

Address to Isaacs Law Society Ball

Hyatt Hotel

Friday 7 October 2005

7:00 for 7:30

Address by Chief Justice Higgins

Good evening everyone. I'm very happy to be opening the Isaac's Ball again this year. It's always a festive occasion, most of you have worked very hard all year, and peel off the tracksuit and sneakers that become a sort of uniform during the school term, and don your glad rags instead. I hope you all thoroughly enjoy tonight's opportunity to relax and let your hair down. But before I let you eat, drink and be merry, I wanted to take this opportunity to speak about a topic that is very contentious at the moment. I hope not to take up too much of your time, but I think it is a matter that needs to be publicly debated as much as possible.

These days, we are undeniably more nervous about terrorist attacks; it is trite to say that the concept is wedged firmly in Australia's social consciousness. But tonight I want to draw attention to an issue that is increasingly sidelined from mainstream discussion on counter-terrorism, an issue that only exists in the periphery of collective dialogue: the protection of fundamental human rights.

Since September 11, the Federal Government has spent over \$5 billion, and enacted a wide range of counter-terrorism laws in an attempt to secure Australia against a terrorist attack. These laws have paved the way for ASIO officials to detain a person without charge, even when that person is not suspected of engaging in or supporting terrorist activities, for up to seven days. This measure is justified on the ground that the warrant "will substantially assist the collection of intelligence that is important in relation to a terrorism offence". Curiously, the law allows ASIO to conduct such interrogations in secret; detained persons who explain their week-long disappearance without prior permission from ASIO can be found guilty of a criminal offence and jailed for up to five years. Seen in this light, the common turn of phrase, "what have you been up to?" becomes rather sinister!

Yet apparently neither the spending spree, nor powers such as this one, are sufficient to “combat terror”; they do not go far enough to deal with the “challenges posed by a new type of enemy.” We need newer, better, “tougher” laws. Even though Australia’s counter-terrorism laws are already more extensive than those in Britain, Canada or the US. Even though, as Phillip Boulten, one of our leading defence lawyers, recently observed

What is clear from the pattern of interrogations, arrests and trials is that most of [our] existing powers have not yet been utilised at all and those that have, only infrequently. The questioning and detention regime seems ... to be disproportionate to the threat that terrorism poses to Australia.

The problem is that this attitude does not reflect wider community perceptions, where the threat is regarded as somewhat of a national emergency. One newspoll conducted in April 2004, for example, found that 68% of adults agreed that terrorists would “strike before too long” and that a terrorist attack in Australia is inevitable. In light of the recent Bali attacks, this figure will certainly be higher today.

As lawyers, but more important as socially aware citizens of this country, it is important to remember that a tide of emotion can eclipse a balanced perspective: when the community is afraid of imminent attacks, it is far more likely to prioritise that elusive, nebulous concept of “National Security” over the protection of civil liberties. Essentially, the perception of urgency undermines widespread concern for political freedoms. Sadly, if you listen to talkback radio, or read the letters to the editor of any major newspaper, you will see that a significant portion of the community believes that a commitment to human rights is not only irrelevant and hopelessly idealistic, but that it is selfish and socially irresponsible.

But why is this? Hillary Charlesworth points to the problematic use of “War” vocabulary and imagery. The discourse implies that it is possible to run a discrete campaign against terrorism, that there is an enemy that is identifiable and “out there”. Implicit in the “War” terminology is the idea that the “Battle” is finite,

that we can expect an end to the war, if not this year, in the foreseeable future. Yet as Ms Charlesworth points out, given the nature of this war, it is difficult to identify, with any degree of certainty, when that end point has arrived; in this sense, the war is “infinite”. Indeed, before the Supreme Court in *Hamdi v Rumsfeld*, the US government conceded that, given its unconventional nature, the “War” was unlikely to end with a formal cease-fire agreement. In the District Court the Government was unable to articulate how it could even determine whether the war had ended, and conceded that it could last several generations.

Given the general willingness of the wider Australian community to subordinate human rights to the perceived exigencies of “National Security”, this is troubling. If the war is open-ended, its boundaries ill defined, how can we guarantee that the recent encroachments on civil liberties won’t continue *ad infinitum*? The sunset provisions for the law permitting detention for questioning have come up for renewal, and of course the Government is seeking to extend the operation of those powers. But how many times will such extensions be granted? What is brought in with a dramatic bang often stays with an insidious whisper; these laws are like a dubious party guest who refuses to leave. How do we ensure that our fundamental freedoms don’t waste away under the weight of volumes of long forgotten, dusty, neglected counter-terrorism legislation?

The argument that it is simply a matter of “extraordinary times call for extraordinary measures” is initially persuasive, but less compelling when subject to closer scrutiny. History has shown that, unfortunately, once taken away, rights don’t tend to hover in the stratosphere, waiting to be reactivated. There is the problem that measures that are introduced during times of national emergency have a nasty habit of overstaying their welcome. Here is the particular problem of the war on terror, the war of never-ending vigilance: surely, if we must *always* be alert but not alarmed, these laws must also *always* be necessary. That is, rather than serving their purpose and then dying a dignified death, emergency provisions weave their way into the fabric of social conceptions of law enforcement.

An examination of the British experience provides us with a case in point. Writing in 1993, Hillyard describes certain emergency terrorism powers that were introduced to

address Catholic terrorism in Northern Ireland during the 1980s. Yet while these provisions contained sunset clauses, and were only envisioned as temporary measures, once enacted they quickly spread throughout the UK. This is how the police power to detain suspects for questioning eventually became a permanent, and accepted, feature of police procedure. Fear of terrorism also led to legislation that modified the right to silence, allowing adverse inferences to be drawn from a refusal to answer questions. Thankfully, thus far, Australia has resisted the temptation to use terrorism to drive a wider review of these civil rights. But for how long?

It is important to note that terrorism, as defined at international law, is itself a massive violation of human rights. But there is a danger that the prolific use of vague expressions such as “Islamic Terrorism” will engulf the pre-September 11 definition. That imprecise expression is freely bandied around in the media and generates a conception of terrorism that bears little resemblance to the definition at international law, that is, where a person

causes death or injury to civilians in order to intimidate a population, or to compel a government or international organisation to act in a particular way

Moving away from that understanding, “terrorism” has become an umbrella term to label, marginalise and criminalize any activities we don’t approve of, particularly where those activities are associated with particular cultures and religions. Ian Barker QC describes the expression “War Against Terror” as

so rubbery and flexible, so bereft of boundary or definition as to be without real meaning. In reality to declare war on terror is to declare war on an abstract noun.

Yet despite the patent vagueness of the term, “terrorism” is widely understood to refer to conduct by agents of Islamic-based terror organisations. Essentially, unless the bomb was planted by someone linked to JI or Al Qaeda, it doesn’t really count. Conversely then, the people who sent white powdered packages to the Indonesian

embassy in Canberra during Schappelle Corby’s trial weren’t engaged in *Terrorism*; they were merely causing a diplomatic nuisance.

This is consistent with a trend observed by Simon Bronitt, who has noted that Australian criminal law is reverting to the ideology of “status crimes”, where laws criminalize a person’s status as a member of a group, rather than punishing them for what that person has *done* or *intends* to do. Liberal criminal justice scholars criticise such crimes because they violate the rule of law: these laws do not punish *acts*; instead, they punish *types*. But we only need to think of Timothy McVeigh of the Oklahoma City bombings, Eric Harris and Dylan Klebold of the Columbine High School massacre or Martin Bryant of the Port Arthur shootings to highlight the fact that it is not possible to ascribe the tendency to engage in unspeakable and senseless killings to one particular cultural subgroup.

Of course, this is not the first time that Australia has had to navigate the minefield of protecting civil liberties in the face of challenges to national security. Politics is a capricious beast – for as long as human beings have organised themselves into communities, there has been one group who has used its dominance to bully other groups in the name of self-protection. No doubt you are all aware of attempts in 1950 by the Menzies Government to pass the *Communist Party Dissolution Act*, which sought to declare the Australian Communist Party an unlawful association and to make it a criminal offence to be an active member of the Party. Of course the Act was struck down by the High Court in the *Australian Communist Party Cases*, but the Government persisted, putting the issue to a public referendum, arguing that the Constitution needed to be changed to allow the Government to pass such legislation to protect Australia from the communist menace.

While these measures ultimately proved unsuccessful, the issue was hotly and closely debated. We are fortunate that the Australian public had the good sense to reject such an amelioration of the Government’s constitutional powers. However, the Government *did* manage to use both World Wars to garner widespread community support for other dreadful encroachments on citizens’ civil liberties. In the name of “National Security”, parliament granted the government extensive powers to detain “alien enemies” as well as citizens born overseas or Australian-born citizens who were

alleged to have expressed “disloyalty” to Australia’s wartime efforts. During WWI, more than 5000 people in Australia of German or Austrian background were held in internment camps as if they were prisoners of war. The military also searched many homes and offices, including that of the South Australian Attorney General, who was a man with German roots.

Despite some misgivings at the time about the extent of these powers, the view of those who sponsored the legislation was that

The safety of the country is infinitely more important than empty talk about habeas corpus or the bill of rights or the Magna Carta. All these things will crumble to dust unless we are successful in this struggle.

That sentiment is eerily familiar. This argument was used during WWII, when the “enemy aliens” were the Japanese or German; it is still in use today. The argument that “these are extraordinary times” is very useful to avoid pesky civil liberties.

But at what point do we draw the line and say “enough is enough”? Clearly the detention of David Hicks and Mumdouh Habib in Guantanamo Bay is not seen as crossing the line. Controversial Melbourne academic Mirko Bagaric advocates torture in certain circumstances – notably, to extract information from people who may know something that can prevent a terrorist attack. But what level of inside knowledge justifies such an interrogation? How does one ensure that an innocent person isn’t wrongly tortured? Is mere suspicion enough?

When pressed to address human rights concerns, there is a quiet confidence that the laws won’t affect law-abiding citizens; they will only apply to “shifty bad guys”. But the US experience should serve to caution against such a cavalier attitude. In that country, the Justice Department and FBI engage in court approved spying on suspected terrorists. Yet in 2002, these bodies were found to have provided erroneous information to the court in more than 75 applications for search warrants and wire taps. Further, the tragic story of Jean Charles de Menezes, the Brazilian man who was shot down in a London train station, illustrates the potentially disastrous consequences

of intentionally subverting human rights to so-called “practical concerns.” If we don’t ask the hard, politically unpopular questions, how will we guard against administrative oversight and prevent similar future tragedies? In short, there is no way to guarantee that the harsh laws only apply to those who deserve to be punished, or to those who have inside information. There will *always* be innocent people in the wrong place at the wrong time.

Polarising rights from any discourse on national security creates the idea that the two are somehow mutually exclusive, that one is inconsistent with the other. Yet that the two are interwoven is recognised in the ICCPR as well as prominent Human Rights advocates. Kofi Annan said in 2003,

If we compromise on human rights in seeking to fight terrorism, we hand terrorists a victory they cannot achieve on their own

Similarly, in the face of the British Government’s attempt to justify the detention without trial of terrorist suspects, Lord Hoffman noted that

The real threat to the life of the nation comes not from terrorism, but from laws such as these.

The question that we must ask is this: can we still claim to live in a democratic state if we do not have the most basic democratic rights? It is important to guard against the violation of civil liberties regardless of whether the challenger is a radical terrorist, or an unduly prescriptive piece of legislation. Like George W Bush once said

It isn’t pollution that’s harming the environment; it’s the impurities in our air and water.

Ultimately, it is the same thing; it becomes a matter of how we characterise the relevant action. We must be wary of laws that undermine the very democratic freedoms we are seeking to protect from terrorism; terrorism laws must serve to protect all Australians, they must not bow to the pressures of collective fear. Now, just as ever, we need to pay attention to the human rights implications of legal

developments. Because to do otherwise, to use the parlance of our times, would be to “let the terrorists win.”

Well, I think that’s probably quite enough serious stuff for one evening; you are all here to party after all! I’m sure my sombre words won’t stop you all from having a happy and wonderful night – let’s just hope that the festivities don’t bring any of you before me on Monday morning!

Thanks for your attention tonight – have a great night.