



A Fair Go in an Age of Terror

Countering the Terrorist Threat to Human Rights and the Australian Identity

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We are stepping into an election year both here and in the United States where the incumbents John Howard and George W Bush have led the initiatives for countering the emerging terrorist threat revealed and unleashed by the events of September 11, 2001. There is the risk that any consideration or critique of these initiatives can be seen to be party political or partisan. That is not my purpose. I am quite agnostic as to whether Mark Latham or John Howard would be any more solicitous of human rights and protective of Australian identity in response to such a crisis. My agnosticism extends to all other conceivable inhabitants of the Lodge in the foreseeable future. Though it is important to examine the conduct of political leaders in the past, my purpose is to see how robust our democratic processes are for finding the right balance, and how informed and committed we are in insisting that our politicians not cut corners in the name of national security. This is an increasing challenge in a society with an aging population who can be expected to be worried about their security whatever the inconvenience to others and with a group of youth who feel marginalised from the decision making processes of the society.

At times of national insecurity, there is an increased need for citizens to trust their political leaders and those leaders are likely to feel very acutely any criticism of their discharge of that trust. There are lessons for us, without our canonising or demonising any particular political actors.

Jim Wolfenson, President of the World Bank, in an address last month on a return visit to Australia, his home country, gave us an inspiring introduction to our seminar topic, *A Fair Go in an Age of Terror: Countering the Terrorist Threat to Human Rights and the Australian Identity*. He said:

I was fascinated today in my discussions with civil society to learn that, in a poll of Australian society, eighty-five percent of people were prepared to support development assistance, and some fifty-three percent of them supporting it strongly. But when asked the reasons why they supported it, it was not enlightened self-interest, it was not protection against terror, it was because it was morally and ethically

right. I found that a remarkable statistic and a great tribute to the Australian people, in terms of what drives this country, in terms of its sense of equity and social justice.

We shouldn't be afraid to say that a 'fair go' or a 'fair share' or a sense of equity is something that drives us. Too few people in the world are doing that today.

I have six questions to get our seminar underway.

When are we justified in going to war? The United States now claims the prerogative for unilateral action not only in making pre-emptive strikes against imminent threats but also in taking preventive action to destroy a prospective enemy's capacity to become a threat. Bush claims a mandate for "deal(ing) with those threats before they become imminent". The bottom line for Bush with Saddam Hussein was: "the fact that he had the ability to make a weapon. That wasn't right."

When should we join with the United States in such preventive action, without endorsement from the United Nations? The invasion of Iraq was consistent with the previously published neo-conservative agenda of Mr Bush's key advisers. Regime change in Iraq was a centre-piece of their agenda. Our own Defence Intelligence Organisation (DIO) told our parliamentary inquiry into the intelligence operations preceding the recent war: "We made a judgement here in Australia that the United States was committed to military action against Iraq. We had the view that that was, in a sense, independent of the intelligence assessment."

When tabling the unanimous, all-party report, the government member David Jull told Parliament of the Committee's conclusion "that there was unlikely to be large stocks of weapons of mass destruction, certainly none readily deployable." We did not go to war because there was an imminent threat to our security. We went to war because the Americans asked us to. The reasons they asked us to go to war have become a movable feast. Before the war, Prime Minister Howard insisted, "Our goal is disarmament." "I couldn't justify on its own a military invasion of Iraq to change the regime. I've never advocated that." The problem was that George Bush's advisers had and that is what they got. Howard told parliament that Iraq's "possession of chemical and biological weapons and its pursuit of a nuclear capability poses a real and unacceptable threat to the stability and security of our world". Walter Lewincamp, the head of DIO, said this "was not a judgement that DIO would have made." They just weren't asked!

Even if the United Nations Security Council be not considered formally to be the competent, relevant authority for deciding just cause for war, it remains a suitable sieve for processing the conflicting claims in determining whether there is "a real and unacceptable threat to the stability and security of our world" and whether or not war is the only realistic resort. The French and Germans would have a mixture of motives for their stand, just as the English and the Americans would have for theirs. Given the mix of motives, the elusiveness of truth, and the now admitted unreliability of the intelligence, it would be better in future to have decisions made by a community of disparate nations united only by a common concern for international security against terrorism rather than a coalition of allies who either share or are neutral about the strategic objectives of the US administration.

Our politicians have a difficult call to make when assessing intelligence about the likelihood of weapons of mass destruction being developed and handed on to terrorist organisations that

have no respect for western nations. In times of crisis, we need to trust our leaders. But it becomes more difficult to grant that trust when the rationale for war is changed after the event. The belated emphasis on the humanitarian concern for the Iraqi people was rank hypocrisy coming from the United States which had first given Saddam Hussein his WMD capacity for countering Iran and from an Australian government which had punished Iraqi asylum seekers who had the temerity to seek asylum within our borders. Trust in government would be better maintained if Mr Howard simply admitted that his public rationale for war was the honouring of the US alliance no matter what the doubts about the wisdom of seeking Iraqi regime change without UN endorsement, and the concern about readily deployable weapons of mass destruction no matter what the shortcomings in the intelligence.

Prior to the Madrid bombings last week, many Australians thought our participation in the war was justified because the world was now a safer place, we had won without any Australian loss of life, and the murderous Saddam Hussein had lost power. Post-Madrid, we have to question whether the world is now a safer place and whether Australia is at no greater risk of being a special target of terrorist groups.

What is the role of religious leaders in assessing the case for war? In the lead up to the war, the church leadership in the US, UK and Australia was remarkably united in its criticism of the public rationale offered for war. However, there was a variety of views about the margin for error to be afforded to government. When asked about the clear opposition from church leaders such as the Archbishop of Canterbury, John Howard told the National Press Club: "There is a variety of views being expressed. I think in sheer number of published views, there would have been more critical than supportive. I thought the articles that came from Archbishop Pell and Archbishop Jensen were both very thoughtful and balanced. I also read a very thoughtful piece from Bishop Tom Frame, who is the Anglican Bishop of the Australian Defence Forces. The greater volume of published views would have been critical, but I think there have been some very thoughtful other views and the ones I have mentioned, I certainly include in them."

Once the war commenced, Archbishop Jensen said, "For my own part I remain unpersuaded that we ought to have committed our military forces, but I recognise the limitations of my judgment and the sincerity of those who differ." After the war, Bishop Frame said: "If it is established that the weapons did not exist and the Coalition did or should have known this, the war will not have been justified and must be deemed immoral. A case for war against Iraq based solely on 'regime change' would have been inadequate and I would have been obliged to share this conclusion with those for whom I have a pastoral responsibility. "

Despite the Prime Minister's fudging of the issue, Cardinal Pell has never given any public indication that the war was justified. Pell did not make any clarifying statement once the war commenced. He left stand his earlier caveat, "The public evidence is as yet insufficient to justify going to war, especially without the backing of the UN Security Council." The Prime Minister's statements and the Cardinal's later silence left many Catholics confused. Presumably the Prime Minister drew solace from the cardinal's pre-war observation, "Decisions about war belong to Caesar, not the church." Though Caesar makes the decision, the church must discern and comment on the morality of that decision. Church leaders must publicly help their people make the moral assessment. It is not good enough to suspend the moral faculty and simply trust the government of the day. If we do that with war, then why

not with any other moral issue? When it comes to war, Cardinal Pell allows more scope for an unformed or uninformed conscience than most other church leaders, including the Pope.

If it is not possible for our politicians to get it right every time, what margin of error is there for religious leaders and the leaders of civil society? Church leaders like the Anglican Primate, Peter Carnley, have received rough handling from government when they have publicly questioned the morality and prudence of our strong alliance with the United States in an Age of Terror. Two days after the Bali bombings in October 2002, Archbishop Carnley promptly published a letter pledging prayers and support for the victims and their families. A few days later he then opened his annual synod in Perth, observing, "The targeting of a nightclub, which is known to have been popular with young Australians on holiday, suggests that this terrorist attack was aimed both at Australia, as one of the allies of the United States of America and, at the same time, at what is seen by militant Muslims to be the decadence of western culture."

Does anyone now seriously doubt what Carnley was saying? Australians were being targeted both because we are identified with the decadent west by militant Muslims and also because of our close relationship to the United States. There may also have been other factors, including our intervention in East Timor. Carnley's remarks greatly upset Anglicans John Howard and Alexander Downer. In the 2003 Playford Oration, Downer singled out Carnley's behaviour post Bali as an instance of 'the tendency of some church leaders to ignore their primary pastoral obligations in favour of hogging the limelight on complex political issues.' Ignoring Carnley's earlier pastoral letter of support for the victims and families, Downer falsely stated, "There was no concentration on comforting the victims and their families, no binding up of the broken-hearted while a shocked nation mourned." Two months before Downer's Playford Oration, the government was arguing for an expansion of ASIO's powers in the Senate. Government Senator Santoro told the Senate: "We know from horrific experience that not only do Australians face the same level of threat as any other people but also, as was the case in Bali in October last year, they are very specific targets."

What Santoro said is quite consistent with Carnley's position. So what was the problem? Are we not permitted to speculate on why Australians are very specific targets? Or is that no role for reflective church leaders? Our political leaders have readily conceded that we are a target with terrorists because we are western. They have also conceded that we are a target because of the fine things we have done such as assisting with the restoration of peace and order in East Timor. But they get very testy when there is any suggestion that our closeness to the Americans or our commitment to coalitions of the willing could heighten the risk to our security. There is a downside to being identified as the deputy sheriff in your region. There has to be room for informed and divergent debate without such vehement government attacks on people such as Archbishop Carnley. Trust and respect are a two way street even in times of crisis.

In the wake of the Madrid bombings, Federal Police Commissioner Mick Keelty answered the question, "Could this happen here?" in words reminiscent of Archbishop Carnley: "If this turns out to be Islamic extremists responsible for this bombing in Spain, it's more likely to be linked to the position that Spain and other allies took on issues such as Iraq. And I don't think anyone's been hiding the fact that we do believe that ultimately one day, whether it be in one month's time, one year's time, or ten years' time, something will happen."

Though there was spirited debate and cabinet resignations in the UK because of Mr Blair's ready membership of the Coalition of the Willing, Canberra compliance with prime ministerial directives was complete. It was very troubling to hear the mixed messages back then from Prime Minister John Howard and Tony Abbott about the increased risks of terrorism to Australian citizens. Abbott, the Leader of the Government in the House, told Parliament, "There is the increased risk of terrorist attack here in Australia". Next day, the Prime Minister told us, "We haven't received any intelligence in recent times suggesting that there should be an increase in the level of security or threat alert." Regardless of who was right, their contradictory statements provided incontrovertible evidence that there was insufficient debate, discussion and discernment within our Cabinet and political party processes prior to making a commitment to war in such novel political circumstances. The thinking was done in Washington. We signed on, presuming that our national interest and the international common good would be served by Alliance compliance. In these circumstances, there is a place for unelected citizens, including church leaders, to speak out.

What now are the criteria for our participation in a just war in this Age of Terror? A post World War II settlement of the UN Security Council configuration, including allocated seats enjoying a permanent veto cannot be determinative of any moral assessment about war. However when prudential assessments of threats have to be made on intelligence against a backdrop of continual breaches of solemn undertakings by a rogue state, the Security Council does provide a useful sieve for getting willing combatants over the threshold of their own self-interest and ideology to a publicly reasoned rationale for military engagement. If western democratic members of the Security Council cannot be convinced of the need for war, there are good grounds for citizens to suspect that the conditions for a just war have not been fulfilled. If such members voted for war, there would still be a need to scrutinise the conditions for a just war.

There was a surprising unanimity of views amongst church leaders opposing the Iraq invasion on the grounds that it did not comply with the just war criteria. On the eve of war, Bishop Gregory, the head of the US Catholic Bishops Conference said:

Our bishops' conference continues to question the moral legitimacy of any preemptive, unilateral use of military force to overthrow the government of Iraq. To permit preemptive or preventive uses of military force to overthrow threatening or hostile regimes would create deeply troubling moral and legal precedents. Based on the facts that are known, it is difficult to justify resort to war against Iraq, lacking clear and adequate evidence of an imminent attack of a grave nature or Iraq's involvement in the terrorist attacks of September 11. With the Holy See and many religious leaders throughout the world, we believe that resort to war would not meet the strict conditions in Catholic teaching for the use of military force.

As early as September 2002, the US bishops had told the President, "We fear that resort to force, under these circumstances, would not meet the strict conditions in Catholic teaching for overriding the strong presumption against the use of military force. Of particular concern are the traditional just war criteria of just cause, right authority, probability of success, proportionality and noncombatant immunity." The bishops maintained that view.

The suspected capacity to produce weapons of mass destruction is not itself just cause for an attack. Even if a state or a coalition of states is able to claim that it is the right authority to make a decision about war, that authority must be able to produce credible evidence about the possession of such weapons and the distinctive threat they pose to those states wanting to

launch an attack. If you cannot convince the western democratic members of the UN Security Council that there is a real threat to world peace or a real and distinctive threat to particular states, it is very likely that you are not engaged in war for a just cause. Even if the coalition of willing states be the appropriate authority, they still need to demonstrate that all other avenues have been tried to disarm the rogue state. If the coalition of willing states has provided the incentive for renewed inspections by pre-deploying troops, the coalition is entitled to put a reasonable limit on the terms of pre-deployment or to demand that other states opposed to war provide assistance with the pre-deployment simply to maintain the pressure for verifiable inspections. Even if the US had established that it was a competent authority to determine that there was a just cause for war which was a last resort, there would still have been a need to consider the consequences of such an engagement.

The nonchalance and belated show of humanitarian concern by the Coalition of the Willing after they had failed to uncover large stockpiles of weapons of mass destruction confirms the suspicion that the Coalition's leader, the United States, had an alternative agenda, namely regime change in Iraq, an attempted re-ordering of the Middle East, and an experiment with a new American project premised on preventive intervention. Those who oppose such ideological experiments in the future will do better if they are able to articulate more clearly the margin of appreciation afforded governments which are privy to sensitive intelligence material. Even if such opponents fail to agree on whether the UN Security Council is the competent authority to determine the legitimacy of war, they ought put forward a united view that the Security Council is the most appropriate sieve for sorting the conflicting claims made by nation states which may be the appropriate authority. The UN Security Council is well qualified to sift out those claims of nation states based only on ideology or national self-interest.

What are the checks and balances we need to maintain our human rights and Australian identity in an Age of Terror? Confronted with terrorist threats reaching our shores, government has a responsibility to arm police, defence and intelligence personnel with the powers to protect us while respecting the civil liberties of all persons. We Australians are now on our own with no Bill of Rights to guide our judges or restrict our governments. But for the government's incapacity to control the Senate, it would be able to ram all sorts of legislation through the Parliament. Checks and balances are often time consuming, and they often provide opportunities for minor parties and sectional interest groups to engage in petty point scoring. The Senate and the parliamentary committee system worked well when the government tried to bluff the Parliament into passing amendments to the ASIO legislation that would have entrenched very draconian measures on our statute books in 2002. Originally the government proposed that ASIO would be able to detain any person incommunicado, including a child. ASIO would have been able to detain indefinitely any person without charge or even suspicion. While detained, any person could have been strip searched, questioned for unlimited periods and prevented from contacting family members, their employer or even a lawyer. They would not even be able to inform loved ones that they had been detained. They could have been denied legal advice.

Senator John Faulkner said that "the original ASIO bill was perhaps the worst drafted bill ever introduced into the Australian parliament." Thanks to the Senate, the legislation is now more protective of human rights, more in the Australian way, while being adapted to the present terrorist threat. There was a lengthy stand-off between the government and the Senate over this legislation. Before Christmas 2002 when the legislation was deadlocked John Howard

warned, "If this bill does not go through and we are not able to clothe our intelligence agencies with this additional authority over the summer months it will be on the head of the Australian Labor Party and on nobody else's head." The government then further delayed the legislation so it could be added to the mix of a double dissolution election, if need be. Having been introduced in March 2002, the legislation was passed in highly amended form in June 2003. The legislation now contains a three year sunset clause so it has to be reviewed again by our parliamentarians after the next election. Sir Harry Gibbs provided an assessment of the final product in his Australia Day address to the Samuel Griffith Society. He notes that the powers given to ASIO are "drastic" and "only experience will show whether (the) safeguards are sufficient". Gibbs says the law goes too far in prohibiting lawyers and others publishing information about the questioning of any person. This could "prevent publication of the fact that an abuse of power or a serious error of judgment had occurred." The government likes to portray the Senate as obstructionist but the Senate has modified national security legislation to better protect civil liberties.

When we go through a down in the political cycle with government encountering little opposition in the House of Representatives or on John Laws and Alan Jones' radio programs, it is difficult to conduct robust public dialogue about policies related to minorities and national security. Fear and flabbiness take over. There is an ongoing deficit in public honesty and rigorous inquiry when it comes to debate about the morality of our engagement in war, about the limits of ASIO's powers, about our treatment of asylum seekers and the identification of their deprivations with national security and border protection needs. There is an important democratic role for unelected citizens, including church leaders, to question government's public rationale and private purpose, to correct the misperceptions, and to espouse rational and coherent policies that do less harm to vulnerable people and to our peace and security. We would all profit from more respectful and rigorous dialogue between elected politicians and unelected community leaders, including between church and state.

Church leaders like Archbishop Carnley, responsible civil servants such as Commissioner Keelty, the courts, the Senate, an independent media, and a robust civil society are entitled to express a contrary view to the executive government of the day, even if the majority are satisfied that the government will do and say whatever it takes to protect "us" against "them" in tough times. The morality of our engagement in the Iraq war cannot be left contingent only on two self-interested outcomes: one, whether our special relationship with the US bears fruit, and two, whether we are more immune from onshore terrorist attack. And even if it were so contingent, the jury is still out on both fronts. Truth and a more coherent morality of war may yet be even in our own short-term national interest in an Age of Terror. Let's take heart from Jim Wolfenson's homecoming observation that there are so many Australians concerned to assist with development, and presumably peace, not because of enlightened self-interest nor for protection against terror, but because it is morally and ethically right.