

Magna Carta and the Rule of Law in the Digital Age

Speech to the Sydney Institute

7 July 2015

##Check Against Delivery##

Tonight I am going to talk about balancing security and individual liberty.

It is a balance our Government has, I believe, got right.

But in order to ensure we continue to do so, this conversation is one that should proceed in a considered manner respectful of the views and experience of others.

And to better understand where we should go, we should not forget from where we came.

Eight hundred years ago, England's most despised King affixed his seal to England's most venerated document.

As a peace treaty^[1] the Magna Carta failed - King John renounced it within a month, the civil war was resumed and the rebellious barons effectively renounced it within a year when they offered the throne to the French heir^[2].

Most of its 63 chapters are long forgotten^[3], but generations of Britons and their descendants in the New Worlds of the Western and Southern Hemispheres drew from it the very distillation of the rule of law.

Most important of all is what became Chapter 29 in the 1297 restatement:

"No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right."

Of course the authors of Magna Carta and its interpreters and promoters, like Coke and Selden, saw the rule of law as protecting the subject from the power of a King.

But it was not long before the Magna Carta was invoked by philosophers such as John Locke^[4] and later the founders of the American republic to protect the citizen not from the tyranny of kings - the revolution had seen to that - but from the tyranny of the majority.

In 1791 the United States' Constitution's Fifth Amendment emphatically cemented the supremacy of the rule of law as administered by the courts of justice.

“No person...shall be deprived of life, liberty or property, without the due process of law...”

Carved in stone in congresses and courts, recited in State Constitutions, Magna Carta has been even more celebrated in the United States than in the land in which it was written.

And by the time our Australian Constitution was being framed, a century or so later, these rights were judged inalienable and inherent among the British people who formed our Commonwealth. In 1925, federation father and by then High Court Justice Sir Isaac Isaacs described these values “as the base of the social structure of every British community” growing from the Magna Carta which he described as “the groundwork of all our constitutions”^[5].

The Rule of Law

Australia is a democracy, now one of the world’s oldest. We are often described as a liberal democracy and by that additional qualification is signified our commitment to the rule of law.

Some people imagine that a democracy is simply a society where the majority of the people get to decide who runs the country. But a society where a majority can do whatever it likes is not a democracy - it is a tyranny.

The notion that the majority entitles the government it appoints to rule as it pleases is as pernicious a doctrine in our times as the divine right of Kings was in the time of King John or King Charles I.

The genius of a liberal democracy is that at the same time it empowers the majority, through the ballot box, it also constrains that majority, or its government, through the rule of law.

The rule of law, which applies to the government as much as the governed, is not as widely appreciated as we might think.

Historically oppressed majorities in Syria and Iraq have seen the prospect of democracy as offering an opportunity to visit the same, or worse, persecution on the minority as had been, until recently, visited on them. A newly empowered majority Government in Egypt, the product of the Arab Spring, promptly set out on fresh waves of persecution against minorities - especially the Christian Copts.

“Democracy,” Churchill said in a parliamentary debate in 1944, “is no harlot to be picked up in the street by a man with a tommy gun.”^[6]

One of the most important elements of the rule of law is that citizens cannot be deprived of their life, liberty or property without due process of law. That requires the decision of a court arrived at after a fair and impartial hearing of both sides of the argument. This principle is reflected in our own Constitution which provides in Chapter III that judicial power - the determination of disputes between citizens and the State - can only be exercised by the Courts.

Liberty in Times of War

Two lines attributed to Cicero are often cited to challenge the primacy of the rule of law in times of war or heightened threats to national security. The first, *salus populi suprema lex* states that the safety of the people is the supreme law. The second *inter arma enim silent leges* observes that in the time of war the laws fall silent.

Put together many would argue that when the security of the state is under threat, the claims of security will always trump the rule of law. And there is no doubt that historically basic rights, including habeas corpus, have at times been suspended in times of war to allow indefinite detention.^[7]

It has been ever thus - Thomas Jefferson observed in 1810 that: “To lose our country by a scrupulous adherence to written law, would be to lose the law itself.”^[8] On the other hand Benjamin Franklin had famously written thirty five years earlier: “Those who would give up essential Liberty to purchase a little temporary Safety, deserve neither Liberty nor Safety.”^[9]

Here, equally eloquently, is what the founder of the Liberal Party, Robert Menzies^[10], had to say on the same subject in 1942, during the darkest days of World War II:

If the day is to come when the courts are to be closed to the aggrieved citizen, when the King's writ is not to run because popular uproar wills it so, when the appeal to the law is to be an occasion of scoffing, then that day will cast a black shadow across British freedom ... The law's greatest benefits are for the minority man - the individual.^[11]

The balance between security and liberty will always be controversial and that is a good thing.

But we need to recognise that getting the balance right is not easy (not least because the balance may shift over time) and we are more likely to do so if there is a thoughtful and well informed public debate - weighing up the reality of the national security threat, the effectiveness of particular proposed measures and then asking whether those measures do infringe on our traditional freedoms and if so whether the infringement is justifiable.

It is important to remember that people and societies with an equal determination to defeat terrorism can have different views on what is the right balance and, indeed, what the right measures are.

Denouncing those who question the effectiveness of new national security measures as “friends of terrorists” is as stupid as describing those who advocate them as “proto-fascists.”

And this debate is not an easy left/right divide. One of the most consistent and cogent critics of our Government's legislation on many national security topics including data retention and citizenship has been the Institute of Public Affairs. Their recent catalogue of the hundreds of Commonwealth laws which qualify or overrule traditional legal rights is sobering reading.^[12]

A Conservative Approach

There are powerful arguments that existing laws need to be constantly reviewed and updated to ensure they are still relevant and effective as new technologies emerge and old ways of intelligence gathering become outdated.

In fact we have an obligation to do so not just to protect our own citizens - which is reason enough for strong action - but also because of international resolutions backed by Australia in the U.N. and other forums^[13]. While our security agencies seek to take advantage of new digital technologies, those same technologies are at the same time making the work of our agencies more challenging.

But respect for the rule of law is at the heart of what it means to be a conservative. As part of this doctrine, the rule of law imposes on legislators and judges a conservative caution when making new laws – the idea that, in general, new laws to quote Dyson Heydon, “should only be changed by a process of gradual development, not by violent new advances or retreats or revolution or ruptures.”^[14]

Edmund Burke compared the freedoms inherited from the Magna Carta to those achieved in the revolution in France - inherited freedoms compared to abstract rights achieved through violent means - and he wrote that only the former had the permanency to be enforced: “By a constitutional policy,” he wrote, “working after the pattern of nature, we receive, we hold, we transmit our government and our privileges in the same manner in which we enjoy and transmit our property and our lives.”^[15]

This approach, that “an old law is a good law”, has been very influential in the Government’s approach to the Citizenship Act changes.

Instead of proceeding with a proposal which would give the Minister the discretion to revoke Australian citizenship if he believed the person affected had engaged in terrorist activities, the proposed amendments build on the existing provisions in section 34 and 35 of the Act.

The upshot of this is that section 35 will be modernised so that it applies to people fighting for a non-state actor like Da’esh as much as it applies to a person who fights in the army of a country at war with Australia. The rule of law is respected because a person whose citizenship ceases in those circumstances has full recourse to the Australian courts under the Constitution to contest the matter on its merits.

Again to quote Menzies:

"To ignore the Constitution, to treat its structure and the limitations it imposes upon the powers of the Commonwealth Parliament as of no account, to endeavour by clamour to prevent recourse to the courts for its interpretation, is to violate the whole conception of the rule of law".^[16]

Terrorism - both a process and an euphemism

The 9/11 destruction of the World Trade Centre towers is often referred to as the beginning of a new “age of terror.” It was on any view the most shocking terrorist attack in our times and we are still living with the consequences.

But as we commemorate the centenary of World War I we should not forget that the fuse was lit by an act of terrorism - the assassination of Archduke Ferdinand on 28th June 1914.

Indeed one of the first act of terrorism in Australia was on New Year’s Day in 1915, when two two Turkish sympathisers opened fire on the ‘Picnic Train’ from Broken Hill to Singleton, killing six people and wounding another seven^[17].

The melancholy truth is that terrorism has always been with us - and no doubt always will be.

Terrorism is defined in our law as using or threatening violence or damage to people or property with the aim of coercing the public or a government to advance a political, religious or ideological cause. It is a wide definition, applies to acts in any country and includes interference with infrastructure including telecommunications and power grids.^[18]

Our law makes it an offence for Australians to be engaged in terrorist activities anywhere in the world. The policy justification is that we just don’t want Australians being involved in conflicts of that kind.

While our laws also make it an offence to join or support specific listed terrorist groups - such as al Qaeda or Da’esh - terrorism itself is defined very broadly. Importantly the definition does not form a view as to the merits of the terrorist activities.

As far as Australian law is concerned, all terrorist activities are unlawful for Australians to engage in or support.

So if our aim is to eradicate “terrorism” - as opposed to defeating a particular terrorist organisation like Da’esh - we are unlikely to be successful. There will always be people and groups who choose to use violence to pursue political goals. One of the strengths of our liberal democracy governed by the rule of law is that there are many peaceful avenues to pursue political goals.

The Nature of the Threat and the Proportion of Our Response

Just as it is important not to underestimate, or be complacent about, the national security threat from Da’esh, it is equally important not to overestimate that threat. Any threat looms largest when it is close to us in either time or space - or both.

In Menzies’ day our democratic way of life was threatened by two totalitarian ideologies - Soviet Communism and fascism. Each were proselytising ideologies. One was defeated in battle in 1945, the other expired, largely from its own contradictions, twenty five years ago. China, the last nominally communist superpower, does not seek to export its way of government.

But Da'esh is not Hitler's Germany, Tojo's Japan or Stalin's Russia. Its leaders dream that they, like the Arab armies of the 7th and 8th century, will sweep across the Middle East into Europe itself.

They predict that before long they will be stabling their horses in the Vatican.

Well Idi Amin wasn't the King of Scotland either.

We should be careful not to say or do things which can be seen to add credibility to those delusions.

Da'esh, more than any of its predecessors, has been able to use the increasingly ubiquitous Internet and social media to amplify its significance. As the Prime Minister has observed a jihadist needs only a victim, a knife and a phone to create an act of terror which will be viewed around the world.

Da'esh's recruiting formula, often slickly produced, includes the well-known combination of sex and violence - especially the latter. It works for Hollywood, so why wouldn't it work for Da'esh especially when a twisted and archaic interpretation of Islam is used to legitimise it? ^[19]

We need to be very careful we don't get sucked into their strategy and ourselves become amplifiers of their wickedness and significance ^[20].

Currently the Government believes there are around 120 Australians known to be fighting, mostly with Da'esh, in Syria and Iraq with around 160 in Australia providing them with support ^[21]. These numbers are larger than on the previous occasions Australians have travelled overseas to fight in jihadist causes. Both the Soviet invasion of Afghanistan and the wars following September 11 resulted in small flows of foreign fighters, including Australians, to the Middle East. And there have been earlier precedents - numbers of Australians fought in the Balkan Wars in the 1990s and in the Spanish Civil War of the 1930s.

The Government's policy on foreign fighters in Syria and Iraq is quite clear. We do all we can to stop people travelling to fight there and many passports have been cancelled to that end. It is an offence to fight for a terrorist organisation and indeed to travel to the key areas of the conflict in Syria and Iraq.

Once somebody has got there and started to fight we do not want them to come back, trained and brutalised as they are in terrorist practices - and the recent amendments to the Citizenship Act are designed to ensure that dual nationals will lose their Australian citizenship from the time they start fighting with Da'esh ^[22] thus eliminating any right to return to Australia.

Da'esh is similar but different to al-Qaida from which it evolved. It appears to place less strategic focus on attacking the West than al-Qaida, as it is seeking to establish a state of its own - its claimed caliphate. It has recruited foreign fighters more rapidly than its predecessors - a

consequence of its use of contemporary digital media on the one hand and what appears to be tangible success on the ground.^[23]

Getting the response right

It is more important that counter-terrorism measures be the right ones, the effective ones, than that they simply be "tough".

Tough policies can be popular, they may even be justified at the time they are conceived, but they can still be a mistake. I suppose there is nothing tougher than invading a country, overthrowing its government and occupying its territory. But with the benefit of hindsight, few today contend that the 2003 invasion of Iraq, popular with the US public and the Congress at the time, was not a tragic error.

The Islamic terrorist seeks to provoke the state to overreact because it creates a more receptive environment for the extremists' recruiting efforts based as so much of it is on perceptions of resentment, oppression and humiliation.

As the then ASIO Director, David Irvine, said last year:

"we should not let the phenomenon of violent Islamist extremism destroy the community harmony that is such an essential characteristic of Australia's highly successful multi-cultural democracy. That is precisely what violent extremism and terrorism want to do."^[24]

Recently, the Prime Minister announced \$630 million in counter-terrorism measures, with a particular emphasis on community engagement and engaging with young men and women, before they become radicalised.

As the Prime Minister said when the package was announced: "The best defence against radicalisation is through well-informed and well equipped families, communities and institutions. As such, local engagement is at the heart of many of these measures."^[25]

Just last night President Obama reiterated this point where he said success depends on "Muslim communities, including scholars and clerics, rejecting warped interpretations of Islam and protecting their sons and daughters from recruitment."^[26]

A critical element in countering violent Islamic extremism is authoritative muslim voices which challenge the extremists' interpretation of Islam. A good British example of this is www.imamsonline.com which makes the case against Da'esh on the same digital platforms as those on which Da'esh campaigns.

One final observation is that broadening the focus of our counter-terrorism efforts is to acknowledge that in a liberal democracy, the Government cannot direct the media how to do its job; but neither can the media escape its responsibility for the consequences of how it reports violent extremism.

On this front, the use of social media by Da'esh has been more sophisticated and prevalent than perhaps any other terrorist organisation before it. And organisations like Twitter and Facebook have been forced to reconsider their policies and have become more active taking down offensive material.

In Australia, these companies continue to work both with the Government to ensure their response to the publishing of extremist material is appropriate.

More broadly, the media has a powerful role in both fostering a sense of cohesion and countering extremist material. I note the review into the Martin Place siege praised the role of the media in not exacerbating what was already a difficult situation or seeking to inflame the messages Man Monis was trying to spread^[27]. But the damage that sensationalist reporting can do can be immense.

That debate has come into sharp focus following on from the ABC's decision to include terrorist sympathiser Zaky Mallah in a live audience. A number of issues related to that decision were investigated by the Government^[28] following the broadcast and I won't add to the report of that inquiry. But as the sentencing judge noted when Mr Mallah was convicted in 2004, providing such coverage to his views runs the risk of spreading divisive and discriminatory views^[29].

The other, and perhaps most important part of the Government's response to Da'esh, is of course lending the support of our armed forces to defeating them in the field. The means of doing so are well beyond the scope of this speech, but the roll back and destruction of Da'esh in Iraq and Syria is critical to ending not just their barbaric rule in the Middle East, but their appeal beyond it, even, as we know, to a few of our own citizens.

Conclusion

It may seem paradoxical that we celebrate the 800th anniversary of Magna Carta at a time when laws are being adjusted, often controversially, to enhance national security. But the truth is that in these times, less remarkable than we imagine, we should never forget the value of the principles of Magna Carta.

And they must live in our hearts as well as on the pages of statutes and constitutions. I hope we will always believe, as a core political value, that no one should be punished without a fair trial and that a true democracy constrains the majority even as it empowers it.

We should always shudder a little, perhaps a lot, when cynics sneer at courts and laws as just troublesome obstacles standing in the way of justice.

While we are - and always will be - facing new and evolving threats to our national security, our forebears have faced far greater ones.

In 1939 Robert Menzies, Prime Minister, was leading Australia into a war against Adolf Hitler, a foe whose march across Europe must have seemed nearly irresistible. This **was** an existential

threat. And he introduced a National Security Bill that gave extensive powers to the Government to control the economy and much of Australia's daily life in what was to become a total war effort.

His warning to the House of Representatives should resonate down the years to all of us, especially those in the party he founded:

"The 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."^[30]

Footnotes

^[1] In the words of David Carpenter: "John's opponents had made the mistake of coming to terms without winning the war. The Charter was a negotiated document, not one dictated when John was on his knees". Source: Carpenter, D.A., (1999), "The Plantagenet Kings", in Abulafia D., [ed] *The New Cambridge Medieval History Volume 5: c.1198–c.1300*, p.329

^[2] After being signed on June 15, 1215, Pope Innocent III annulled the Magna Carta on August 25. By the time of King John's death on the night of 17-18 October 1216, more than half of England was under control of Prince Louis of France.

^[3] As the great historian on medieval England, Sir James Holt, wrote: "Magna Carta was secured within a generation but only just". Source: Holt, J.C., (1985), *Magna Carta and Medieval Government*, p.394

^[4] Many of Locke's ideas were taken up by the U.S. revolutionaries. In his *Second Treatise on Government*, he wrote: "Where-ever law ends, tyranny begins, if the law be transgressed to another's harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command, to compass that upon the subject, which the law allows not, ceases in that to be a magistrate"

^[5] "It is essential, however, even at this advanced stage of our political development, and perhaps none the less because of that development, to bear constantly in mind certain fundamental principles which form the base of the social structure of every British community ... The principles themselves cannot be found in express terms in any written Constitution of Australia, but they are inscribed in that great confirmatory instrument, seven hundred years old, which is the groundwork of all our Constitutions— *Magna Charta*. Chap. 29 (sometimes cited as Chap. 39) contains them all. Its words, rendered into English, and so far as immediately material here, are: "No free man shall be taken or imprisoned ... or exiled ... but ... by the law of the land." The chapter, as a whole, refers to other rights as well, and recognizes three basic principles, namely, (1) primarily every free man has an inherent individual right to his life, liberty, property and citizenship; (2) his individual rights must always yield to the necessities of the general welfare at

the will of the State; (3) the law of the land is the only mode by which the State can so declare its will. These principles taken together form one united conception for the necessary adjustment of the individual and social rights and duties of the members of the State.” Source: *Ex Parte Walsh; Ex Parte Johnson; In re Yates* (1925) 37 CLR 36, available at: <http://www.austlii.edu.au/au/cases/cth/HCA/1925/53.html>

^[6] Quoted in Churchill, W., (1953), *The Second World War, Vol V*, pp.294-295. Churchill said: “Democracy, I say, is not based on violence or terrorism, but on reason, on fair play, on freedom, on respecting other people’s rights as well as their ambitions. Democracy is no harlot to be picked up in the street by a man with a tommy gun. I trust the people, the mass of the people, in almost any country, but I like to make sure that it is the people, and not a gang of bandits who think that by violence they can overturn constituted authority, in some cases ancient Parliaments, governments and States.”

^[7] The debate over *habeas corpus* has been controversial and has evolved over time. For example, On April 27, 1861, the writ of *habeas corpus* was unilaterally suspended by President Abraham Lincoln in Maryland during the American Civil War. More recently, the US Military Commissions Act of 2006 purported to suspend *habeas corpus* for any alien determined to be an “unlawful enemy combatant engaged in hostilities or having supported hostilities against the United States”. The Supreme Court later ruled in *Boumediene v. Bush* that the MCA amounted to an unconstitutional encroachment on *habeas corpus* rights. Source: *Boumediene v. Bush*, 553 US 723 (2008). In the Britain a central feature of policy post 9/11 was the indefinite detention of foreign national terror suspects at Belmarsh Prison which continued from 2001 until it was ruled unlawful by the House of Lords in 2004. Source: *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

^[8] As Thomas Jefferson wrote, in times of emergency, there is much more power vested in the executive than elected representatives: “A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means”. Source: *Letter to John B. Colvin*, 20 Sep 1810, available at: http://press-pubs.uchicago.edu/founders/documents/a2_3s8.html

^[9] Reply to the Governor by the Pennsylvania Assembly 11 November 1775

^[10] Indeed in September 1939 after the declaration of war Prime Minister Menzies said, introducing the National Security Bill: ‘Whatever may be the extent of the power that may be taken to govern, to direct and to control by regulation, there must be as little interference with individual rights as is consistent with concerted national effort.....the 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.’

^[11] Menzies, R., (1942), 'The Forgotten People', Chapter 32 'The Law and the Citizen' (Originally broadcast 12 June 1942). He stated: "If the day is to come when the courts are to be closed to the aggrieved citizen, when the King's writ is not to run because popular uproar wills it so, when the appeal to the law is to be an occasion of scoffing, then that day will cast a black shadow across British freedom. For Erskine's "security under the law", mark you, is not such security as your opponents, being in a majority, may concede; it is not something precariously dependent upon the whim of a mob. It is that security to which a man may confidently and calmly appeal, even though every man's hand may be against him. The law's greatest benefits are for the minority man - the individual."

^[12] See for instance, Breheny, S., & Begg, M., (2014), "The state of fundamental legal rights in Australia", available online at: http://ipa.org.au/portal/uploads/The_state_of_fundamental_legal_rights_in.pdf

^[13] In September 2014, Australia supported U.N. Security Council Resolution 2178 (2014), which among other things stated that we will act, consistent with international law, to prevent the "recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning of, or participation in terrorist acts". Source: UN, (2014), available at: <http://www.un.org/press/en/2014/sc11580.doc.htm>. As Prof Williams notes: "Resolution 1373 of the United Nations Security Council, adopted on 28 September 2001, determined that States shall 'take the necessary steps to prevent the commission of terrorist acts' by ensuring that 'terrorist acts are established as serious criminal offences in domestic laws and regulations'. This gave rise to an obligation on the part of Australia to enact laws directed at this problem." Source: Williams, G., (2014), "Does Australia Need New Terror Laws?", available at: <http://www.cla.asn.au/News/terror-laws-some-good-some-unneeded/>

^[14] Heydon, D., (2003), "Judicial Activism and the Death of the Rule of Law", in *Quadrant*, Vol 47, Number 1-2.

^[15] Edmund Burke, *Reflections on the Revolution in France*

^[16] Menzies, R., (1942), "The Law and the Citizen"

^[17] At the time the *War Precautions Act 1914* was in force, which could be seen as, in part, Australia's first anti-terrorism legislation. Under the Act regulations could be created for search and seizure, arrest, detention and to order the disclosure of information. The regulations even included safeguards, specifically that 'the ordinary avocations of life and the enjoyment of property are to be interfered with as little as may be permitted by the exigencies of measures required for securing the public safety'.

^[18] See *Criminal Code Act 1995* (Cth).

^[19] A study by the Soufan Group on the motivations of foreign fighters joining the Islamic State noted that: “The French authorities also categorize volunteers from France as disaffected, aimless and lacking a sense of identity or belonging. This appears to be common across most nationalities and fits with the high number of converts, presumably people who are seeking a greater sense of purpose and meaning in their lives. Indeed, the Islamist narrative of Syria as a land of ‘jihad’ features prominently in the propaganda of extremist groups on both sides of the war, just as it does in the social media comments of their foreign recruits.” Source: Soufan Group, (2014), “Foreign Fighters in Syria”, available online at: <http://soufangroup.com/wp-content/uploads/2014/06/TSG-Foreign-Fighters-in-Syria.pdf>. As Thomas Hegghammer of the Norwegian Defense Research Establishment noted: “Foreign fighters are overrepresented, it seems, among the perpetrators of the Islamic State’s worst acts. So they help kind of radicalize the conflict—make it more brutal. They probably also make the conflict more intractable, because the people who come as foreign fighters are, on average, more ideological than the typical Syrian rebel.” Source: Quoted in Stern, J., & Berger J.M., (2015), “ISIS and the Foreign Fighter Phenomenon”, published in *The Atlantic* available at: <http://www.theatlantic.com/international/archive/2015/03/isis-and-the-foreign-fighter-problem/387166/>

^[20] Berger, J.M., (2015), “How ISIS Succeeds on Social Media Where #StopKony Fails”, in *The Atlantic*, available at: <http://www.theatlantic.com/international/archive/2015/03/how-isis-succeeds-where-stopkony-fails/387859/>

^[21] Ascertaining the actual number of Australian fighters in Syria and Iraq is difficult. A study by the Soufan Group in June 2014, quoting ASIS figures, put the number at around 250. Source: Soufan Group, (2014), “Foreign Fighters in Syria”, p.13, available at: <http://soufangroup.com/wp-content/uploads/2014/06/TSG-Foreign-Fighters-in-Syria.pdf>. A study by ICSR in January put the number at 100-250. Source: Neumann, P., (2015), “Foreign fighter total in Syria/Iraq now exceeds 20,000; surpasses Afghanistan conflict in the 1980s”, available at: <http://icsr.info/2015/01/foreign-fighter-total-syriairaq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s/>. A Lowy Institute study in April quoted ASIO figures, that around 90 Australians were fighting for jihadist groups in Syria and Iraq, that up to 30 have returned, and that over 20 have died. Source: Zammit, A., (2015), “Australian foreign fighters: Risks and responses”, available at: <http://www.lowyinstitute.org/publications/australian-foreign-fighters-risks-and-responses>

^[22] Or any other listed terrorist group for the purpose of section 35

^[23] As the Lowy Institute’s Andrew Zammit notes: “So far, neither Jabhat al-Nusra nor IS appear to have made attacks in the West as high a strategic priority as al-Qaeda’s senior leadership did, and they have a wide range of other uses for foreign recruits. This contrasts with the situation when Australians travelled to South Asia to train with al-Qaeda and LeT at the turn of the century. Al-Qaeda was prioritising attacks within the West, devoting substantial resources to this purpose, and LeT was actively assisting this effort”. Source: Zammit, A., (2015), “Australian

foreign fighters: Risks and responses”, available
at: <http://www.lowyinstitute.org/publications/australian-foreign-fighters-risks-and-responses>

^[24] Irvine, D., (2014), “Evolution of terrorism - and what it means for Australia” available
at: <http://www.asio.gov.au/Publications/Speeches-and-Statements/Speeches-and-Statements/DGs-Speech-12-August-2014.html>

^[25] Abbott, T., (2015), “Counter Terrorism Measures for a Safer Australia”, available
at: <https://www.pm.gov.au/media/2014-08-26/counter-terrorism-measures-safer-australia-0>

^[26] President Barack Obama, ‘Update on our strategy to degrade and destroy ISIL’ (Speech delivered at the Pentagon, 6 July 2015).

^[27] DPMC and Department of Premier and Cabinet, (2014), “Martin Place Siege - Joint Review”, pp.65-71, available
at: http://www.dPMC.gov.au/sites/default/files/publications/170215_Martin_Place_Siege_Review_1.pdf

^[28] “Context and decisions regarding the appearance of Mr Zaky Mallah on the ABC’s Q&A program on 22 June 2015”, available
at: <https://www.communications.gov.au/sites/g/files/net301/f/QA%20NC%20final%20draft%20Summary%201%20July%20%282%29.pdf>

^[29] R v Mallah [2005] NSWSC 317, at par.37: “Placing a person such as [Mr Mallah] into the public spotlight is not only likely to encourage him to embark on even more outrageous and extravagant behaviour but, perhaps more importantly, it risks unnecessarily heightening the existing public concerns about terrorist activity as well as encouraging or fanning divisive and discriminatory views among some members of the community”

^[30] Menzies, R., quoted in *Hansard*, 7 September 1939 at p.165 It is worth noting the pains to which Menzies goes to note that the Bill does not allow the Government to introduce conscription by regulation nor to subject any person not in the military to the jurisdiction of courts martial. “There is, and I think properly so, a very great objection in Australia to submitting to this method of trial by court martial persons who are not subject to military law. There is a very great objection to the notion of a civilian, a person not subject to naval, military or air force law, being subject to a form of trial which is other than the usual form of trial to which a civilian may appeal.” at 166.