billion of the world’s population, it seems that insufficient political attention was paid to the strategic value of retaining a religious motive requirement in the context of Islamist extremism, and to the risks that this would have negative consequences for human rights by reinforcing popular stereotypes linking terrorism and the Islamic faith.

C Popular Understandings of Terrorism

If little substantive justification was given by the Australian Government for including a reference to religious motive in the *Criminal Code*’s definition of a terrorist act, and if the religious motive requirement has the potential to increase suspicion of innocents who follow the Islamic faith, why then has it remained unchallenged in the legislation for nearly a decade, while 37 Australian citizens have been charged with terrorism-related offences?⁴⁷ There may be other hypothetical ways to answer this question – such as whether the presence of a Human Rights Act could have acted to remove subsection (1)(b) on the grounds

45 See *Anti-Terrorism, Crime and Security Act 2001* (UK) c 24, s 39.

46 [2006] OJ 4245, [73] (*‘Khawaja’*).

47 See Attorney-General Robert McClelland, ‘Address to the National Security College’ (Speech delivered at the Senior Executive Development Course Dinner, Old Parliament House, Canberra, 10 March 2011).

of discrimination⁴⁸ – but for present purposes there are three immediate factors involved: one constitutional, one comparative, and one political.

The first reason is that section 100.1(1)(b) is constitutionally valid because al-Qaeda's religious views have been characterised as an 'international political aim' for the purposes of the defence power in section 51(vi) of the *Australian Constitution*. In *Thomas v Mowbray*,⁴⁹ the applicant challenged the control order regime in division 104 of the *Criminal Code* on the basis of two main arguments: (1) that the legislation conferred non-judicial power on a federal court contrary to Chapter III of the *Australian Constitution*, and (2) that the legislation was invalid because it was not supported by the defence, external affairs or referral powers under section 51 of the *Constitution*. By 5:2 the High Court dismissed both of the applicant's arguments.⁵⁰ Justice Kirby dissented from the majority opinion on both grounds;⁵¹ Hayne J disagreed only on the question of Chapter III judicial power, and found that the legislation was supported by section 51.⁵²

In considering the scope of section 51(vi), the majority held that the defence power was not limited to external threats to Australia's security, and could also support laws which are designed to respond to non-state threats emanating from *within* Australia's borders.⁵³ More specifically, Hayne J explained that al-Qaeda's threats of violence against the West could be 'characterised as an international political aim' for the purposes of the defence power.⁵⁴ He drew a distinction between 'individuals whose motives ... are not to further any international political aim' and 'the application of force in furtherance of international political objectives', and held that the defence power would only apply to the latter.⁵⁵ He also recognised, however, that this distinction would be 'more difficult to draw in some cases than others', including where religious and ideological motives are involved.⁵⁶

This suggests that the phrase 'political, religious or ideological cause' in section 100.1(1)(b) is safe from constitutional challenge, although the relation between religious motive in particular and the defence power still remains uncertain. While al-Qaeda's motives certainly involve an international political

48 Although this seems unlikely given that the UK and Canada still retain identical provisions: see *Terrorism Act 2000* (UK) c 11, s 1(1)(b); *Criminal Code*, RSC 1985, c 46, s 83.01(1)(b)(i)(A) (Canada). In the Canadian *Khawaja* trial, the reference to 'political, religious or ideological cause' in s 83.01 was held to be contrary to the *Canadian Charter of Rights and Freedoms* (contained in Part I, *The Constitution Act 1982*, c 11) by Rutherford J in the Ontario Superior Court, but the Canadian government declined to amend the definition and the decision was later overruled by the Court of Appeal: see *R v Khawaja* (2006) 42 CR (6th) 348; *R v Khawaja* (2010) 103 OR (3d) 321.

49 (2007) 233 CLR 307.

50 *Ibid.*, 322–5 (Gleeson CJ), 335–66 (Gummow and Crennan JJ), 480–511 (Callinan J), 511–527 (Heydon J).

51 *Ibid.* 366–443 (Kirby J).

52 *Ibid.* 443–480 (Hayne J).

53 *Ibid.* 324–326 [7]–[9] (Gleeson CJ), 359–364 [132]–[148] (Gummow and Crennan JJ), 449–460 [411]–[445] (Hayne J), 503–506 [582]–[590] (Callinan J), 511 [611] (Heydon J).

54 *Ibid.* 448 [409] (Hayne J).

55 *Ibid.* 458 [442] (Hayne J).

56 *Ibid.*

dimension, subsection (1)(b) extends beyond acts of religiously motivated terrorism that can also be described as having an international political aim to those that are *solely* motivated by a religious cause. Where an individual engages in terrorist activity for religious reasons but his or her wider motives 'are not to further any international political aim', in Justice Hayne's words, then this would seem to fall outside the scope of the defence power. To be sure, subsection (1)(c) attaches a pseudo-political quality to any religiously motivated terrorist act, but if this is really terrorism's defining feature, then why is religion still included in subsection (1)(b) as one of three *independent* possible motives? Would not a reference to 'international political aim' in subsection (1)(b) more accurately reflect the constitutional purposes of the legislation?

The second, comparative reason is that post-enactment parliamentary review has supported section 100.1(1)(b) by reasoning that *other* Commonwealth nations have also included a motive requirement in their respective definitions. In its December 2006 review of Australia's anti-terrorism legislation, the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') supported the inclusion of section 100.1(1)(b) on the basis that the UK, New Zealand, Canada and South Africa also included reference to 'political, religious or ideological cause' in their own legislative responses to 9/11.⁵⁷ In turn, the Canadian Government justified its own motive requirement in the *Khawaja* trial on the basis that 'other Western democracies have recognised the need to identify political, religious or ideological motivation in relation to terrorist acts.'⁵⁸

These arguments seem unconvincing when one considers that the only reference to 'political, religious or ideological cause' existing at the time of the 9/11 attacks was in the UK's TA2000, and that the reference to religious motive in that Act was originally designed as an appropriate strategy for targeting millenarian cults and not Islamist terrorist organisations. If Australia, Canada, New Zealand and South Africa have all copied the motive requirement from the UK legislation, why should each individual replication of the UK legislation serve to justify another in turn? And where is the original justification for religious motive being a useful or appropriate legislative strategy in the context of Islamist extremism? For all the Commonwealth nations to be vindicated by the identical actions of others relies on circular reasoning; it breeds a problematic 'if we have all done it, then there is no problem' mentality, where each motive requirement simply justifies another identical replication. This circular reasoning shrouds existing motive requirements with a false air of legitimacy, when what is needed is critical revision of the legal and public policy strategies underlying the *very first* inclusion of a motive requirement in anti-terror legislation.

The third, political reason is that post-enactment parliamentary review has supported section 100.1(1)(b) because it reflects popular understandings of terrorism. In its June 2006 report on Australia's anti-terror legislation, the Sheller

57 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terror Legislation* (2006) 54–55.

58 This argument was included in a 'News Room – Backgrounder' document that the Canadian Government counsel provided to the Ontario Superior Court in the *Khawaja* trial: see *Khawaja* (2006) OJ 4245, [66].

Committee acknowledged that the Howard Government offered little explanation for including subsection (1)(b). It thought that it was reasonable to infer, however, that the wording was included to reflect understandings of terrorism in public discourse:

It is ... reasonable to infer from the very inclusion of paragraph (b) that Parliament intended that the definition of 'terrorist act' reflect contemporary use of that term in political and public discourse to stigmatise certain political acts, rather than actions motivated by non-political reasons such as greed or revenge.⁵⁹

It therefore recommended that the motive requirement in paragraph (b) be retained because it 'appropriately emphasises a publicly understood quality of terrorism.'⁶⁰

Similar comments were also made by the PJCIS. It agreed with the Sheller Committee that anti-terrorism law should reflect the public understanding of terrorism as qualitatively different from other types of crime:

There are arguments for and against the inclusion of the element of 'political, ideological and religious cause' but, on balance, we agree with the Sheller Committee that it's important to retain this distinguishing element. The case for a special terrorism law regime is made out on the basis that terrorism is qualitatively different from other types of serious crime. Terrorist violence is typically directed toward the public to create fear and promote political, religious or ideological goals. We believe that terrorist violence is seen by the public as something distinctive from other serious crime.⁶¹

This is the most convincing argument for the inclusion of 'political' and perhaps 'ideological' motives, because otherwise there would be little to distinguish terrorism from murder, extortion, and other types of 'private' criminal offences. But it still gives little reason to retain religion as one of three independent possible motives of a terrorism offence. Again, section 100.1(1)(c) attaches a pseudo-political dimension to any religiously motivated act of terrorism, but if this is the defining quality of terrorism that necessitates special legislation, why does a reference to religious cause also need to be included in the definition? Is there something about contemporary terrorism which is necessarily, or even typically, religious?

According to Bruce Hoffman, former RAND Corporate Chair in Counterterrorism and Counterinsurgency, 'the religious imperative for terrorism is the most important defining characteristic of terrorist activity today'.⁶² He documents the growth of terrorist groups motivated by any religion (not just Islam), from 16 (approximately one third) of 49 identifiable international terrorist groups in 1994, to 26 (nearly half) of 56 groups in 1995, to 52 of 113 groups a decade later in 2004.⁶³ More importantly, he also records significantly higher casualty rates for religiously motivated attacks compared to those launched for secular or nationalist purposes. Between 1982 and 1989, Shi'a Islamic terrorists

59 Sheller Committee, above n 35, 56 [6.22].

60 Ibid 57 [6.23].

61 Parliamentary Joint Committee on Intelligence and Security, above n 57, [5.25].

62 Hoffman, above n 1, 82.

63 Ibid 86.

only committed eight per cent of all international terrorist incidents, but were responsible for 30 per cent of total casualties.⁶⁴ Similarly, between 1998 and 2004, al-Qaeda only perpetrated 0.1 per cent of all terrorist attacks, but was responsible for nearly 19 per cent of total fatalities.⁶⁵ Hoffman ascribes these high casualty rates to the ‘transcendental dimension’ of religious terrorism. Whereas secular terrorists ‘rarely attempt indiscriminate killing on a truly massive scale’, religious terrorists believe that

violence is first and foremost a sacramental act or divine duty executed in direct response to some theological demand or imperative. Terrorism thus assumes a transcendental dimension, and its perpetrators therefore often disregard the political, moral, or practical constraints that may affect other terrorists ... [R]eligious terrorists often seek the elimination of broadly defined categories of enemies and accordingly regard such large-scale violence not only as morally justified but as necessary expedients for the attainment of their goals.⁶⁶

Based on Hoffman’s figures, there is something about modern terrorism that is particularly religious, and particularly dangerous because of those religious views. But it does not follow that there is something about religion in general, or Islam in particular,⁶⁷ that causes or justifies terrorist acts.

There is widespread agreement among scholars of Islam and Islamic law that al-Qaeda and its offshoots rely on a distorted interpretation of Islamic scripture by invoking the concept of jihad to target innocent civilians. After 9/11, more than 120 American Muslim groups, leaders and institutions rallied behind a fatwa issued by American Muslim jurists which condemned the actions of al-Qaeda.⁶⁸ This fatwa stated that there was ‘no justification in Islam for extremism or terrorism’, and that it was *haram* (forbidden) for Muslims to target civilians’ lives and property through suicide bombings or any other method.⁶⁹

There are also several reasons in Islamic law and language why al-Qaeda’s mission cannot be referred to as a ‘jihad’. According to Ahmed, there are five main legal reasons ‘why bin Laden’s barbaric violence cannot fall under the rubric of jihad’:⁷⁰

- (1) only a state, and not an individual or organisation, can declare a jihad;
- (2) even if al-Qaeda is at war, Islam still does not justify the killing of innocent women and children;
- (3) Islam does not permit the waging of war against countries in which Muslims can freely practice their religion (ie the United States and its Allies);
- (4) condemnation of bin Laden’s tactics by prominent Muslim jurists amounts to an *ijma* (consensus) which has authority above all except divine injunctions;

64 Ibid 88.

65 Ibid.

66 Ibid 88–9.

67 Ibid 85. Hoffman emphasises that the growth of religious terrorism is not only linked to Islam: ‘within a decade of [the Islamic Revolution] none of the world’s major religions could claim to be immune to the same volatile mixture of faith, fanaticism, and violence’.

68 See Parvez Ahmed, ‘Terror in the Name of Islam: Unholy War, Not Jihad’ (2007) 39 *Case Western Journal of International Law* 759, 768.

69 Ibid.

70 Ibid 772.

- (5) the welfare and interest of the *maslaha* (Muslim community) is harmed by bin Laden's actions.⁷¹

Along with these legal reasons, Ahmed also cites the multiple linguistic meanings of jihad, which all relate to the Arabic root J-H-D and simply mean 'to strive or exert effort'.⁷² While the meanings of jihad include 'fighting in order to stop oppression and injustice', they also include 'giving charity and feeding the poor, concentrating intently in one's prayer, [and] controlling one's self and showing patience and forgiveness'.⁷³ He denies that jihad can simply be equated with the English expression 'holy war', as is often the case in popular discourse, because the Arabic equivalent of 'holy war' (*harb muqaddasah*) is not found anywhere in the *Qur'an*.⁷⁴ For Ahmed, al-Qaeda should not be considered Islamic in the same way that the Lord's Resistance Army in Uganda is not considered Christian – despite their claims that they are fighting to establish a government based on the 10 Commandments.⁷⁵

These sentiments have been echoed by Mohammad,⁷⁶ Heck,⁷⁷ and Waleed Aly of Monash University,⁷⁸ who has pleaded with the public to refer to terrorism as anything but jihad:

By all means, call this terrorism 'barbaric'. By all means call it 'depraved'. Certainly call it 'criminal', 'inhuman', 'evil', 'perverted'. Feel free to call it by the strongest known terms of condemnation and contempt. But please, don't call it 'jihad' ... Do people who make such blanket statements even understand what they're saying?⁷⁹

Aly recognises, however, that his plea is an 'unrealistic fantasy' because terrorism has managed to enter public consciousness by taking the concept of jihad 'as its hostage'.⁸⁰ By invoking the rhetoric of Islam to justify their actions, al-Qaeda and its followers have managed to influence public discourse to the extent where jihad, holy war and even Islam itself are used as labels to explain acts of incomprehensible violence, when the use of these terms by terrorists are simply misrepresentations and mistranslations of the Islamic faith and scripture:

terrorists are co-opting the language of jihad for their crimes, while journalists faithfully, and uncritically, reproduce their narrative ... It is tragic, really, because, far from being synonymous with it, terrorism is jihad's exact opposite ... [T]hanks to the lazy sloppiness of many public commentators, and ... the deranged rhetoric of terrorist leaders themselves, we have long lost sight of this, if indeed we ever saw it.⁸¹

71 Ibid 772–3.

72 Ibid 769.

73 Ibid 770.

74 Ibid. For a detailed discussion of why jihad should be equated with the English phrase 'just war' and not 'holy war', see Aly, above n 9, 155–73.

75 Ahmed, above n 68, 772.

76 Noor Mohammad, 'The Doctrine of Jihad: An Introduction' (1985) 3 *Journal of Law and Religion* 381, 381, 389–90.

77 Paul L Heck, "'Jihad' Revisited' (2004) 32 *Journal of Religious Ethics* 95, 97–8.

78 See Aly, above n 9, 147–55, 174–7.

79 Ibid 149–50.

80 Ibid.

81 Ibid 174.

To be fair, the PJCIS did not fall lazily into this trap. It recognised that al-Qaeda ‘misuses the fundamental precepts of Islam’.⁸² It is nonetheless worrying, however, that any kind of ‘popularly understood quality of terrorism’ or ‘contemporary use of ... political and public discourse’ should be allowed to normalise federal criminal legislation, especially one that has generated ‘so much heat and so little light as jihad’.⁸³ To justify the continued existence of a legislative provision by reference to a public understanding of terrorism as ‘typically directed towards ... religious goals’ fails to sufficiently recognise the legal and linguistic contradictions underlying a concept of ‘jihadist terrorism’. It fails to recognise that religion in general – and Islam in particular – has nothing to do with the defining characteristic of terrorism as a violent tactic used to further political ends.⁸⁴

III CONCLUSIONS

In a footnote to its most recent Counter-Terrorism White Paper, the Australian Government offered its own definition of ‘jihadist’. This inconspicuous entry provided a pithy summary of the effects that terrorist organisations have had on public discourse:

The term ‘jihadist’ is an imperfect descriptor that has multiple meanings. It is, however, a term that has been appropriated by many terrorist groups to describe their activities, and it is commonly used by security services and public commentators across the world to describe them.⁸⁵

For the government, it was enough to justify the use of ‘jihadist’ that the terrorist groups had employed the term themselves, and that this term had been adopted by the security services and the popular media. The other possible meanings of jihad were largely unimportant, because the only relevant meaning in the context of counter-terrorism was that which the terrorists themselves had given it. One can understand the government’s approach, and judges have taken a similar line in criminal trials when relying on the concept of jihad to find that

82 Parliamentary Joint Committee on Intelligence and Security, above n 57, 7 [2.7].

83 Aly, above n 9, 150.

84 ‘Terrorism has nothing to do with religion ... [I]t is a tactic, not an ideology’: Ahmed, above n 68, 786.

85 Commonwealth of Australia, *Counter-Terrorism White Paper: Securing Australia – Protecting Our Community* (2010) 7 ff.

religious motive under subsection (1)(b) has been satisfied.⁸⁶ But it does suggest that the relationship between Islam and terrorism has not been discussed critically in public discourse, and that many of the problems involved have been glossed over for the sake of linguistic convenience.

Looking back on the history of the religious motive requirement in section 100.1(1)(b) of the *Criminal Code*, the reasons why it was included in the definition of a terrorist act seem unconvincing. Australia clearly followed the UK by including a reference to religious motive in section 100.1, but neither jurisdiction offered a sufficient explanation as to why this was any more effective a strategy for targeting terrorists than targeting only those with political aims, or those with no higher purpose at all, as in the 1999 *Bombings Convention*. When religion has been considered as a typical indicator of the motives of terrorist groups, such as in Justice Hayne's conception of the defence power, it has only been considered in tandem with a more significant 'international political aim'. A crime committed for the purpose of advancing a religious cause does not *of itself* satisfy the public understanding of terrorism as politically or publicly motivated violence. To be sure, section 100.1(1)(c) attaches a pseudo-political quality to any religiously motivated act of terrorism, but if this political dimension is really the defining feature of a terrorist act, why should an independent reference to religious motive also be included in the definition?

The reasons why the religious motive requirement has remained in subsection (1)(b) for nearly a decade, and is now likely to remain for the foreseeable future, also seem unconvincing. The religious views of al-Qaeda may be characterised as an 'international political aim' for the purposes of the defence power, but what about other religiously motivated groups and individuals who have no such grand political intentions? It is also unconvincing to justify a reference to religious motive in criminal legislation simply by virtue of the fact that *other* Commonwealth nations have also included an identical provision. If the UK did not offer a convincing explanation at the time for retaining a religious motive requirement in the context of Islamist extremism, then the Howard Government's actions should not be vindicated simply because other jurisdictions have also included the same reference.

Perhaps the most significant factor in normalising the religious motive requirement in subsection (1)(b), however, has been the impact of the language used by terrorist organisations on public discourse. It is certainly understandable,

86 See, eg, *R v Benbrika* [2009] VSC 21, [20] ('Benbrika'); *R v Lodhi* [2006] NSWSC 691, [73]. In *Benbrika*, Bongiorno J relied on the meaning given to jihad by the defendants, rather than the term's other innocent meanings, to satisfy sub-s (1)(b): 'The term "jihad" is used ... in many of the intercepted conversations. Although it is an Arabic word which translates literally as "struggle", it has acquired many different meanings in Islam ... Many of these meanings are benign. It can mean the promotion of Islam by non-violent means; the seeking of perfection in one's own moral life and relationship with Allah; the diligent attention to one's religious and familial duties; and probably a number of other similar things. However, it also means a violent struggle against the enemies of Islam: the kuffar. This was the meaning which Benbrika attributed to it ... whatever meanings jihad might have in Islamic discourse generally, Benbrika and his organisation used the term in the sense he described – as a violent attack on the kuffar to advance the Islamic cause': at [20].

though not ideal, that public discourse presumes a strong link between an Islamic jihad and terrorism when this is precisely the view that terrorist organisations themselves put forward to justify their actions. To the much larger, moderate Muslim population, these connections may seem inappropriate or offensive, because there are several reasons under Islamic law and language why the actions of terrorist organisations cannot amount to jihad. To justify the continued existence of the religious motive requirement by reference to publicly understood qualities of terrorism is to perpetuate this lack of critical understanding about the relationship, or lack thereof, between Islam and terrorism. It means that the religious motive requirement in subsection (1)(b) is supported by, and supports in turn, popular associations between religion and terrorism, when religion itself has nothing to do with the defining characteristic of terrorism as a violent tactic used to further political ends. If subsection (1)(b) is indeed here to stay in Australian anti-terror law, then it should be accompanied by a greater willingness by the government to engage in a critical discussion about the nature of jihad and Islam in the context of terrorism. The government should also offer a clearer explanation of the strategic benefits that a religious motive requirement provides to state authorities when targeting and prosecuting those suspected of engaging in terrorist activity. In the absence of any such explanation, the risks that a religious motive requirement might have for human rights and racial profiling are too high a price to pay for the sake of merely ‘emphasis[ing] a publicly understood quality of terrorism.’⁸⁷

87 Sheller Committee, above n 35, 57 [6.23].