Contradictory verdicts in Australia's largest terrorism trial

Rudd government rushes to claim "success"

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Australia's largest and most protracted terrorist trial ended with distinctly mixed results last week in Melbourne. After a Victorian Supreme Court trial that ran for 115 days, the nine women and three men on the jury took nearly four weeks to reach their verdicts. While they found seven of the twelve defendants guilty of terrorist-related offences, they acquitted four others of all charges and were unable to reach a unanimous verdict on another, who now faces a lengthy re-trial.

Those acquitted walked free after nearly three years in maximum security prison cells; the lawyers for those convicted have indicated that they will almost certainly appeal. No sentencing has yet occurred, but if the convictions were upheld, they could be jailed for between 10 and 50 years.

The trial became a major test case for the so-called "war on terror" and the draconian anti-terrorist legislation introduced by the former Howard government from 2002, with the Labor Party's support. Most of the 12 Muslim men on trial were arrested in highly-publicised police raids in November 2005, just days after then prime minister John Howard declared there was an imminent terrorist threat and recalled the Senate for an emergency session to push through far-reaching amendments to the anti-terrorism laws.

Media outlets in Australia and internationally published misleading reports of the trial's outcome, some claiming that the men had been convicted of planning mass killings at major sporting events. According to the *Australian*, they were "guilty of a terror plot" that involved bombing football finals or a car racing Grand Prix. Reuters claimed: "An Australian jury found a Muslim cleric and five of his followers guilty of planning to an attack on a sporting event in Melbourne during 2005 to force Australian troops out of Iraq."

In reality, none of the men was charged with carrying out, or even preparing for, a terrorist act. Police produced no evidence of actual terrorist activities, not even a specific plot. Instead, Muslim cleric Abdul Nacer Benbrika and his alleged followers were charged with being members of an unnamed terrorist organisation—apparently consisting only of themselves. Eight of the men were also charged with ancillary offences, such as providing resources or funds to the same group, or possessing items (Islamic fundamentalist CDs) connected with the preparation of a terrorist act.

During the trial, the prosecution was forced to abandon its reliance on star witness, Izzydeen Atik, a former member of the group who received a reduced sentence for turning police witness and testifying that Benbrika had told him of plans to attack sporting events. Justice Bernard Bongiorno warned jurors not to rely on Atik's evidence because he was a conman, liar and social security fraudster. What the jury was not told was that Atik had secretly pled guilty to membership of a terrorist organisation and about 40 previous fraud charges, and been jailed with a four-year non-parole period—with a discount of two years for assisting the police.

An undercover police infiltrator, referred to as Security Intelligence Officer 39 (SIO 39), provided the only allegation of any involvement with explosives. SIO 39 offered Benbrika cheap ammonium nitrate and, while being secretly filmed by police, took Benbrika to a remote hilltop to show him how to detonate an ice-cream container of the explosive. In other words, the only explosion presented as evidence in the trial was one conducted by a police provocateur for the clear purpose of entrapping the cleric.

After the trial was over, it was revealed that Benbrika and three members of the group face a further trial next year on charges of trying to obtain laboratory equipment—beakers and arm brackets—allegedly in preparation for a terrorist act. Such charges only further highlight the lack of any police evidence for an imminent terrorist threat.

Once the trial concluded, it was confirmed that the defendants had been under intense surveillance by state and federal police and the Australian Security Intelligence Organisation (ASIO) for 16 months before their arrests. From July 2004, their phones were tapped, houses bugged and movements tailed. In a massive multi-million dollar exercise, codenamed Operation Pendennis, the Australian Federal Police (AFP) intercepted 97,480 calls and recorded 16,400 hours of listening material. More than 26 gigabytes of Internet traffic was intercepted as well. The AFP and Victoria Police conducted 402 eight-hour surveillance shifts of the accused and ASIO conducted 224 shifts—all without producing any evidence of a terrorist plot.

Melbourne *Age* journalist Karen Kissane noted: "Despite the intense surveillance, investigators never got their holy grail: direct statements from the men themselves that would nail Benbrika and his followers by proving they had developed a plan and a specific target. The attack that had been thought 'imminent' by their informant was never discussed on the tapes."

Given the intensity of the official and media witch-hunt conducted against the defendants and the sweeping wording of the anti-terrorism laws, it is significant that the jury cleared four of the accused completely and dismissed about half the 27 charges against the 12 men in total. The fact that they deliberated for 22 days, and were then prompted by the judge to deliver their verdicts, suggests that members of the jury had concerns and reservations about the case.

The legislation itself gave the jury little scope to find the men not guilty. The defendants were not accused of membership of a specific terrorist group that had been listed by the United Nations or the government. They were charged under the federal Criminal Code definition of a terrorist organisation as one "that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs)".

The words "directly or indirectly" and "fostering" are extremely open-ended. Moreover, "membership" can include "informal membership" and "a terrorist act" can be merely a "threat" of violence directed at "coercing" a government or "intimidating" a section of the public. In addition, the amendment rushed through parliament in November 2005 changed the wording of all terrorist offences from "the" terrorist act to "a" terrorist act, so that police no longer have to prove that any specific terrorist activity, at any particular time or place, was being planned or fostered.

Combined with an all-encompassing definition of terrorism, these measures are so broad they can be used against many traditional forms of political protest and industrial action, and to outlaw oppositional political groups for mere expressions of opinion.

Civil liberties lawyer, Brian Walters of Liberty Victoria, said the men were found guilty of simply talking and thinking about possible acts of violence. The case was based almost entirely on covertly recorded conversations between the men that included various vague statements about wanting to do "something big" or kill people to stop Australia's involvement in the US-led occupation of Iraq.

Any talk of killing innocent people is repugnant and expresses the reactionary perspectives of Islamic fundamentalism and individual terror, but there is no evidence that Benbrika or anyone in the group took these words seriously enough to actually do anything. Jailing people for doing no more than voicing hostile sentiments toward the government and the wars in Iraq and Afghanistan sets a dangerous precedent for use against political dissent.

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The Rudd government was so anxious to claim the trial's result as a victory that Attorney-General Robert McClelland almost derailed the last day of the proceedings. As soon as the jury handed down its first 10 verdicts on September 15, McClelland called a press conference to "welcome the convictions" and hail "the most successful terrorist prosecution that this country has seen". He heaped praise on the police and ASIO for "performing their role admirably" and declared that the Rudd government made no apology for taking a "hard line against terrorism".

McClelland's comments were patently prejudicial to the jury's deliberations, so the next morning, lawyers for one of the two remaining accused applied for a retrial. Justice Bongiorno dismissed the application, ruling that the comments were not bad enough to warrant discharging the jury, but condemned them as unnecessary and potentially damaging. "It's abundantly clear it would have been to the enhancement of justice in this country if these comments had not been made," the judge said.

Prime Minister Kevin Rudd also weighed in, declaring that the trial proved that Australia still faced risks of terrorism. Rudd said the convictions sent a "clear message to those contemplating any act of political violence" that the government and the authorities "will not only not tolerate it, but the full force of the law will be brought to bear as well". Rudd later specifically defended McClelland's remarks, declaring that governments sometimes had to endure criticisms from judges.

These comments are a plain signal that the Rudd government remains just as intent as the previous Howard government to exploit fears and threats of terrorism, largely generated by the US-led occupations of Afghanistan and Iraq, to justify increasingly discredited police-state measures. Like the Howard government before it, the Rudd government has been anxious to secure convictions to counteract mounting public distrust of the "war on terror".

Some of the political calculations behind the government's reaction can be seen in an article by Cameron Stewart in the *Australian*, who also rushed into print on September 16, before the final verdicts had been delivered. Stewart declared that the trial's outcome was a "much-needed confidence boost" for the security agencies. "Not before time," he wrote. "Until now, the story of this country's fight against homegrown terror has been a sad litany of bungled prosecutions, inept police work and flawed leadership. The effect has been to seriously erode public confidence in the ability of the government, police and intelligence agencies to combat terrorism without the Keystone cop mistakes we have seen, most recently in the case of Indian doctor Mohamed Haneef."

Stewart listed the previous failed terrorist prosecutions of Zeky Mallah, Jack Thomas and Izhar Ul-Haque, as well as Haneef. But none of these cases resulted from "bungling". Each one, like Operation Pendennis, was politically-driven, with Howard and his ministers declaring that the arrests proved that ordinary Australians faced the constant danger of terrorist attack. In the end, it was proven that Mallah was incited by a police agent into making a ludicrous threat; Thomas was tortured into making incriminating statements; Ul-Haque was illegally kidnapped and interrogated by the police and ASIO; and the police "evidence" against Haneef was simply false.

The jury in the Benbrika trial is not the only one to exhibit reservations about the police allegations and legal provisions in a terrorist prosecution. Earlier this month, a jury was unable to reach a verdict against Sydney man Belal Khazaal on a charge of inciting terrorism, while finding him guilty of compiling a document that could be used to assist a terrorist attack. Nonetheless, Khazaal's conviction, which is also being appealed, sets another politically dangerous precedent for use against anyone accused of writing or saying anything that could be construed as advocating or supporting terrorism.