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Civil Rights and "Terrorism" in Australia

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"Where people are a danger to society after they have served their time for conviction, as we do with sex and as we do with violent offenders... then they should be put into preventive detention." -Dan Tehan, Intelligence and Security Committee, Australian Parliament, Dec 12, 2015

The change in Australian leadership, initiated by the prime minister's own party, was meant to be an altering movement. Tony Abbott had been too extreme; too zealous. He wanted to commit Australian troops haphazardly. He pondered moves against death cults. He cut against the grain of the environmental lobby, lobbing climate change scepticism into each forum he could find. And there was the delight taken in steam rolling civil liberties.

Malcolm Turnbull is showing how is he is not much better. There is everything to say that he could be worse, a sort of Obama-screen placed over a Bush legacy. Terrible things are justified by language that is picked for the moment.

Given that Australia is already doing its best to attack various liberties, one example being stripping away citizenship of convicted terrorists, albeit those with dual-nationality, Turnbull's proposal did not seem irregular.

On Friday at the Council of Australian Governments (COAG) meeting, Turnbull got what he wanted. There was no arm-twisting needed. Governments of conservative and labour persuasions across the country agreed to a regime detaining convicted terrorists past their sentence date.[1] Their model of inspiration? The highly problematic, permanent regime designed to penalise exceptional sex and violent offenders.

Such a policy is a poor move on justice, suggesting that convictions, in terms of their philosophy, are irrelevant. It assumes, for instance, that a penal figure cannot reform, and that exceptional categories of offender exist. Rehabilitation is thereby eschewed, and the protection of society not assured.[2]

It assumes, furthermore, that a state has infinite, unreviewable powers to select groups of individuals for punishment. This precedent has proven catastrophic for the health of political systems which are, notionally at least, accountable and reviewable. They also suggest that the burgeoning powers of a police state beckon, one that acts under the pretence of law whilst suspending it.

Within the courts, some resistance has been mounted, though far from enough. There have been cases suggesting that such moves are unconstitutional, an overstepping of some vague mark that is impossible to identify accurately in the common law. But the Australian Constitution is a generally weak document given to procedural outlines and commercial

protections.

The drafters remained, with some exceptions, silent on the rights of the citizen, largely thinking that the sagacity of the common law would do the rest. Judges have had to, inventively, discover hidden protections. The response from Australian governments at all levels has been to take away that inventiveness and effectively empower courts to take away liberties.

Take, for example, the Queensland Supreme Court. In 2003, a state insistent on seeing paedophiles as being the equivalent of genocidal masterminds decided that courts could make preventive or supervision orders where there was a high degree of probability that the offender poses a "serious danger to the community". That danger is assessed, cryptically, where there "is an unacceptable risk that the prisoner will commit a serious sexual offence".[3]

Such regimes ensure that the offender is never treated as anything other than a convict. Electronic tagging is permitted and prohibitions from living in certain areas enforced under what are called supervision orders. The continuing detention order goes further: it keeps a person in custody after the release date. Much to the consternation of civil liberty advocates, the High Court of Australia validated the provisions.[4]

The Queensland precedent saw jurisdictions across Australia smitten. In 2013, New South Wales decided to extend the post-detention scheme to high-risk violent offenders. Two years later, South Australia followed.[5] At the federal level, the *Foreign Fighters Act* was amended to expand the use of control orders over those convicted of a terrorism-related offence.[6] Officials, it seemed, could not get enough of the idea that prisoners, having served their time, could still be detained in some form at Her Majesty's pleasure.

Australia is not unique in this regard. Indefinite detention has insinuated itself into various democracies, often on the pretext to target supposedly exceptional criminals. (The threat could happen here, so act now!) In the United Kingdom, a post-supervision regime exists for those convicted of terrorist-related offences, though these tend to take the form of less intrusive notification requirements.

In the United States, the National Defense Authorization Act of 2012 has been used to indefinitely detain US subjects suspected of being affiliated with al-Qaeda or associate organisations.

In a vain effort to repeal the indefinite provision last year, Rep. Adam Smith (D-Washington) suggested that having such a provision on the statute books was dangerous. "That is an enormous amount of power to give the executive, to take someone and lock them up without due process." Doing so "places liberty and freedom at risk in this country."[7]

This highly troubling state of affairs betrays the flimsiness of certain protections, even in the United States. Australia has one less protective barrier. Unbacked by a spine of constitutionally protected rights, individuals tend to be at the mercy of supposedly wise judgments made by the prime minister and his colleagues. When that wisdom goes on an extended holiday, lawyers are usually left with minimal resources.

Such a program can also have another lasting effect. Far from protecting Australian society, which is ostensibly its aim, very much the opposite can take place. "Detaining persons

convicted of terrorist offences for lengthy periods after they have served their time," argue Tamara Tulich and Jessie Blackbourn, "could risk radicalising a section of the community who see the measure as unjust."[8] Prevention duly becomes cause and catalyst.

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Notes:

[1] http://www.abc.net.au/news/2015-12-11/malcolm-turnbull-wants-to-treat-terrorists-like-paedophiles/7019348
[2] http://www.lifesciencegloba l.com/home/cart?view=product&id=719
[3] www.legislation.qld.gov.au/LEGISLTN/ACTS/2003/03AC040.pdf
[4] http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2004/46.html?stem=0&synonyms=0&query=Fardon
[5] http://www5.austlii.edu.au/au/legis/sa/consol_act/clroa2015289/
[6] https://www.comlaw.gov.au/Details/C2014A00116
[7] https://www.rt.com/usa/160832-ndaa-gitmo-detention-approved/

[8] http://theconversation.com/the-government-still-needs-to-demonstrate-that-indefinite-detention-for-terrorists-is-necessary-52206
