

Achieving Security, Respecting Rights and Maintaining the Rule of Law

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It is clear that terrorism is a danger in the modern world that we cannot ignore. But what should be the role of law in shaping our responses to this threat? Is law a tool that we can marshal in our efforts to ensure that dangerous extremists are thwarted in their attempts to intimidate governments and the public by violent means? Almost certainly this is so – even if one believes that such a function may be performed through judicious application of existing criminal offences, without the need for specific anti-terrorism laws. But the more demanding question is just how far the law may be employed in a preventative capacity before it produces poor outcomes – both for individuals and our collective security goals – and erodes its moral and philosophical core.

This is the trap that terrorism lays for democratic nations committed to the rule of law. In seeking to defend ourselves from those who would cause us harm, our commitment to law as a restraint on power – the essence of constitutional governance that defines such nations – is sorely tested. It is tempting to accept that the state needs enhanced powers in order to preserve security and order. Additionally, individuals may agree that some sacrifice of their rights is also necessary to this end. But the very liberties that are prone to curtailment at such a time are those that are most vital to the health of our democracy – freedoms of association and speech, the right to a fair trial by an independent judicial system, and protection from far-ranging executive discretion.

So, the twin goals of effective counter-terrorism and fidelity to constitutionalism pose a difficult challenge for governments committed to both (it need hardly be said that states with a peripatetic attraction to the rule of law suffer little anxiety over the introduction of powers that achieve security through oppression). Overwhelmingly, this challenge was met, in the wake of

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adjustment in order to respond to the post-9/11 world. Regardless of cynicism which may exist in some quarters about the need for these changes and the true extent of any ongoing threat, it is beyond dispute that very real shifts are taking place in the law as all three arms of government adapt to this new paradigm.

As the law is increasingly called on to play its part in the attainment of security and prevention of violence, a commitment to the preservation of individual rights and constitutional constraints on government is imperative. Safeguarding our defining civil liberties and the presumption of innocence under Australian law is neither a hindrance nor a luxury, but instead the only certain way to ensure that in responding to the threat of terrorism we do not allow those who would do us harm to dictate what kind of people we are and our relationship to the state. Doubtless the debates contained in this book will continue for some time ahead and the current period of legal experimentation is surely far from over. But an approach to security which is built upon, rather than dismissive of, civil liberties should mean that we are still able to recognise ourselves when the dust settles.

Notes

- 1 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2004, 31,701 (Philip Ruddock). See also the chapters by both the Attorney-General and Secretary of the Attorney-General's Department, Robert Cornall, earlier in this book.
- 2 Philip Ruddock, 'Australia's Legislative Response to the Ongoing Threat of Terrorism' (2004) 27 *University of New South Wales Law Journal* 254, 255.
- 3 Irwin Cotler, 'Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy' in Ronald J Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2001) 111, 113. See also Clive Walker, 'Clamping Down on Terrorism in the United Kingdom' (2006) 4 *Journal of International Criminal Justice* 1137, 1146-48.
- 4 Christopher Michaelsen, 'Balancing Civil Liberties Against National Security? A Critique of Counter-Terrorism Rhetoric' (2006) 29 *University of New South Wales Law Journal* 1, 6.
- 5 Fernando R Tesón, 'Liberal security' in Richard Ashby Wilson, *Human Rights in the War on Terror* (2005) 62.
- 6 Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32 *Journal of Law and Society* 507, 516.
- 7 This is a central theme of Kent Roach, 'Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain' (2006) 27 *Cardozo Law Review* 2151.
- 8 Peter Wilson, 'Timing of email supports Haneef', *The Australian*, 21 August 2007, 9.
- 9 *Terrorism Act 2000* (UK), s 38B(1)(b).
- 10 *Crimes Act 1914* (Cth) Pt 1C, Div 2.
- 11 *Crimes Act 1914* (Cth) s 23CB(5).
- 12 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill 2004* (2004) para 3.25.
- 13 *Crimes Act 1914* (Cth) s 15AA.
- 14 The issuing by the Attorney-General of 'criminal justice certificate' under s 147 of the *Migration Act 1958* (Cth) meant that Haneef would not be deported until criminal proceedings against him had concluded.

- 15 *Migration Act 1958* (Cth) s 501(5).
- 16 Andrew Fraser and Hedley Thomas, 'Tell us all you know: accused's lawyer', *The Australian*, 19 July 2007, 1.
- 17 Hedley Thomas, 'Haneef Dossier Flawed', *The Australian*, 20 July 2007, 1.
- 18 Hedley Thomas, 'Pressure on Ruddock to explain "sloppy" Haneef case', *The Australian*, 21 July 2007, 1.
- 19 Tom Allard, Connie Levett and Craig Skehan, 'Brother told Haneef to call police', *Sydney Morning Herald*, 23 August 2007, 5.
- 20 *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273, [230].
- 21 Walker, above n 3, 1145.
- 22 Kent Roach, 'The criminal law and terrorism' in Victor V Ramraj, Michael Hor and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (2005) 129, 142-4.
- 23 *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273, [311].
- 24 Above, [326]-[327].
- 25 *Thomas v Mowbray* [2007] HCA 33.
- 26 *Director of Public Prosecutions v Thomas* [2006] VSCA 165.
- 27 The decision and its significance for the rule of law is subjected to analysis by Dyzenhaus and Thwaites in Chapter 2 of this book.