

The Baby or the Bathwater? Terrorism, Responses and the Role of the Courts.

By Robert McDougall¹

Introduction

[1] During the bleakest days of World War Two, Lord Atkin, alone in dissent in the House of Lords², made a famous statement concerning the rule of law and the role of the courts in upholding it. The applicant in that case was detained in Brixton prison under cl 18B of the *Defence (General) Regulations 1939 (UK)*, on suspicion of being an enemy collaborator. He sought to challenge his detention by bringing an action for false imprisonment. Clause 18B provided that a person could be imprisoned under the orders of the Secretary of State if the Secretary had reasonable cause to believe the person to be of hostile origin or associations. The Crown had refused a request to provide details of the reasonable cause on which the Secretary had acted. The majority in the House of Lords held that particulars should not be ordered, on the basis that it was not for the courts to review or adjudge the correctness of the Secretary's belief. Lord Atkin held that, notwithstanding the wording of the regulation and the fact that England was at war, the courts could review the secretary's decision. In direct contradiction to Cicero's famous aphorism, *inter arma silent leges*³, Lord Atkin said:

"In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see

¹ A judge of the Supreme Court of New South Wales. The views expressed in this paper are my own, and should not be attributed to the court or to my colleagues. I acknowledge the great help of the Commercial List researcher, Mr David Greenberg BA LLB (Hons) (Macq), who undertook the original research on which this paper is based, and who prepared the first draft. Responsibility for the defects is mine alone.

² *Liversidge v Anderson* [1942] AC 206.

³ In battle, the laws are silent.

*that any coercive action is justified in law.*⁴

[2] It is beyond the scope of this paper to consider whether the fight against terrorism should be regarded as a form of, or analogous to, war. For my own part, I see real dangers in this characterisation: including the risk that, by denominating persons characterised by race, ethnicity or religion as “the enemy”, we turn the threat of terror into a self fulfilling reality. But I acknowledge that this is a topic way beyond my area of expertise (such as it is), and one on which there is room – and, in my view, an urgent need – for informed debate.

Historical background

[3] In medieval days, the sovereign was the source of all authority. The sovereign was directly and personally responsible for making laws, administering the realm and doing justice: what we now refer to as the legislative, executive and judicial functions.

[4] Over time in England (and particularly when the early rulers were diverted by the enhancement or defence of their French possessions), the sovereign devolved some of those responsibilities. For example, justices were appointed to administer justice in the name of the sovereign; and councillors were appointed to administer the affairs of the realm.

[5] Over the centuries, and with many stops and starts, what we now know as the Westminster system evolved. In substance, laws were made by the parliament. (In form, they were made by the sovereign acting with the advice of the parliament.)

⁴ [1942] AC 206 at 244

Government was administered by ministers appointed by the sovereign; and by the 18th century, the “Prime Minister” selected to form a ministry was the one who could command a majority in the House of Commons. (In form, the ministers were the sovereign’s ministers, and administered the realm in the sovereign’s name.) Justice was administered by judges appointed by the King, through the Courts of Kings Bench, Common Pleas and Exchequer that had grown up over the centuries, and through the courts of Chancery. (Again, in form, judges administered justice in the name of the sovereign.)

[6] The Westminster system of government was fully evolved, as a matter of form, in the 18th century. It was not then however a democratic system of government. Members of the House of Commons were elected by a tiny minority of citizens. Full adult male suffrage did not arrive until the last quarter of the 19th century; and full adult suffrage had to wait until the 20th century. Nonetheless, as the suffrage expanded towards full adult suffrage, the Westminster system developed with it, retaining the form that it had assumed in the 18th century.

[7] Under the Westminster system, the right to form and remain in government depends on retaining a majority in the lower house of parliament. In the 18th and 19th centuries, when there were no organised parties and when political alliances were far looser and more fluid than they now are, that was a task that required very real ingenuity and agility. Parliament – by which I mean the lower house – had, and exercised on many occasions, the right to unmake governments, by defeating a government measure on the floor of the house or by passing a motion of no confidence in the ministry. The rise of the party system has put paid to that. As a

result, parliament has lost its power to supervise the executive; and although it is often said that the government of the day is accountable in parliament, that accountability is more theoretical than real.

[8] After the “Glorious Revolution” of 1688, the judiciary developed and consolidated its independence. It remained apart from the legislative and executive arms of government. It had, and exercised, the right to hold the executive to account when its actions were not justified by law. By the end of the 18th century, it was common place to talk of the judiciary standing between the state and the citizen. The concept of what is now known as “due process” evolved at the same time. The courts insisted that a person should not be detained without lawful cause; that the courts had the right to examine the lawfulness and sufficiency of the cause (the writ of habeas corpus, of ancient origin, was the means by which the courts did this; and at least in America is still relevant today, as is shown by some of the cases to which I refer below). The courts insisted that someone accused of a crime should know the nature of the case that he or she had to meet, and should have an opportunity of defending it. They insisted that justice should be administered in public. Of course, these mechanisms did more than provide a check on the unbridled and arbitrary exercise of executive power; they also provided a check on the exercise of unbridled and arbitrary judicial power.

[9] Australia, in common with many other Commonwealth countries, has adopted the Westminster system. Each of the three arms of government serves a different role. Each is independent of the other, creating a system of checks and balances. “Westminster” democracy is thus broader than a simplistic notion of majority rule,

fundamental though that concept may be⁵. Governments, for example, are elected by obtaining a majority of votes in a majority of seats, and are sometimes said thereby to have a mandate to act. (The idea of giving a “mandate” to the party or coalition obtaining a majority in the lower house is rather difficult to sustain. It is very difficult to attribute, to the millions of electors who through their first or second preference votes contributed to the election of the government of the day, a specific intention to pursue particular aspects of the policies advocated during election campaigns. The task is not made any easier by the new distinction between “core” and “non-core” promises.) But few would vote for a government with the intention that it will be free from scrutiny. There are a number of principles that are broadly accepted and have been tried and tested over time, which although unspoken and not sourced within the constitution are a fundamental bedrock that underpin the existence of Australia as a free democracy. These principles include the rule of law⁶.

The rule of law

[10] At its most basic, the rule of law can be seen as the law of rules⁷. Rules are important. They provide for an objective test of what is right and what is wrong, and as a result act as a bulwark against arbitrary decision making. By providing for a unitary source of legitimacy that can be applied equally to citizens regardless of their personal qualities, the very existence of rules is a protection in itself⁸. Lord Bingham of Cornhill, the former Lord Chief Justice of England and Wales and one of the most senior judges in England, described the “core” of the concept of the rule of law as

⁵ *Vriend v Alberta* [1998] 1 SCR 493 at 566 per Iacobucci J

⁶ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J

⁷ The Hon Justice Antonin Scalia, “The Rule of Law as a Law of Rules” (1989) 56 *University Chicago Law Review* 1175 at 1187

⁸ Joo-Cheong Tham, “ASIO and the rule of law” (2002) 27 *Alternative Law Journal* 216 at 217

being “that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts”⁹.

[11] One of the key functions of the courts is to insist on observance of the law.

That function extends to the executive government. As Dixon J explained it in the

Communist Party Case:

*“History and not only ancient history, shows that in countries where democratic institutions have been superseded, it has been done not seldom by those holding executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.”*¹⁰

[12] The majority in that case declared the *Communist Party Dissolution Act* 1950 (Cth) to be unconstitutional because it provided for a system of law without rules in which the executive had the power to arrest and seize the property of anyone considered by the government to be a communist, with no independent avenue of appeal.

[13] However, the rule of law is wider than this notion suggests. One problem with seeing the rule of law as merely a protection against arbitrariness, and therefore more procedural than substantive in nature, is that it says nothing about whether those rules that the courts enforce are fair and just in the first place. This problem has already beset the High Court in relation to a series of immigration detention rulings where, although noting that it was tragic to contemplate the internment of

⁹ “The rule of law” (2004) 15(3) *Commonwealth Law Journal* 22 at 23.

¹⁰ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 187

children¹¹ or the permanent incarceration of a refugee who was unable to be repatriated to his homeland¹², the Court concluded that it was constrained by the terms of the *Migration Act 1958* (Cth) and thus powerless to prevent substantive injustice. It is because of this defect that the procedural approach has been referred to as an impoverished notion of the rule of law¹³.

[14] The question may be asked: is there an “inner morality to law”¹⁴- a series of principles which can commonly be agreed to represent the ideas and aspirations that we as Australians believe that democracy must embody if it is to be a democracy at all? It may be difficult to identify such principles in a country as pluralistic and diverse as ours. Nonetheless, I suggest that these principles do exist. The Honourable Aharon Barak, President of the Supreme Court of Israel, provides some useful guidance as to what these values may be when noting that all democracies share common characteristics:

*“These general principles include the principles of equality, justice and morality. They extend to the social goals of the separation of powers, the rule of law, freedom of speech, freedom of movement, worship, occupation and human dignity, the integrity of judging, public safety and security, the democratic values of the State and its very existence. These principles include good faith, natural justice, fairness and reasonableness.”*¹⁵

[15] According to this view, the rule of law can be seen as a more robust substantive doctrine embodying the fundamental values that we consider to be essential to democracy. I acknowledge that the identification of those fundamental values is a process on which opinions differ widely, and reasonably.

¹¹ *Re Woolley* (2004) 225 CLR 1

¹² *Al-Kateb v Godwin* (2004) 219 CLR 562

¹³ The Hon President Aharon Barak, “A Judge on Judging: The Role of a Supreme Court in a Democracy” (2002) 116 *Harvard Law Review* 16 at 124

¹⁴ Lon Fuller, *The Morality of Law* (1941)

¹⁵ *Borochov v Yefet* (1983) 39(3) P.D. 205 at 218

The threat of terrorism

[16] In times of stress, history has shown that it may be necessary to re-evaluate priorities in order to decide which values are more important. The age of “megalomaniac” hyperterrorism and the reactive war against terror have been a catalyst for the realignment of society’s values. They make us consider the extent to which we are willing to tolerate the diminution of personal liberties in favour of collective security¹⁶. Some jurists find such a balancing exercise to be inherently dangerous and intrinsically wrong. Benjamin Franklin, in his historical review of Pennsylvania (1759), cautioned that a society which “gives up essential liberty to obtain a little temporary safety deserves neither liberty nor safety.”¹⁷ Similarly, Jenny Hocking, in an article in an edition of the University of New South Wales Law Journal especially dedicated to the counter terrorism laws, derided the idea of balancing rights, arguing that the preservation of rights and liberties is the *sine qua non* of democracies precisely because of their non-negotiability. Since it is these rights and responsibilities that define us as a democracy, she argued, their diminution is the diminution of democracy itself¹⁸.

[17] The contrary view has been put with equal clarity. The 18th century English judge and jurist Sir William Blackstone noted, in relation to the power of Parliament to suspend an applicant’s right to habeas corpus, that “sometimes it may be

¹⁶ A Dershowitz, *Why Terrorism Works: Understanding the Threat and Responding to the Challenge* (Scribe Publications, Melbourne 2002) at 10.

¹⁷ Cited in M Head, ‘Counter-Terrorism’ Laws: A threat to Political Freedom, Civil Liberties and Constitutional Rights (2002) 26 (3) *Melbourne University Law Review* at 682

¹⁸ J Hocking, “Protecting Democracy by Preserving Justice: ‘Even for the feared and Hated’” (2004) 27 (2) (2004) *University of New South Wales Law Journal* 319 at 336

necessary for a nation to part with its liberty for a while, in order to preserve it for ever.”¹⁹ This is because the right to life, and in particular a life bereft of the fear of anarchy and violence, cannot exist without the protection of the state whose primary role is to maintain law and order. As has been stated:

*“A constitution is not a prescription for suicide, and civil rights are not an altar for national destruction.... The laws of a people should be interpreted on the basis of the assumption that it wants to continue to exist. Civil rights derive from the existence of the State, and they should not be made into a spade with which to bury it.”*²⁰

[18] Thus we live in a contradiction. The violent destruction of life and property, the fear and alarm consequent on a state of continual danger, may cause us to resort for repose and security in institutions which have a tendency to destroy our lives or our civil and political rights. To be more safe, we at length become more willing to run the risk of being less free²¹.

[19] Terrorism has emerged as a serious global threat. Although critics point out that more people are killed every year in automobile accidents (or, in America, from food poisoning) than terrorist attacks, this does nothing to diminish the impact of these attacks, nor the responsibility of governments to protect us. Attacks upon the World Trade Centre and the Pentagon on September 11 2001²², the bombing of busy transport networks in Madrid²³, Mumbai²⁴ and London²⁵ and the destruction of

¹⁹ Cited with approval by Scalia J in *Hamdi v Rumsfeld, Secretary of Defense* 542 U.S. 507, 561-562 (2004).

²⁰ The Hon President Aharon Barak, above n 13 at 44.

²¹ W Banks, “United States responses to September 11” in V Ramraj, M Hor and K Roach (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, Cambridge, 2005), p 491

²² Approximately 3000 people were killed.

²³ 11 March 2003. 191 people were killed, and at least 1,800 injured.

²⁴ 11 July 2006. 200 train commuters were killed and at least 700 people injured.

²⁵ The attack on 7 July 2005 and attempted bombings on 21 July 2005. 52 people were killed, 770 injured.

nightclubs and restaurants in Bali²⁶ killed thousands of innocent people. In Bali, which is dependent upon tourism, those attacks have substantially damaged the island's economy. Such attacks are qualitatively different to the forms of terror that had emerged in the past, and are rightfully characterized as megalomaniac hyperterrorism. Furthermore, the loss of life and property are only two consequences of acts of terror. Scenes like the twin towers falling in New York have become images that resonate deeply in our collective subconsciousness which, when combined with the sheer randomness of the attacks, can't help but make society feel less safe. This is indeed one of the things that terrorists aim for- to make us feel insecure and more troubled in our daily lives. Such collective fear is destructive anywhere in the world. It is oppressive in Australia, where we pride ourselves on our open and trusting way of life. As Whealy J explained in *R v Lodhi*²⁷:

“Australia is in general terms a very safe country. It is far removed, physically from the rest of the world. It is far removed from the turmoil and gross disturbances that beset so many parts of the inhabited globe. It is a country in which Australians have been able in the past, with some exceptions no doubt, to congratulate themselves on their easy going and tolerant way of life. Although we have not escaped being drawn into world affairs and world conflicts, and although our citizens have not been free from attack in other countries, Australia has, to this time, not been a country where fundamentalist and extremist views have exposed our citizens to death and destruction within the sanctuary of our shores. One only has to think of the consequences on the national psyche of a tragedy such as the Port Arthur massacre to realise how a major terrorist bombing would or could impact on the security, the stability and well being of the citizens of this country.”²⁸

[20] Nevertheless, the fear and destruction caused by terrorism should not of themselves lead us to abandon our values. There are other more dangerous and tangible risks to our lives that are tolerated without questioning our rights to liberty.

²⁶ 12 October 2002 and 1 October 2005 killed 222 civilians.

²⁷ (2006) 199 FLR 354.

²⁸ (2006) 199 FLR 354
at 374

What sets terrorism apart is not its probability of occurring (which in reality is relatively low), but rather the way in which terrorists operate. Terrorist often comprise small groups of highly committed and trained individuals, utterly devoted to their cause, who can easily move in and out of the community. To find a terrorist can be very difficult, because the most unexpected person can be a terrorist. For example, Faheem Lodhi, one of the first people to be convicted under the anti-terror laws, came from a supportive family background, had no criminal history and was described as having a considerable professional work ethic²⁹.

[21] Since terrorism is so hard to stop, ordinary precautions and investigative techniques may not be sufficient. Special measures may need to be taken in order to protect the community, some of which if they are to be effective may need to tread upon liberties we previously perceived to be sacrosanct. What terrorism therefore does is asks us in a most immediate and important way how much we need, and how much we are willing, to sacrifice in the interests of security. It thus goes to the centre of what I have been talking about- that is the functioning of a democracy and in particular the rule of law - because it is in times like this where democracy is most under strain.

The absence of real debate

[22] I accept that there is a real risk that Australia may be subjected to terrorist attacks. The extent of that risk is perhaps something that is very difficult to quantify; and I accept that it may not be in the public interest for detailed information, which

²⁹ (2006) 199 FLR 354 at 377

might enable some assessment of the extent of the risk, to be made public. Further, I accept that it is of extremely limited (if any) relevance to dwell on the reasons for the threat, or to seek to allocate responsibility or blame.

[23] Nonetheless, I am concerned at the lack of real debate before the measures, to which I turn in the next section of this paper, were enacted. In particular, there has been no real public justification of the need to expand further the powers of the police: a point made by the commentators to whom I refer in para [31] below. In effect, the Australian public has been asked to accept extraordinary and substantial inroads into its liberties and traditional rights, on the basis that the new and extensive powers are necessary, and will be exercised carefully in good faith. As the recent events involving Dr Mohammed Haneef show (and I discuss these below at paras [98] and following), at least the second of those assurances appears to have been written in water.

[24] In this context, it is notable that a nation such as Israel, which has been the subject of innumerable terrorist threats causing the death and maiming of thousands of its citizens, and the destruction of vast amounts of property, has not gone to the legislative extremes that we in Australia appear by default to have regarded as reasonable. Perhaps Israelis, taught by the dreadful lessons of the Holocaust, value their democratic liberties more highly than we do, and are prepared to pay a higher price to maintain them.

[25] Another aspect of the very limited and shallow way in which the debate has been conducted in this country is the focus on the Islamic character of terrorism.

There does not appear to be any real attempt to understand why it is that some of those who follow the Muslim faith have chosen to pursue a course of violence against western democracies. Such an understanding may be important: if we can understand the reasons why people take up terrorism, it may be possible to react not only by seeking to deal with those who have become terrorists, but also by minimising the risk that others will decide to pursue terror in the first place. Unfortunately, in Australia (according to anecdotal evidence in the newspapers) there appears to have been a backlash against people who are obviously of the Muslim faith: for example, women wearing the hijab. That is a disgraceful state of affairs in a country that has gained so much from successive waves of immigration; and, at the most brutally practical level, it is likely to marginalise those who are the objects of hatred and thus turn them against the country in which they live. That does not seem to me to be productive.

[26] Almost twenty years ago, we agonised over the introduction of the so called “Australia” Card: a form of national identification. There was great trumpeting of fears that this would be a step along the road to totalitarianism. The proposal faded away. Now, however, we appear to be willing not only to countenance but to accept very much greater incursions on our rights and liberties, without debate and indeed without any real evidence as to their necessity.

How is Australia Responding?

[27] Australian governments have responded robustly to the perceived threat of terrorism. In a somewhat ironic way, although the attacks on September 11 were the

result primarily of human errors- intelligence and security failures- rather than inadequate laws³⁰, the first reaction of the Australian government was to implement a massive overhaul of our legal system. Part 5.3 was inserted into the *Criminal Code 1995 (Cth)*³¹. That part provides for a variety of offences including being involved in a terrorist act³², participating in the planning of a terrorist act³³, being a member of a proscribed terrorist organisation³⁴, associating with a proscribed terrorist organisation³⁵ and financing organisations that commit terrorist acts³⁶. Terrorism is defined extremely broadly to be any action or threat that is made to advance a political, religious or ideological cause with the intention of intimidating or coercing any Australian government, a foreign government, the public or a section of the public³⁷. Section 102.1 gives the executive the power to declare that an organisation is a terrorist organisation, which will make it illegal for anyone to have anything to do with that organisation. If a person is convicted of any of these new offences, penalties varying from 3 to 25 years to life imprisonment are provided depending upon on the degree of involvement. The government also has the power, with the sanction of a court, to place a person under a control order when such orders are necessary to prevent a terrorist attack or when the government can prove that the subject person has received training or had an “association” with a terrorist organisation³⁸.

³⁰ A Dershowitz, above n 16, at 191

³¹ through the *Security Legislation Amendment (Terrorism) Act 2002 (Cth)*

³² *Criminal Code 1995 (Cth)*, s 101.1-101.2

³³ *Criminal Code 1995 (Cth)*, s 101.4-101.6

³⁴ *Criminal Code 1995 (Cth)*, s 102.2-102.7

³⁵ *Criminal Code 1995 (Cth)*, s 102.8

³⁶ *Criminal Code 1995 (Cth)*, s 103.1

³⁷ *Criminal Code 1995 (Cth)*, s 100.1

³⁸ See *Criminal Code 1995 (Cth)*, Part 5.3, Division 104

[28] These laws are reinforced by Part III, Division 3 of the *Australian Security Intelligence Organisation (ASIO) Act 1979* (Cth)³⁹ and the *Terrorism (Police Powers) Act 2002* (NSW),⁴⁰ which give ASIO and the police special powers in relation to terrorist operations. Some of these powers - for example, the right to execute search and seizure operations, to undertake clandestine reconnaissance and if desired to hold suspects without charge for the purposes of conducting extended interrogations - existed under previous legislation (in particular, in relation to narcotics⁴¹). But they have never been so easy to exercise, without having to obtain a warrant from a court, and never for such an extended period of time⁴².

[29] The governments have stated that these changes, although dramatic, are proportionate to the threat we face, and are balanced by a set of procedural safeguards that are designed to protect basic human rights. For example, in introducing the *Terrorist Legislation Amendments (Warrants) Bill 2005* (NSW), the New South Wales Attorney General, the Honourable Bob Debus MP, said:

“These powers are extraordinary and will be permitted only with the strictest safeguards.... Those safeguards are an attempt to balance the legitimate needs of enforcement and the right of privacy that all citizens enjoy.... These are extraordinary powers that the government is enacting in response to the extreme threat that a terrorist attack poses to the peace and stability of our society. They are enacted only with the strictest safeguards and strong and effective oversight. When introducing the Terrorism (Police Powers) Act in 2002, the Premier said he looked forward to the day when the threat of terrorism has been eliminated from our State and when laws and powers like this can be removed from our

³⁹ Enacted through the *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth)

⁴⁰ especially after the changes introduced by the *Crimes Legislation Amendment (Terrorism) Act 2004* (NSW); *Terrorism (Police Powers) Amendment (Preventive Detention) Act 2005* (NSW); *Terrorism Legislation (Warrants) Amendment Act 2005* (NSW)

⁴¹ For this interesting discussion see S Bronitt, “Constitutional rhetoric v criminal justice realities: Unbalanced responses to terrorism?” (2003) 14 (2) *Public Law Review* 76

⁴² Committee on the Office of the Ombudsman and the Police Integrity Commission, Parliament of New South Wales, *Report on the Inquiry into Scrutiny of New South Wales Police Counter-Terrorism and Other Powers* (2006) [3.1.5]

*statute books. I echo those comments.*⁴³

[30] The Honourable Phillip Ruddock MP, Attorney General for the Commonwealth, has made similar observations in regards to the new laws:

*“The ongoing threat of terrorism seriously threatens western liberal democracies. We must protect ourselves from attack and we must ensure the safety and security of our citizens. Our method of confronting this threat must not compromise the integrity of our democratic traditions, and institutions. The Government’s legislative response to terrorism has strengthened and reinforced the democratic processes so vital to both our national and human security. The safeguards in place demonstrate that the Government’s response to this challenge is a measured one. We realise that, in the war on terror, our democratic traditions and processes are our greatest ally and our greatest strength. These traditions and processes are the tools that will help repel the terrorist threat and protect and preserve the rights that we value so highly.”*⁴⁴

[31] In contrast, critics have been scathing of the new regime. The prominent legal academic Professor George Williams has described the new laws as “rotten to the core” and as “one of the worst bills ever introduced into the Federal Parliament”⁴⁵. Beverly Inshaw, in a submission to the Senate Legal and Constitutional Legislation Committee, suggested that the powers of ASIO, which under the proposed legislation would have the power to detain people incommunicado for up to 48 hours without charge, without the right of silence and without access to a lawyer, were draconian and reminiscent of Nazi Germany⁴⁶. Michael Head has questioned whether these laws were necessary, arguing that ASIO already had ample powers to detect terrorist activity, including the right to bug telephones, install listening devices

⁴³ The Hon Bob Debus MP, Attorney General, Seconding Reading Speech, *Terrorism Legislation Amendment (Warrants) Act 2005*, Legislative Assembly Hansard, 9 June 2005, at p 16940

⁴⁴ The Hon Phillip Ruddock MP, “Australia’s Legislative Response to the ongoing threat of terrorism” (2004) 27(2) *University of New South Wales Law Journal* 254 at 260-261

⁴⁵ G Williams, “The rule of law and the regulation of terrorism in Australia and New Zealand” in V Ramraj, M Hor and K Roach (eds), above n 21, at 541

⁴⁶ Submission to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 and Related Bills (2002) Vol 1, 11 (Beverly Inshaw)

in offices and homes, intercept telecommunications, open people's mail, monitor online discussion groups, break into computer files and data bases, and use personal tracking devices. Hence in his view the idea that ASIO also needs a detention power is ludicrous⁴⁷.

Are there appropriate safeguards?

[32] One of the main defences offered by supporters of the anti terror laws is that appropriate safeguards have been built into the legislation, that will prevent the executive from misusing its power. Mr Ruddock, for example, went to some lengths to explain how the process for listing terrorist groups would be transparent and fair⁴⁸. He noted that before proscribing an organisation he must be satisfied that the relevant organisation is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act⁴⁹. He said that this power cannot be exercised arbitrarily, because under the Act he is obliged to brief the Leader of the Opposition⁵⁰, to seek the consent of the Parliamentary Joint Committee on ASIO, DSD and ASIS⁵¹. He pointed out that if the proposed listing is unfavourably received it may be rejected by Parliament.

[33] A similar safeguard is said to exist in relation to the *Terrorism (Police Powers) Act 2002* (NSW), where the NSW Attorney General as the Minister responsible for the Act is required to report annually to the Parliament on the operation of the Act

⁴⁷ M Head, above n 17 at 678-679

⁴⁸ The Hon Phillip Ruddock MP, above n 44 at 257

⁴⁹ *Criminal Code 1995* (Cth), s 102.1(2)

⁵⁰ *Criminal Code 1995* (Cth), s 102.1(2A)

⁵¹ *Criminal Code 1995* (Cth), s 102.1A

and on the way in which the Ombudsman and the Police Integrity Commission are performing their oversight functions⁵².

[34] I put these two safeguards together because they are enacted with the same policy in mind. By exposing the executive to Parliamentary scrutiny, it is hoped that any governmental abuses will be brought to light. Thus, in assessing whether this is an appropriate safeguard or merely a house of straw, it is necessary to analyse to what extent the legislature can act as check on executive power.

[35] To date, the legislature's performance (at both the state and federal level) in reviewing the legislation and actions of the government has been mixed. In reviewing the original anti-terrorism bill⁵³, the Senate Legal and Constitutional Committee, a committee composed of members of all major parties was initially very critical of the legislation, finding that its implementation "would undermine key legal rights and erode the civil liberties that make Australia a leading democracy."⁵⁴ The parliamentary debate that followed was described as one of the longest and most bitter in Australian Parliamentary history. In retrospect, the debate did succeed in ameliorating some of the harshest elements of the legislative regime⁵⁵. Significant gains included the right of an individual detained by ASIO to have access to a lawyer⁵⁶, for preventive detention to only be undertaken after ASIO has obtained a warrant from a judge⁵⁷, for the interrogation process to be videotaped⁵⁸ and for it to

⁵² *Terrorism (Police Powers) Act 2002* (NSW), s 36

⁵³ *Security Legislation Amendment (Terrorism) Bill 2002* [No 2] 2002 (Cth)

⁵⁴ Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002), vii

⁵⁵ G Williams, above n 45, at 542

⁵⁶ *Australian Security and Intelligence Organisation Act 1979* (Cth), ss 34F(5), 34G(5), s 34ZO-34ZQ

⁵⁷ *Australian Security and Intelligence Organisation Act 1979* (Cth), s 34G(1)

⁵⁸ *Australian Security and Intelligence Organisation Act 1979* (Cth), s 34ZA

be monitored by a judicial officer (who is to be present when the questioning is occurring⁵⁹) and the Inspector-General of Intelligence and Security⁶⁰. Nonetheless, although this provided a good example of parliamentary review, the parliament has been more taciturn of late. It could be said that the debate represented a highpoint of parliamentary activism in the field of anti terror legislation.

[36] The effectiveness of parliamentary scrutiny depends upon the legislature's being independent from the executive; but, after the 2004 election, the Howard government won a majority of seats in both the House of Representatives and the Senate. This is not intended in any way to suggest that the Liberal and National Parties are any less concerned with human rights than the opposition ALP, but rather to acknowledge that the ability of the legislature to act as an independent check on the executive is greatly diminished when that independence is illusory and for all practical purposes non-existent. Although episodes like Senator Joyce's efforts to frustrate the full privatisation of Telstra, and the Hon Petro Georgio MP's success in getting the government to release children from immigration detention, demonstrate that the threat of government MPs' crossing the floor can effect changes, in Australia with its strong tradition of party solidarity such episodes should be viewed as an aberration rather than the norm.

[37] Indeed, this demonstrates what is wrong in relying on parliamentary review as means of checking the government of the day. Parliamentarians are reliant upon securing the popular vote in order to continue to rule. Populism can be a source of danger. Victor Ramraj has reviewed current psychological literature and has

⁵⁹ see powers of judges in such circumstances under *Australian Security and Intelligence Organisation Act 1979* (Cth), s 34K

⁶⁰ *Australian Security and Intelligence Organisation Act 1979* (Cth), s 34P

concluded that the high profile nature of terrorist attacks and the way in which they portrayed in the media has had great impact in distorting the public response to terrorism⁶¹. Adding to this effect is the fact that, rightly or wrongly, terrorism has been attributed to Islamic extremism which in turn helps to fuel the racial prejudice that unfortunately is building in some parts of this country towards Australians of Middle Eastern descent⁶². It is becoming increasingly apparent that it is popular, and thus politically expedient, to be “tough” on terrorism⁶³. In such an environment of heightened fear it is asking a lot of elected parliamentarians to seek to protect the rights of people suspected of terrorist attacks. Evidence of this can be seen in the reticence of the current leader of the Opposition, the Hon Kevin Rudd MP, in regard to the investigation of Dr Mohamed Haneef⁶⁴, and in the fact that the NSW Attorney General, 5 years after the enactment of the *Terrorism (Police Powers) Act 2002* (NSW), is still to report on the operation of the laws⁶⁵. This latter omission is particularly troubling considering that since November 2005 counter terrorism police, as part of Operation Pendennis, have executed a number of raids across Sydney and Melbourne in which over 10 people have been arrested and one suspect, Omar Baladjam, has been shot⁶⁶. To put it bluntly, parliament may no longer be sufficiently independent to make unpopular yet just decisions.

⁶¹ V Ramraj, “Terrorism, risk perception and judicial review” in V Ramraj, M Hor and K Roach (eds), above n 21, at 108-114

⁶² Gareth Griffith, *Sedition, Incitement and Vilification: Issues in the Current Debate* (Briefing Paper No 1/06, NSW Parliamentary Library Research Service), p 33; HREOC, *Isma- Listen: National Consultation on Eliminating Prejudice Against Arab and Muslim Australians* (2004), at 4

⁶³ J Hocking, above n 18 at 331

⁶⁴ M Franklin and J Roberts, “Rudd’s backbone a long time coming”, *The Australian*, 31 July 2007, p 4; M Davis and J Gibson, “Bailed then jailed: Justice in the new age of terrorism”, *The Sydney Morning Herald*, 17 July 2007, p 1; ABC Radio, “Haneef’s lawyers to launch detention appeal”, *PM*, 17 July 2007 www.abc.net.au/pm/content/2007/s1981018.htm at 18 July 2007

⁶⁵ Committee on the Office of the Ombudsman and the Police Integrity Commission, Parliament of New South Wales, *Report on the Inquiry into Scrutiny of New South Wales Police Counter-Terrorism and Other Powers* (2006) [7.19.2]

⁶⁶ *Ibid*, [6.11] – [6.11.18]

[38] Delegating too much authority to the executive can reduce transparency and in turn accountability. Blackstone, in his *Commentaries on the Laws of England*, noted how clandestine governmental incarceration can have a more detrimental impact on democracy than overt acts of government tyranny:

“Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper.... there would soon be an end to all other rights and immunities... To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking and therefore a more dangerous engine of arbitrary government.”⁶⁷

[39] In Australia, concerns have been raised about the accountability of ASIO, particularly when it has the power to build a wall of secrecy around its operations. It is illegal for any person to publish materials making public the identity of any current or former members of ASIO⁶⁸; it is a criminal offence for ASIO officers and people associated with ASIO to convey information regarding ASIO to the public⁶⁹; and the organisation is not subject to the (misleadingly named) *Freedom of Information Act 1982* (Cth)⁷⁰. Even the transparency of the application process ASIO needs to go through in order to obtain a preventative detention order or a warrant to extend the interrogation of a suspected terrorist is attenuated by the court’s power to close such hearings to the public. The problem with this is that whatever legal rights individuals have, the secrecy that cloaks ASIO’s operations means, in practical terms, that people affected by ASIO’s operations cannot, enforce the law against ASIO because

⁶⁷ W Blackstone, *Commentaries on the Laws of England* (1765), p 131-133 cited with approval in *Hamdi v Rumsfeld, Secretary of Defence* 542 U.S 507, 555 (2004) per Scalia and Stevens JJ

⁶⁸ *Australian Security Intelligence Organisation Act 1979* (Cth), s 92

⁶⁹ *Australian Security Intelligence Organisation Act 1979* (Cth), s 18

⁷⁰ *Freedom of Information Act 1982* (Cth), s 7(1) and Part 1 of Schedule 2

the legislative framework effectively prevents them from having access to all the evidence⁷¹.

[40] Institutional inertia and instinctive self preservation can also make it difficult to make governmental departments accountable when there is no avenue for external review. This occurred most recently in regard to the investigation surrounding the shooting of Mr Jean Charles de Menezes⁷². Mr de Menezes lived in a London apartment bloc that was under surveillance after police discovered a gym card linking another resident of that building to the July 2005 terrorist attacks in London. When Mr de Menezes departed that building at 9:30am on Friday 22 July 2005, police mistakenly assumed that he was their target. After following Mr de Menezes when he caught a bus, police panicked when Mr de Menezes was seen running for the train. It appears that Mr de Menezes, when confronted, did not respond in whatever way it was that the police were expecting, and they shot him seven times, killing him instantly. When his body was searched, no bomb was discovered. Mr de Menezes, a tourist from Brazil, was quickly cleared of any links to terrorism.

[41] Although such an accident is tragic, it is not just the mistake or the shooting that causes me concern. To me, even more worrying is the way in which the matter was “investigated”; in particular how those in power did their utmost to frustrate an independent inquiry into the circumstances surrounding the shooting.

⁷¹ Joo-Cheong Tham, above n 8 at 217

⁷² The following information on the Jean Charles de Menezes case is taken from Committee on the Office of the Ombudsman and the Police Integrity Commission, Parliament of New South Wales, *Report on the Inquiry into Scrutiny of New South Wales Police Counter-Terrorism and Other Powers* (2006) [4.9] –[4.9.12] and the citations mentioned therein

[42] Sir Ian Blair, Commissioner of London Metropolitan Police, refused to refer the matter to the Independent Police Complaints Commission as he is obliged to in all cases of police shooting. He said that to do so would jeopardize the operational tactics and sources of information the police use in conducting anti-terrorist operations. When that decision was overruled by the Home Office, the London Police still refused to cooperate. In its subsequent report, the IPCC referred 10 officers to the Crown Prosecution Services for consideration of potential criminal charges. Nonetheless, the Crown Prosecution Service announced in July 2006 that no police would face any murder or manslaughter charges, but that the Metropolitan Police Service would be charged with failing to provide for health, safety and welfare of Mr de Menezes under the *Health and Safety at Work Act 1974* (UK). This prosecution is currently proceeding through the judicial system of the UK.

[43] The de Menezes case is useful in demonstrating the dangers of giving an organisation whose primary reason for existing is security the responsibility of balancing security concerns with personal rights. As Souter and Ginsburg JJ explained in *Hamdi v Rumsfeld*:

“In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace and war (or some condition in between) is not best entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the government asked to counter a serious threat is not the branch to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.”⁷³

⁷³ 542 U.S 507, 545 (2004)

[44] This suggests that even with the most efficient and transparent police force it may still be necessary to review their actions because insular decision-making can force organisations to cling to, and seek to cover up, bad decisions. This will not necessarily be intentional, but may reflect either or both of institutional inertia and the human tendency to view any problem through a particular lens.

In such an environment can the courts maintain the rule of law?

[45] Courts play a vital role in our democracy. Legislation is, although to varying degrees, inherently general. It is the courts' duty to construe legislation – to say what it means – and to apply it to the facts of particular cases. In doing this, the courts seek to ascertain and apply the intention of the legislature, to the extent that the terms of the legislation allow this to be done. Through this process of interpretation and application, our understanding of Australian law develops. This does not mean that the courts act as unelected legislators. They must always give effect to the legislative command as embodied in acts, regulations and the like. Unfortunately, with much contemporary legislative drafting, the challenge is to ascertain precisely what is the legislative command in a particular case.

[46] Further, statutes, including the anti-terror laws, do not exist in isolation. They are a part of a complex and dynamic legal system where other legislative instruments and underlying principles such as the rule of law, must be considered in construing and applying an Act of parliament. The judiciary, as the branch of government uniquely empowered under our Constitution to interpret the law, is in a

vitaly important position⁷⁴. It has the right and (subject to any legislative command to the contrary) duty to review the actions of the executive and the legislature to ensure that they are not beyond power.

[47] To some the idea that a group of unelected judges, not possessing any direct expertise in combating terrorism, may restrain an elected government's action is contrary to democracy, and amounts to judicial imperialism of the worst kind⁷⁵.

Thomas J in dissent in *Hamdi* said that such questions "are of a kind for which the judiciary neither has the aptitude, facilities nor responsibility to make"⁷⁶. However, such an approach underestimates the important role that the judiciary has played in our system of government and the way in which the rule of law can be seen as a more robust and substantive concept. As Kirby J recently noted in a speech regarding the new counter terrorism laws titled, "Judicial Review in a time of terrorism- Business as Usual":

*"The great power of the idea of independent judicial examination of "control orders" and other decisions, made under the foregoing legislation shows, once again, the potent metaphor that judicial review represents in modern democratic constitutional arrangements. It is as if many people recognise the need to counter-balance the swift, decisive, resolute and opinionated actions of officers of the Executive government with the slower, more reflective, principled and independent scrutiny by the judicial branch, performed against the timeless criteria of justice and due process."*⁷⁷

⁷⁴ The Hon President Aharon Barak, above n 13 at 33-36, 48

⁷⁵ N Glazer, "Toward an Imperial Judiciary?" (1975) *Public Interest* 104 at 122. Also see R Ekins, "Judicial Supremacy and the Rule of Law" (2003) 119 *Law Quarterly Review* 127

⁷⁶ 542 U.S 507, 585 (2004). Also see the comments of Lord Romer in *Liversidge v Anderson* [1942] AC 206 at 281 and Kitto J in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 272

⁷⁷ The Hon Justice Michael Kirby, "Judicial Review in a time of terrorism- Business as Usual" (Speech delivered at the University of the Witwatersrand School of Law & South African Journal of Human Rights, Johannesburg South Africa, 25 November 2005), p 15

[48] In this respect the unelected and independent character of the judiciary may be its greatest asset, as unlike either the executive or legislative branches, it should not be swayed by passing fads.

[49] I wish to make it clear that, in talking of judicial review, I am not referring to judges who make decisions based on their own subjective notion of right or wrong. I refer instead to judges who approach a legal issue in an objective way in an effort to ensure that the rule of law is followed. Judges, by adopting objective reasoning based on centuries of established legal doctrine, are as well placed as anyone to analyse according to law and enforce our legislative attempts to forfeit our rights in the name of collective security. Such a process is democratic because the judiciary is performing the role that is delegated to it in our system of constitutional democracy. As Victor Ramraj explains:

“Judicial review may well encroach on democratic populism, but its goal is to articulate and express the wishes of the people at the level of the most profound values of society in its progress through history, not at the level of passing vogues. There is of course, an element of judicial paternalism here, but perhaps a softer more palatable kind of paternalism than a courts-know-best variety, one that seeks only to ensure that public decisions are fully informed and considered. In this way, judicial review (or even the prospect of judicial review) can serve as a check on democratic law-making to ensure that in times of heightened emotion and widespread fear, a decision to limit individual liberty is not lightly taken. The courts might not always be able to prevent excessive responses to terrorist attacks, but their willingness to scrutinize new laws may stimulate public debate and provide civil society groups with the means to ask critical questions about anti-terrorism policies. They may empower concerned citizens to ask more pointed questions about the extent of the risk and remind them of the sacrifices that they are being asked to make.”⁷⁸

⁷⁸ V Ramraj, above n 61, at 124-125

[50] The utility of this approach can be seen by a series of decisions from jurisdictions outside Australia, which I would like to consider before analysing whether Australian courts are discharging such an important function.

How other courts have tackled the problem

[51] *Rasul v Bush*⁷⁹: In the wake of Al Qaeda attacks upon the United States in September 11 2001, the President was authorised by Congress to use “all necessary and appropriate force against those nations, organisations or persons he determines planned, authorised, committed or aided the terrorist attacks”⁸⁰. In the subsequent months an international “coalition of the willing” invaded Afghanistan, leading to capture of a number of foreign nationals including two Australians, David Hicks and Mamdouh Habib. President Bush established a detention facility (Camp X-Ray), at the Naval Base in Guantanamo Bay in Cuba, to incarcerate those captives, in the hope that they might provide more information regarding the international terrorist network.

[52] From its very inception there were worries about the treatment of inmates at Camp X-Ray and the fear that its inmates may have fallen into a legal black hole⁸¹. Allegations were made ranging from accusations that inmates were being tortured to the simple yet important fact that people were being detained for prolonged periods (in the case of David Hicks over 3 years) before being told what on what charges they were being held. Counsel for the President argued that the right for the

⁷⁹ 542 U.S. 466 (2004)

⁸⁰ *Authorisation for the Use of Military Force*, Pub L No 107-243, 116 Stat 1498, 1500 (2001)

⁸¹ See Lord Steyn, “Guantanamo Bay: The Legal Black Hole” (2004) 53 *International & Comparative Law Quarterly* 1

executive to detain foreign enemy combatants had always been essential to the conduct of war, and that the decision of Supreme Court in *Eisentrager*⁸² prevented the courts from granting *habeas corpus* to “aliens detained outside the sovereign territory of the United States”. (Guantanamo Bay was not formally part of the sovereign territory of the United States, in that was leased from Cuba under a treaty made over a hundred years ago.)

[53] In 2004, Mamdouh Habib, David Hicks and 12 others filed writs of habeas corpus seeking release from custody, access to counsel, freedom from interrogation and other relief. After being rejected in lower courts, the petition eventually reached the United States Supreme Court. The court, by a majority of 4 to 3, granted certiorari and remitted the case to the Federal Court. The majority held that application of the habeas statute to persons detained at Camp X-Ray was consistent with the historical reach of the supervisory role of the court, which is not limited by formal notion of territorial sovereignty, but rather is based on the practical question of where the government rules⁸³. This decision has been described as an extremely important one as, in the face of executive demands for exemption from court scrutiny because of the suggested exigencies of terrorism, the Supreme Court asserted the availability of judicial supervision and the duty of judges to perform their functions⁸⁴. In other words it reaffirmed the doctrines of judicial review and government accountability.

⁸² *Johnson v Eisentrager* 339 U.S. 763 (1950)

⁸³ *Rasul v Bush* 542 U.S. 466, 481-482 (2004) per Stevens J with O'Connor, Souter, Ginsburg and Breyer JJ joining

⁸⁴ The Hon Justice Michael Kirby, above n 77, at 29

[54] The majority decision also corresponds to what was said by Stevens J in *Rumsfeld v Padilla*⁸⁵, a case about whether an American citizen detained in the United States for planning a terrorist attack could be treated as an enemy combatant. In dissent his Honour warned:

“At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people’s rulers and their successors is the character of the constraints imposed upon the executive by the rule of law. Unconstrained executive detention for the purposes of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.

Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolised by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.”⁸⁶

[55] *Public Committee Against Torture in Israel v The State of Israel*⁸⁷: Emerging out of the horrors experienced by the Jewish people in the Nazi era, Israel is a state that has always prided itself on its democratic credentials. The Declaration of Establishment of the State of Israel by David Ben Gurion on 14 May 1948 included a statement that the State of Israel will be based upon principles of “freedom, justice and peace” to “ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex” by “guaranteeing freedom of religion, conscience, language, education and culture” (an ambitious statement, and one conspicuously missing from our own Constitution). However, for reasons beyond the

⁸⁵ 542 U.S. 426 (2004)

⁸⁶ 542 U.S. 426, 465 (2004)

⁸⁷ (1994) 53 (4) P.D 817

purview of my speech, Israel has been targeted extensively by terrorists. From 29 September 2000 to 1 May 2006, Israeli hospitals treated 7,844 civilian victims of terrorist attacks, of whom 999 died, 642 were severely injured, 940 moderately injured and 5,263 lightly injured. In 2002 at the height of the Second Intifada, there were 60 terrorist attacks inside Israel against civilian targets: an attack approximately every 6 days⁸⁸.

[56] In such an environment it is little wonder that it might be challenging to uphold democracy. Innocent civilians were being killed. There was great pressure upon the State to protect citizens against terrorism. In 1994 the State sought sanction from the courts to utilize special interrogation methods, outside the ordinary ambit of criminal law, to gather information and intelligence needed to stop terrorist attacks. Special interrogation methods included sleep and food deprivation, noise and sensory confusion, and other “mild” forms of coercion which a number of prominent jurists have concluded should be used to obtain information that would defuse ticking time bombs⁸⁹. The Supreme Court, however, rejected this argument. President Barak said:

“This decision opened with a description of the difficult reality in which Israel finds herself.... We are aware that this decision does not make it easier to deal with that reality. This is the destiny of democracy- it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and liberty of an individual constitutes important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its

⁸⁸ Israel Ministry of Foreign Affairs, *Victims of Palestinian Violence and Terrorism Since September 2000* (2007) <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Victims+of+Palestinian+Violence+and+Terroris+m+sinc.htm> at 2 August 2007

⁸⁹ A Dershowitz, above n 16, ch 4; M Bagaric and J Clarke, “Not enough official torture in this world? The circumstances in which torture is morally justified” (2005) 39 *University of San Francisco Law Review* 581

difficulties.⁹⁰

[57] President Barak is not alone. Justice Dorit Beinisch, another judge in the Supreme Court of Israel, said recently:

“We live in a period of constant tension and contradictions. The public demands security and the government is under pressure to protect the public and ensure them peaceful and safe lives. The court is part of Israeli society. As judges, we share its concerns, yet we recognize our role and responsibilities. We acknowledge the duty of the executive to protect its citizens and preserve their right to life against the threat of terrorism. We also recognize, however, that it is the duty of the judiciary to help guarantee that a nation fighting for its survival will not sacrifice those very values that make the fight worthwhile. In times of emergency it is difficult role of the judiciary to guard against the disproportional limitations on the basic human rights of every individual, including terrorists. In today’s reality, the Court confronts the challenge of balancing these twin values of security and human rights on a daily basis. Our point of departure- our guiding principle- is that the battle against terrorism must be fought within the law, and that no war may take place outside the boundaries prescribed by the law.”⁹¹

[58] Other notable judgments of the Israeli Supreme Court include the Court’s recent decision requiring the IDF to change the route of their proposed security fence because the inconvenience and damage caused to neighbouring Palestinian villages was disproportionate to Israel’s security needs⁹², and the Court’s rejection of the IDF’s power to take punitive action against the families of terrorists in an attempt to deter suicide bombers⁹³.

[59] *A v Secretary for the Home Department*⁹⁴: Under the *Human Rights Act 1998* (UK), the government of the United Kingdom has the power to derogate from its

⁹⁰ (1994) 53 (4) P.D. 817 at 845

⁹¹ The Hon Justice Dorit Beinisch, “The role of the Supreme Court in the fight against terrorism” (2004) 37 *Israel Law Review* 281 at 282-283

⁹² *Beit Sourik Village Council v Government of Israel* (Unreported, Supreme Court of Israel, Barak P, Mazza VP, Cheshin J, 2 May 2004) 44-5

⁹³ *Ajuri v IDF Commander in West Bank* (2002) 56 (6) P.D. 352

⁹⁴ [2005] 2 AC 68

responsibilities under the Act if there is a public emergency threatening the life of the nation. After the September 11 terrorist attacks, the UK government declared that the threat of Islamic extremism was such an emergency. Section 23 of the *Anti-terrorism, Crime and Security Act 2001* (UK) provided for the indefinite detention of non-nationals if the Home Secretary believed that their presence in the United Kingdom was a threat to national security and they were unable to be deported to another country. Nine immigrants were detained under this section on the orders of the Home Secretary in 2001. Since no other country was willing to take them they were held in detention for three years. At first instance the Special Immigration Appeals Commission (SIAC) found that their indefinite detention was not proportionate to the threat that they posed to the nation and ordered their release. However, this was overturned on appeal.

[60] When the matter came to the House of Lords, the Attorney General argued that it was the sole prerogative of the executive to decide if and when a public emergency existed. These were political questions involving the exercise of political judgement and expertise beyond the purview of the courts⁹⁵.

[61] The House of Lords, by a majority of 8 to 1 (Lord Walker dissenting), agreed with the SIAC that the courts could play a role in analysing how proportionate the government's response was to a public emergency. This required the court to decide to what extent terrorism threatened the life of the nation. In the majority's view, the indefinite detention of immigrants suspected of terrorism was not proportionate to that threat. In reaching their decisions a number of the Law Lords made some

⁹⁵ Ibid at 84-86

significant statements about the role of the judiciary and the rule of law. Although those statements were made in the context of a particular legislative framework that is not present in Australia, they are based on and restate wider and more fundamental principles, as Lord Hoffman in particular made clear.

[62] The senior Law Lord, Lord Bingham of Cornhill, said:

“I do not accept in particular the distinction which [the Attorney General] drew between democratic institutions and the courts. It is of course true, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognized as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision making as in some way undemocratic.... The effect is not, of course to override the sovereign legislative authority of the Queen in Parliament.... The 1998 Act gives the courts a very specific, wholly democratic, mandate. As Professor Jowell has put it “The courts are charged by Parliament with delineating the boundaries of a rights-based democracy”.”⁹⁶

[63] Lord Nicholls of Birkenhead had particular concerns with the government’s tortuous logic:

“All courts are very much aware of the heavy burden, resting on the elected government and not the judiciary, to protect the security of this country and all who live here. All courts are acutely conscious that the government is able to evaluate and decide what counter-terrorism steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility.

But the Parliament has charged the courts with a particular responsibility. It is a responsibility as much applicable to the 2001 Act and the Human Rights Act 1998 (Designated Derogation) Order 2001 as it is to all other legislation and ministers’ decisions. The duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected. In enacting legislation and reaching decisions Parliament and ministers must give due weight to fundamental rights and freedoms. For their part, when carrying out their assigned task they will accord to Parliament and

⁹⁶ [2005] 2 AC 68 at 110-111

Ministers, as primary decision makers, an appropriate degree of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question, and the extent of the encroachment upon that right. The courts will intervene only when it is apparent that, in balancing the various considerations involved, the primary decision maker must have given insufficient weight to the human factor.

In the present case I see no escape from the conclusion that Parliament must be regarded as having attached insufficient weight to human rights of non-nationals. The subject matter of the legislation is the needs of national security. This subject matter dictates that, in the ordinary course, substantial latitude should be accorded to the legislature. But the human right in question, the right to individual liberty, is one of the most fundamental of human rights. Indefinite detention without trial wholly negates that right for an indefinite period. With one exception all the individuals currently detained may have been imprisoned now for three years and there is no prospect of imminent release. It is true that those detained may at any time walk away from their place of detention if they leave this country. Their prison, it is said, has only three walls. But this freedom is more theoretical than real.... They prefer to stay in prison rather than face the prospect of ill treatment in any country willing to admit them.

.....

The difficulty with according to Parliament substantial latitude normally to be given to decisions on national security is the weakness already mentioned: security considerations have not prompted a similar negation of the right to personal liberty in the case of nationals who pose a similar security risk. The government, indeed, has expressed the view that a “draconian” power to detain British citizens who may be involved in international terrorism “would be difficult to justify”... But, in practical terms, power to detain indefinitely is no more draconian in the case of a British citizen than in the case of a non-national.⁹⁷

[64] Lord Hoffman used different but perhaps even more persuasive reasoning to come to his conclusion. He started by outlining the importance of the case:

“This is one of the most important cases the House has had to decide in recent years. It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom.

At present, the power cannot be exercised against citizens of this country. First, it applies only to foreigners whom the Home

⁹⁷ [2005] 2 AC 68 at 128-129

*Secretary would otherwise be able to deport. Secondly, it requires that the Home Secretary should reasonably suspect the foreigners of a variety of activities or attitudes in connection with terrorism, including supporting a group influenced from abroad whom the Home Secretary suspects of being concerned in terrorism. If the finger of suspicion has pointed and the suspect is detained, his detention must be reviewed by the Special Immigration Appeals Commission. They can decide that there were no reasonable grounds for the Home Secretary's suspicion. But the suspect is not entitled to be told the grounds upon which he has been suspected. So he may not find it easy to explain that the suspicion is groundless. In any case, suspicion of being a supporter is one thing and proof of wrongdoing is another. Someone who has never committed any offence and has no intention of doing anything wrong may be reasonably suspected of being a supporter on the basis of some heated remarks overheard in a pub.*⁹⁸

[65] His Lordship continued:

"The technical issue in this appeal is whether such a power can be justified on the grounds that there exists a "war or other public emergency threatening the life of the nation" within the meaning of article 15 of the European Convention on Human Rights. But I would not like anyone to think we are concerned with some special doctrine of European law. Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out the rights which British subjects enjoyed under the common law.

.....

What is meant by "threatening the life of the nation"? The "nation" is a social organism, living in territory (in this case, the United Kingdom) under its own form of government and subject to a system of laws which expresses its own political and moral values. When one speaks of a threat to the "life" of the nation, the word life is being used in a metaphorical sense. The life of the nation is not coterminous with the lives of its people. The nation, its institutions and values, endure through generations. In many important respects, England is the same nation it was at the time of the first Elizabeth or the Glorious Revolution. The Armada threatened to destroy the life of the nation, not by loss of life in battle, but by subjecting English institutions to the rule of Spain and the Inquisition. The same was true of the threat

⁹⁸ [2005] 2 AC 68 at 129-130

posed to the United Kingdom by Nazi Germany in the Second World War. This country, more than any other country in the world, has an unbroken history of living for centuries under institutions and in accordance with values which show a recognisable continuity.

.....

The Home Secretary has adduced evidence, both open and secret, to show the existence of a threat of serious terrorist outrages. The Attorney General did not invite us to examine the secret evidence, but despite the widespread scepticism which has attached to intelligence assessments since the fiasco over Iraqi weapons of mass destructions, I am willing to accept that credible evidence of such plots exist. The events of 11 September 2001 in New York and Washington and 11 March 2003 in Madrid make it entirely likely that the threat of similar atrocities in the United Kingdom is a real one.

But the question is whether such a threat is a threat to the life of the nation. The Attorney General's submissions... treated a threat of serious physical damage and loss of life as necessarily involving a threat to the life of the nation. But in my opinion this shows a misunderstanding of what is meant by "threatening the life of the nation". Of course the Government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom. When Milton urged the government of his day not to censor the press even in time of civil war, he said: "Lords and Commons of England consider what nation it is whereof ye are, and whereof ye are the governours."

This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt we shall survive Al-Qaeda.⁹⁹

[66] In my view, these judgments, like the judgment of Lord Atkin to which I referred at the beginning of my speech, epitomise the common law's conception of the rule of law and the role of the courts in maintaining it.

⁹⁹ [2005] 2 AC 68 at 130-132

What are Australian courts doing?

[67] As mentioned above, one of the most persistent criticisms of the counter terrorism legislation in Australia is of its drafting. By using ambiguous language it gives an enormous amount of discretion to the executive, leaving the judiciary with the ability to deal only with the periphery of the issues¹⁰⁰. Critics claim that the counter terrorism laws have deprived the courts of their core function. This is a bold accusation, and can only be decided by analysing relevant Australian case law.

[68] *R v Mallah*¹⁰¹: In this case the accused had been charged with acquiring a rifle for the explicit purpose of killing and kidnapping ASIO/AFP officers, a terrorist offence under s 101.6(1) of the *Criminal Code Act 1995* (Cth). The prosecution's case was based on a series of admissions Mr Mallah had made to an undercover police officer between 28 November 2003 and 3 December 2003. The police officer had been posing as a reporter who was offering to buy a video tape and short statement that Mr Mallah had prepared and intended to release after his attack. After obtaining those admissions, police believed they had enough evidence to act and arrested Mr Mallah.

[69] At trial, counsel for the accused objected to the admission of his confessions. He claimed that since the police, in offering to purchase the video tapes were aiding, abetting and ultimately financing terrorism¹⁰², it would be unfair to admit the evidence as it had been obtained if not illegally then in an improper way. Section 15M of the *Crimes Act 1914* (Cth) granted police immunity for illegal activities if they had

¹⁰⁰ G Williams, above n 45, at 536; J Hocking, above n 18 at 322-323

¹⁰¹ (2005) 154 A Crim R 150

¹⁰² *Criminal Code Act 1995* (Cth), s 103.1

obtained a certificate for conducting a controlled operation. In this case, the police had acted hastily and on poor advice, only obtaining a certificate for the last meeting on 3 December. Hence, because the evidence of the admissions at the previous meetings was not lawfully obtained and the events of those meetings influenced what Mr Mallah did at the 3 December meeting, the admissibility of all the evidence came into question.

[70] In very general terms, Sections 90 and 138 of the *Evidence Act 1995* (NSW) mean that the court may not admit such evidence unless the desirability of its admission outweighs any detriment it is likely to cause. Each section has a different way of measuring this, but factors common to both include the need to take into account the probative value of the evidence, the importance of the evidence, the gravity of the impropriety and whether that impropriety has caused the defendant to act in some way that otherwise he would not have done. Section 138 also allows the court to take into account broad considerations of public policy in deciding whether to admit the evidence. These sections accordingly give judges a broad discretion as to whether to admit the confessions.

[71] Wood CJ at CL decided to admit the evidence, but in doing so demonstrated that judicial discretion is as alive in relation to terrorism as it is in relation to other area of law. This can be seen from the following excerpts from his Honour's judgement:

"In circumstances where the accused appears to have formulated his plan before speaking to the undercover operative, and to have sounded out others with a view to its implementation, without the slightest encouragement from police, I am of the view that the balance which

*is required, by way of value judgment as to the conduct of the police, and its effect on the accused, falls on the side of the admission of the evidence. Among other considerations, the objective of the police was not simply to gather evidence about offences already committed. An important additional objective, if not the primary objective, was to obtain information concerning any plan, or plans, which the accused had for the ongoing or future offences, and to nip them in the bud. Had the conduct of the undercover officer been such as to encourage, or to lead the accused to engage in a course of conduct on which he had not already embarked, or had the conversation been essentially fashioned by the officer so as to commit him to that course, then that degree of unfairness in the use of the evidence at trial, which would justify a discretionary exclusion may well be made out.*¹⁰³

[72] In dealing with the impropriety of the police, Wood CJ at CL made a number of statements which show why police need to be monitored, but also a willingness from the judiciary to understand the difficult decisions that police are required to make:

“The impropriety and contravention of the law involved on the part of Greg [the under cover policemen] occurred, in the course of an operation, which, I am satisfied, was conducted in good faith. While the decision to proceed in the way chosen was deliberate, any contravention of the law that was involved was at worst negligent, having regard to the failure of police to pursue the legislation and to seek formal legal advice. More appropriately I would regard it as having been inadvertent, and as flowing from a lack of an appreciation that arranging a meeting with the accused, and discussing his plans, in an attempt to discover what he had in mind, and what he possessed, and to then take steps towards procuring any relevant item which he might obtain, might constitute an offence. In that regard the newly created terrorist laws do extend criminality well beyond the traditionally recognised offence of attempt, and it is understandable that there was not an appreciation of the fact of that conduct, of the kind which occurred between 27 November and 1 December might fall foul of s 11.2 of the Criminal Code Act.....

It is not immaterial that there was an urgency to act, in view of the perceived threat to Commonwealth officials and the suspicion that the accused was making inquiries directed towards obtaining a replacement weapon. It was absolutely essential in those circumstances for steps to be taken to determine whether the threat was real, and how far any plan may have proceeded. For the police not to have acted in light of what was known or suspected, who have involved a gross neglect of duty on their part. That any breach of law was inadvertent is also indicated by the fact that police sought and obtained a Controlled Operation Certificate as a matter of prudence, following

¹⁰³ (2005) 154 A Crim R 150 at 165

*discussions within the Undercover Branch, before proceeding to the third meeting and before obtaining the video tape and the other items in exchange for moneys which were, in accordance with the operation immediately recovered and which were never likely to be passed or used for any terrorist act.*¹⁰⁴

[73] *R v Roche*¹⁰⁵ is another example of a court's using its discretion in relation to counter terrorism legislation. The accused was charged in that case under s 8(3c)(a) of the *Crimes (Internationally Protected Persons) Act 1976* (Cth) with conspiring to bomb the Israeli embassy in Canberra. At first instance the trial judge sentenced Mr Roche to 9 years imprisonment (after discounting his sentence by 2 years in recognition of the assistance he had given to the federal police after his incarceration). The Commonwealth DPP appealed on the grounds that the sentence was manifestly inadequate to serve the needs of general deterrence. The Commonwealth argued that, to take into account the serious nature of terrorism, a sentence of between 16 and 25 years was more appropriate.

[74] By a majority of 2 to 1, the Western Australian Court of Criminal Appeal upheld the sentence of the trial judge. Murray ACJ and Templeman J in separate judgments noted that although terrorism is a grave and serious offence, the ordinary principles of criminal justice remain applicable. In particular, their Honours said that it is important to draw a distinction between offenders whose criminal activities are frustrated because of the timely intervention of the police and those such as Mr Roche, who desist from criminal conduct voluntarily¹⁰⁶. In Mr Roche's favour was the fact that not only was he guilty of taking only relatively preliminary steps in the terrorist attacks (merely taking photos and undertaking surveillance), but also that he

¹⁰⁴ (2005) 154 A Crim R 150 at 169

¹⁰⁵ (2005) 188 FLR 336

¹⁰⁶ (2005) 188 FLR 336 at 343 per Templeman J

had actually lost enthusiasm for the plot two years ago and had contacted ASIO before he was arrested. Moreover, because he was over 50 when convicted, it was perceived that the chance of his re-offending when released from gaol was relatively low¹⁰⁷.

[75] The importance of personal contrition and the degree to which an accused is willing to cooperate with police are reinforced by contrasting the court's finding in *Roche* with the sentence of Whealy J in *R v Lodhi*¹⁰⁸. Since I have already quoted from that case I will dwell only on one particular feature of Whealy J's reasons, which in my view demonstrates the difference between legal reasoning and crude populism. In that case, defence counsel argued that the harshness of the conditions of Mr Lodhi's imprisonment justified a reduction in his sentence. Mr Lodhi had been detained in a wing of Goulburn gaol, established especially for incarcerating terrorists and the most notorious criminal offenders. It is known colloquially as "Super Max." A prisoner in Super Max is placed into solitary confinement, is only allowed outside between 1 and 3 hours a day, may be shackled when being transported around the prison and is subject to constant surveillance. In addition, a prisoner in Super Max is forced to change cells every two weeks, will have his cell searched every day, and is prohibited from being employed within the prison system. Whealy J quoted from an article published in the Daily Telegraph, entitled "Shed no tears for this terrorist" where an editorialist wrote "Aligned with the world's worst butchers and psychopaths, Lodhi deserves only to be locked up for a very long time, away from the fellowship even of other prisoners, out of sight and out of mind. And if

¹⁰⁷ (2005) 188 FLR 336 at 341 per Murray ACJ

¹⁰⁸ (2006) 199 FLR 364

his gaol term is a torment to him, few will shed any tears for that.” In response

Whealy J said the following:

“This somewhat vengeful attitude is a sorry reflection of the recent inroads made into our normally tolerant and decent society. The Court reflects no doubt, or it should do so, the attitudes of society when it imposes sentence on a serious offender. Our society, a free democratic and democratic one, allows for a variety of attitudes in such a situation. No doubt the Telegraph editorial reflects one such attitude. But it seems to me that, no matter how much we may deplore and disapprove of a particular offender, no matter how repulsive we may find his or her actions, we sacrifice our essential decency if we fail to treat him or her as a fellow human being.

If the vengeful attitude to which I have referred is allowed to override our traditional values, the war against terror will be over and we will have lost.”¹⁰⁹

[76] Although Whealy J only reduced Lodhi’s sentence by a small amount in light of the conditions of his imprisonment, I think there is comfort to be taken from his Honour’s words.

[77] The final two cases which I shall consider in detail are *R v Thomas*¹¹⁰ and the recent decision of the High Court upholding the validity of the interim control orders that were imposed against Mr Thomas¹¹¹.

[78] Jack Thomas was an Australian citizen detained by Pakistani immigration officials in January 2003 at an airport in Karachi. He possessed an altered Australian passport, a one-way airline ticket to Australia with a stop in Indonesia and \$3,800 in unexplained cash. In a series of interviews conducted whilst he was detained in Pakistan, Mr Thomas made a number of inculpatory statements in which he admitted

¹⁰⁹ (2006) 199 FLR 364 at 380

¹¹⁰ (2006) 14 VR 475

¹¹¹ *Thomas v Mowbray* [2007] HCA 33

to having had extensive contact and training with Al Qaeda. After making those admissions, Mr Thomas was eventually released by Pakistani authorities and returned home to Australia on 6 June 2003. He was then arrested by Australian Federal Police some 17 months later, on 18 November 2004, and charged with receiving funds from a terrorist organisation¹¹².

[79] Mr Thomas sought to have his admissions excluded, on the basis that they were not made voluntarily; and he argued alternatively that they should be excluded on public policy grounds. In particular, arguments focused upon the admissibility of an interview conducted with Mr Thomas in Pakistan by two AFP officers on 8 March 2003. In that interview the AFP officers told Mr Thomas that the interview was being conducted in order to obtain evidence from him that could be used in a court of law, and they took care to ensure that the interview was conducted in a way that would meet the admissibility requirements of Australian law. The interview was tape recorded; the AFP officers explained to Mr Thomas that he had a right to silence; and said also that, although the Pakistani officials would not allow him to have a lawyer present, he did have a right to refuse to continue. Mr Thomas, although not denying that the AFP officers had explained these matters to him, claimed that the interview and the admissions he made in it had to be seen in context. He claimed that for two months before the interview he had been detained by Pakistani authorities in harsh conditions, and interrogated continuously. It appears from Mr Thomas' version that a variety of techniques was used to obtain information from him. After his initial arrest he was not fed or given water for 2 days, and had to spend two weeks in what he describes as a cage. He was kept continuously blindfolded.

¹¹² *Criminal Code Act 1995* (Cth), s 102.6(1)

He claimed that Pakistani and American interrogators threatened to send him to Guantanamo Bay, and that he would never see his wife or child again unless he cooperated. He said that, whilst he was detained, the continual theme was that he could only save himself by telling his interrogators what they wanted to hear. In summary Mr Thomas alleged that he had made the admissions because he was terrified of what would happen if he did not cooperate.

[80] Such claims are of their very nature almost always difficult to verify. Mr Thomas' admissions seemed to fit in with the facts that he had falsified his passport and associated himself with people known to be Al Qaeda operatives. Courts need to consider to what extent a suspect was actually coerced into confessing, or whether he was acting of his own volition. Such judgements are difficult to make, especially when analysing how even subtle forms of persuasion (and I do not mean to suggest that all the matters of which Mr Thomas complained, if they had occurred, could be so characterised) can have a huge impact upon an individual's psychological disposition. In some cases an individual might conceive that he does not have a real choice but to talk, when in fact he does have a real choice.

[81] At first instance the trial judge admitted the confessions. It was held, that although the frightening prospect of indeterminate detention and the background interviews and interrogations did have a considerable potential to overbear his will, because Thomas understood that the interview on 8 March 2003 was qualitatively different from his earlier interviews he did know that he had a choice whether to admit the allegations or to remain silent. Thus the admissions made in that interview were admissible as they were voluntarily made.

[82] In a unanimous ruling the Victorian Court of Criminal Appeal disagreed with the trial judge, holding that the confessions were not admissible, and quashed the conviction. Maxwell P, Buchanan and Vincent JJA said:

“In our view, it is clear from the extracts from the various interviews.... and from the very circumstances themselves, that these “alternatives” were not simply “conceived” by the applicant. Rather, they were inherent in his situation, and were presented to him, directly or indirectly, by the officials on more than one occasion. It was not to the point that these clearly powerful inducements were not held out at the time of the AFP interview nor that the interview itself was directed to a different objective from that of the interviews in which the inducements were held out. What was important was whether the inducements were held out by persons in authority and whether they were likely to have been operating on the mind of the applicant at the time he was interviewed on 8 March 2003.

In our view, it was immaterial whether or not the applicant appreciated the difference between an interview conducted for intelligence gathering purposes and an interview conducted for the purpose of Australian law. What is striking is the degree of continuity between the earlier interviews and the last: same place, same AFP personal, same topics. It was hardly surprising that the applicant referred, during the AFP interview, to his hope that “the prosecutor [would] really think about all the places or the people, all the things that I have given away and help that I’ve provided- it’s just enormous - it’s a gold mine”.

Put bluntly, there can be little doubt that it was apparent to the applicant, at the time of the AFP interview, as it would have been to any reasonable person so circumstanced, that, if he was to change his current situation of detention in Pakistan and reduce the risk of indeterminate detention there or in some unidentified location, co-operation was far more important than reliance on his rights under the law. Indeed, it is apparent that he believed – and we would add, on objectively reasonable grounds- that insistence upon his rights might well antagonise those in control of his fate.

.....

Of course, the applicant could have declined to answer questions and subjected himself to what he clearly perceived would be an increased risk of indeterminate detention in a foreign country. Realistically, however, that alternative prospect was so daunting that few would be likely to have accepted the risk. Whatever the threat or inducement proffered, there is almost always a choice if the individual is prepared to accept the consequences of the

threat being realised or the inducement denied. Even the threat “Confess or be tortured” can be said to involve a choice, and a chance that torture may not be applied. But it could never be regarded as a free choice in the relevant sense.

What is important is whether the applicant could, in any real sense, be said to have had a free choice to speak or remain silent. In our view the judge fell into error by divorcing the interview from the context in which it occurred, a context which his Honour found operated on the will of the applicant. It is necessary when considering the admissibility of an inculpatory statement made by a person in the course of a police interview, to bear in mind that evidence of this kind differs from most other forms of evidence. The most obvious difference which has long been identified and to a large extent underlies the principles governing the admissibility of such evidence, is that the evidence comes into existence at the time of the interview and is a product not only of the interview itself but of many factors, both external and personal to the maker. Whether or not an individual decides to speak or remain silent, and the content and form of any statement made, will inevitably be influenced by his perception of the situation in which he is placed at that time.

Obviously, the fact and circumstances of his detention, the various inducements held out and threats made to him, and the prospect that he would remain detained indefinitely, can be seen to have operated upon the mind of the applicant when he decided to participate in the 8 March interview. While nothing occurred in the interview itself that could be seen to overbear the will of the applicant, there can be little doubt he was, at that time, subject to externally-imposed pressures of a kind calculated to overbear his will and thereby restrict, in a practical sense, his available choices and the manner of their exercise”¹¹³

[83] This case encapsulates the rule of law in operation. It applies logical reasoning in way that is consistent yet flexible enough to take into account the subtleties of the case. A layman approaching this ruling may well find it abhorrent. But that is a price we must pay, because to allow the state to obtain inculpatory statements through coercion would undermine one of our core traditional values.

[84] This brings me to the High Court case¹¹⁴, which on first impression might seem to undermine rather than uphold the rule of law.

¹¹³ (2006) 14 VR 475 at 501-503

¹¹⁴ *Thomas v Mowbray* [2007] HCA 33

[85] The High Court challenge emerged from a series of control orders that were imposed upon Mr Thomas by a Federal Magistrate on application by the Commonwealth. The power to make control orders derives from Division 104 of Part 5.3 of the *Criminal Code Act 1995* (Cth). Those powers enable the executive to take preventative action against a suspected terrorist when there is a reasonable suspicion that a person has received training from a terrorist organisation and may be a threat to national security, but for whatever reason the conclusive evidence required to convict the person as a terrorist is lacking. In such circumstances ASIO or the AFP can make an application for a suspected terrorist to be constrained in described ways. It is the court's function to carry out a balancing exercise by reviewing the evidence to see what threat the suspected terrorist poses, what control orders are being proposed and whether those orders are reasonably necessary and appropriate and adapted for the purpose of protecting the public from a terrorist attack¹¹⁵.

[86] On 27 August 2006 the Commonwealth sought *ex parte* and obtained authorisation to place Mr Thomas under a series of interim control orders after the Victorian Court of Criminal Appeal had overturned his conviction. These interim control orders required Mr Thomas to remain in his residence between midnight and 5 am every morning, to attend one of three specified police stations three times a week and to seek permission before using any telecommunication or internet device. Other restrictions included an absolute prohibition on his contacting proscribed terrorist organisations, handling firearms or explosives and travelling outside Australia. As the orders were made *ex parte* they could be challenged on a rehearing

¹¹⁵ *Criminal Code Act 1995* (Cth), s 104.4

or appeal, in which many issues could be taken into account, including that the Court of Criminal Appeal had acquitted Mr Thomas of the primary charge, and its reasons for doing so. Looking at the short reasons provided, it may be argued that the magistrate had erred in considering some of the evidence, including most obviously that the defendant had admitted to training with Al Qaeda.

[87] Nonetheless, lawyers for Mr Thomas chose to challenge the entire validity of the control order regime, arguing that Div 104 of the Criminal Code was beyond the Commonwealth's legislative power and violated Chapter III of the Constitution. I will confine my analysis of the case to High Court's reasoning on the Chapter III issues.

[88] Counsel for Mr Thomas argued that getting courts to make control orders violated Chapter III because it required them to act in a way that is not commensurate with judicial decision making. In particular they argued that the question, whether the restrictions outlined in the control order were "reasonably necessary" and "appropriate and adapted to needs of protecting the public", involved policy decisions traditionally made by the executive and legislature and not by the courts. They were said to be policy decisions because they required the courts to analyse threats that may arise in the future rather than to decide the case on facts and issues that are put before them. In the alternative, it was argued that the tests proposed were so wide that they could not be applied in a judicial way. The challenge therefore relied on two arguments that have been commonly relied on to restrict the role of the courts: firstly, that it was not the courts' role to make such decisions; and secondly, that the courts lacked the expertise to make these judgments.

[89] The High Court by a majority of 5 to 2 upheld the validity of the control orders, finding that the underlying questions were not beyond the scope of judicial power. Chief Justice Gleeson reviewed the appellant's submissions and the particular wording of the section, concluding that although the phrases like "reasonably necessary" and "appropriate and adapted" are broad they are not so ambiguous to be distinguishable from similar terms which have been judicially considered for a number of years:

"It is not difficult to see where Parliament found the language of s 104.4(1)(d) of the Criminal Code. The language is taken from a long line of decisions of this Court, and of English courts, and from local and foreign statutes. Against this background of judicial and legislative usage it cannot plausibly be suggested that the standard of reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public is inherently too vague for use in judicial decision making.

*Is there, nevertheless, something about the threat of terrorism, or the matter of inference and prediction involved in considering terrorist threats and control orders, that renders this subject non-justiciable, or in some other way inherently unsuited to be a subject of judicial decision? What has been said above as to the variety of contexts in which courts have addressed issues of reasonable necessity, and of proportionality, seems to suggest otherwise. Furthermore, predictions as to danger to the public, which are commonly made against a background of the work of police, prison officers, public health authorities, welfare authorities, and providers of health care, are regularly part of the business of the courts. In *Veen v The Queen [No 2]* this Court spoke of the role of protecting the public involved in sentencing. This topic was considered in a different in *Fardon*, where it was pointed out that the standard of an unacceptable risk of harm, used in Queensland legislation there in question, had been used by this Court in *M v M*, a case about parental access to children. Reference was made earlier to apprehended violence orders, and the restraints on liberty that they may involve. I am unable to accept that there is a qualitative difference between deciding whether an angry person poses an unacceptable risk to his or her family, or to the community or to some section of the community, or whether a sexually dysfunctional man poses an unacceptable risk to women, and deciding whether someone who has been trained by terrorists poses an unacceptable risk to the public. The possibility that a person will do what he or she has been trained to do, or will be used as a "resource" by others who have been so trained, is capable of judicial evaluation. I do not accept*

*that these issues are insusceptible of strictly judicial decision-making.*¹¹⁶

[90] In countering the idea that control order hearings involved courts acting in a manner inconsistent with the essential character of a court, Gleeson CJ said:

*“This argument fails. We are here concerned with an interim control order which was made ex parte, pursuant to subdiv B, but, as has been pointed out, in the ordinary case a confirmation hearing would have been held before now. Applications for control orders are made in open court, subject to the power to close the court under the court’s general statutory powers. The rules of evidence apply. The burden of proof is on the applicant. Prior to the confirmation hearing, the subject of the control order is given the documents that were provided to the Attorney General for the purpose of seeking consent to the application for the interim order, together with any other details required to enable the person to respond (s 104.12A). The confirmation hearing involves evidence, cross examination, and argument (s 104.14). The court has a discretion whether to revoke or vary or confirm the order (s 104.14). An appeal lies in accordance with the ordinary appellate process that govern the issuing court’s decisions. The outcome of each case is to be determined on its individual merits. There is nothing to suggest that the issuing court is to act as a mere instrument of government policy. On the contrary, the evident purpose of conferring this function on a court is to submit control orders to the judicial process, with its essential commitment to impartiality and its focus on the justice of the individual case. In particular, the requirements of s 104.4, which include an obligation to take into account the impact of the order on the subject’s personal circumstances, are plainly designed to avoid the kind of overkill that is sometimes involved in administrative decision-making. Giving attention to the particular circumstances of individual cases is a characteristic that sometimes distinguishes judicial from administrative action.”*¹¹⁷

[91] A similarly broad approach was adopted by Gummow and Crennan JJ, who argued that the traditional distinction between law and policy should not be viewed as strictly as counsel for Mr Roche had suggested. In their Honours’ view an essential role of a judge is to consider a law in its context. In fact, they went so far to suggest that this might even result in more effective judicial review. They concluded

¹¹⁶ [2007] HCA 33 at [27] – [28]

¹¹⁷ Ibid at [30]

that the control orders regime was not invalid because it asks courts to make judgments on issues that would otherwise be political in nature. Their Honours said:

“In Australian Communist Party v The Commonwealth Kitto J declared “the courts have nothing to do with policy”, but spoke too broadly. Where legislation is designed to effect a policy, and the courts then are called upon to interpret and apply that law, inevitably consideration of that policy cannot be excluded from the curial interpretative process. No principle of the separation of the judicial power from that of the other branches of government should foreclose that activity, for it is apt to lead to the just determination of controversies by the courts.

Statutes implement particular legislative choices as to what conduct should be forbidden, encouraged, or otherwise regulated. It is a commonplace that statutes are to be construed having regard to their subject, scope and purpose. Much attention now is given by the courts, when engaged on that task, to placing the law in question in its context and to interpreting even apparently plain words in light of the apprehended mischief sought to be overcome and the objects of the legislation.

.....

Courts are now inevitably involved on a day-to-day basis in the consideration of what might be called “policy”, to a degree which was never seen when earlier habits of thought respecting Ch III were formed. Care is needed in considering the authorities in this field. The vantage point from which the issues were presented is significant. The issue may be whether a power reposed by statute in an administrative or regulatory body is invalid because there is an attempted conferral of the judicial power of the Commonwealth. Here, the presence of criteria which give a prominent part to considerations of policy points against an attempted conferral of judicial power, and so in favour of validity.”¹¹⁸

[92] Gummow and Crennan JJ outlined how these principles applied to Division 104:

“It is not for an issuing court to enter upon any dispute as to the assessment made by the executive and legislative branches of government of the “terrorist threat” to the safety of the public before the enactment of the 2002 Act, the 2003 Act and the 2005 Act. But to the extent that this assessment is reflected in the terms of legislation, here Div 104 of the Code, and questions of the interpretation and application of that law arise in the exercise of jurisdiction by an issuing court, no violence is done to Ch III of the Constitution. The issuing court is concerned with a “matter” arising under a law which was preceded by a political assessment, but is not itself making or challenging that assessment.

¹¹⁸ [2007] HCA 33 at [81] – [82], [88]

The question of what is requisite for the purpose of protecting the public from a terrorist act may found a political assessment and lead to the enactment of legislation. That legislation may confer jurisdiction upon a federal court and stipulate as a criterion for the making of an order the satisfaction of the issuing court, on the balance of probabilities - a distinctively judicial activity - that each proposed obligation, prohibition and restriction would be reasonably necessary and appropriate and adapted - other familiar terms of judicial discourse - for that purpose of public protection.”¹¹⁹

[93] In their Honours’ view, Div 104 of the Criminal Code is a valid law as it defines the concept of terrorism and asks the courts to consider, on the facts of the particular case, what precautions are reasonably necessary and reasonably adapted to prevent that menace. Such a balancing exercise is relevantly an exercise of judicial power.

[94] A similar approach was adopted by Callinan J in upholding the validity of the control orders:

*“The plaintiff argues that the issues raised by s 104.4 are political issues unsuited for judicial determination. I disagree. The making of orders by courts to intercept, or prevent conduct of certain kinds is a familiar judicial exercise. Every injunction granted by a court is to that end. And every application for an interlocutory injunction requires the court to undertake a balancing exercise, that is to say of the convenience of the competing interests, and the efficacy and necessity of the orders sought. Injunctions to restrain public nuisances require the same approach. Orders to prevent apprehended violence, to bind people over to keep the peace, and, more recently, as in *Fardon v Attorney-General (Qld)*, to approve curially continued detention as a preventative purpose to protect the public, are exercises undertaken, and, in my view, as here, better so undertaken by the courts. Protection of the public is frequently an important, sometimes the most important of the considerations in the selection of an appropriate sentence of a criminal. That too is necessarily both a balancing and a predictive exercise. It is one that necessarily takes account of the role of the*

¹¹⁹ [2007] HCA 33 at [107] – [108]

police and other officials in preventing crime, and even of further criminal conduct on the part of the offender to be sentenced, as well as his personal circumstances.

I do not doubt that s 104.4 is concerned with justiciable controversies. It raises for trial issues on which evidence may be led and contested, the prospect of a terrorist act or otherwise, and whether an order would substantially assist in preventing it. Other familiar issues affecting the crafting of the order are similarly justiciable, these being as to its duration and other necessary, appropriate and reasonable components of it. The words of s 104.4 do state sufficient criteria for the resolution in a judicial way of the questions they raise. Whether an applicant for equitable relief comes to the court with clean hands, whether it would be just and equitable to make an order sought, whether conduct has been and might in the future be unconscionable, indeed a great deal of the jurisdiction of the courts, particularly in equity and much of it in common law, as well as under statute, is concerned with the balancing of interests and the assessment of past, current and future behavior and circumstances. Examples of many of these are given in the joint judgment of Gummow and Crennan JJ and need no repetition by me. All legislation is, in a sense a "response" by Parliament to events and circumstances. The legislative response will frequently provide, as one of the criteria for the exercise of any judicial power conferred, the possibility or likelihood of an occurrence or its recurrence."¹²⁰

[95] The majority's reasoning can be compared to that of minority judges, Kirby and Hayne JJ. Each held that the judicial function does not extend so far. Kirby J said:

"I accept that considerations of the "public interest" or "public policy" are sometimes applied in legal, including judicial, contexts. However, such considerations can easily be distinguished from the judicial standard that federal courts are asked to exercise in giving effect to s 104.4(1)(d) and (2) of the Code. The court in question here is not asked to take into account considerations of public policy. It is asked to determine what is necessary for "protecting the public". This criterion is not merely one of the factors to be considered. It is the only factor. The role of determining what is "reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act", balanced against the individual rights of the person subjected to the order, is at odds with the normative function proper to federal courts under the Constitution. I agree with Hayne J that the stated criteria "would require the court to apply its own idiosyncratic notion as to what is just". The court would be required to make its decision without the benefit of a stated, pre-existing criterion of law afforded by the legislature. In the present context and with the consequences that follow, the stated criteria attempt to confer on federal judges powers and discretions that, in their nebulous generality, are unchecked and unguided. In matters affecting individual liberty, this is to condone a form of judicial tyranny alien to federal judicial office in this country. It is therefore invalid."¹²¹

¹²⁰ [2007] HCA 33 at [595] – [596], [599]

¹²¹ *Ibid* at [322]

[96] Hayne J said:

“Many rules applied by the courts are expressed in abstract terms of great generality. Phrases like “just and equitable” and words like “reasonable” require difficult judgments to be made in particular cases. Those judgments are to be made, however, in the context of deciding the rights and duties of identified parties. They are judgments that depend upon applying recognised, if imprecise, measures of what is “just and equitable” or “reasonable”. By contrast, the provisions now in issue require an assessment of how to protect the public from the conduct of persons who may have no direct connection with the person to whom the order is directed. By hypothesis the persons whose terrorist acts are to be impeded by the making of the order are themselves unwilling to obey Australian law. The federal courts are asked to make orders that will (help to) impede their conduct but are given no standard by which to decide when such an order should be made except the tendency of the order to protect the public.

In Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd, a majority of the Court concluded that a statutory power for a State Supreme Court to grant an injunction “in all cases in which it shall appear to the Court or judge to be just and convenient” required that Court, when asked to grant an interlocutory injunction, to identify the legal or equitable rights which are to be determined at trial and in respect of which final relief is sought. The provision was held not to expand the jurisdiction of the Supreme Court to permit the grant of an interlocutory injunction where no legal or equitable rights were to be determined. Gaudron J identified the root of that conclusion as being found in a proposition “beyond controversy, that the role of Australian courts is to do justice according to law - not to do justice according to idiosyncratic notions as to what is just in the circumstances”. To require a Ch III court to decide whether to impose upon a person obligations, prohibitions or restrictions of the kind specified in s 104.5(3), by reference only to the relationship between those orders and the protection of the public from a terrorist act, would require the court to apply its own idiosyncratic notion as to what is just. That is not to require the exercise of the judicial power of the Commonwealth.”¹²²

[97] The minority rejected the broad authority that has been delegated to the courts by parliament. The majority by contrast had stressed that the statutory balancing exercise did not differ from the powers that courts already exercise on a daily basis in relation to other areas of law. This power, in the context of national security, provides for a check on the executive: in this case, on the executive’s power to

¹²² [2007] HCA 33 at [515] – [516]

obtain control orders. It also gives courts flexibility and room to apply the law in a way that is best able to serve the interest of the community.

Recent challenges to the rule of law in Australia

[98] Nonetheless, there have been recent events that might be seen to have placed the rule of law under strain in Australia. I would like to focus upon the Mohamed Haneef case. (What I am about to say does not take account of developments after this paper was finalised in late August 2007.)

[99] On 2 July 2007, Dr Mohamed Haneef was arrested in Brisbane International Airport, attempting to fly to India. Dr Haneef was an immigrant doctor who had been working in a Gold Coast hospital since September 2006. Dr Haneef claimed that he was leaving Australia urgently to see his wife, who had recently undergone an emergency caesarean operation. The AFP claimed that his departure was not so innocent, and that it was intimately related to terrorist attacks on London and Glasgow International Airports launched by a group of Indian doctors residing in the United Kingdom. Both the paucity of evidence that has been made public and the fact that the investigation is still progressing make it difficult for me to comment in detail. However, taking into account the information that is already on the public record, the police seemed to be acting on the basis of the following suspicions:

1. Whilst living in London Dr Haneef either resided with or at the least had extensive contact with his cousins Kafeel Ahmed and Sabeel Ahmed, both of whom had been implicated in the UK terrorist attacks. Of particular

significance is Dr Haneef's mobile telephone SIM card, which was said to have been used by the terrorist cell in preparing for the attacks; it is however unclear to what extent it was used and where it was actually located. (Dr Haneef claims that he gave the SIM card to Kafeel Ahmed as a gift when he was leaving the UK, and that he had no knowledge of what it would be used for.) The police claimed that Dr Haneef either knew about the plot or was reckless in disregarding the information around him. Since leaving the UK, Dr Haneef has had sporadic contact with Kafeel Ahmed, although this has largely been of an innocent nature¹²³.

2. That the reason Dr Haneef had given for his urgent departure was false. The primary evidence for this suspicion appears to have been an intercepted conversation between Dr Haneef and his brother in India conducted (in Urdu) in an internet chat room the day before his departure. In that conversation Dr Haneef's brother is said to have mentioned that there may be suspicions about a mobile telephone SIM card that Dr Haneef had left in England, but noted that "Nothing has been found out about you". The conversation is said to have concluded with the brother's asking Dr Haneef when he would be leaving the country, to which Dr Haneef replied "today". Dr Haneef did not discuss with the Gold Coast hospital his requirements for leave until he had received two phone calls indicating that he may be implicated in the terrorist attacks. His ticket was one way, perhaps demonstrating (at least, to the AFP and the Minister) that he did not intend to return to Australia¹²⁴.

¹²³ H Thomas, "I am not a terrorist: doctor", *The Australian*, 13 July 2007, p 1

¹²⁴ See information contained in Hon Kevin Andrews MP, Minister for Immigration and Citizenship, "Dr Haneef- Advice from Solicitor-General" (Press Release, 31 July 2007) <www.minister.immi.gov.au/media/media-releases/2007/ka07066.htm> at 5 August 2007

[100] There was thus behaviour on Dr Haneef's part which could justify an investigation. In fact, in the age of terrorism, the police might have been negligent if they had not taken all necessary precautions¹²⁵. (Having said that, it is only fair to Dr Haneef to point out that the full texts of the records of interview and the chat room conversation seriously undermine the AFP's and the Minister's reliance on snippets from them, devoid of context.) However, the question is: was the way the government responded necessary in the circumstances?

[101] The police investigating the matter immediately moved to use their powers under the counter terrorism laws to detain Dr Haneef without charge. In justifying this action the AFP announced that "the detention of Mr Haneef is necessary to preserve evidence; obtain evidence; and complete the investigation, including by way of further questioning of Mr Haneef, given the risk that Mr Haneef may seek to flee Australia [and] the risk that Mr Haneef may interfere with on going investigations by Australian and overseas authorities."¹²⁶ There is no doubt that a reasonable amount of time was needed to conduct this investigation. Perhaps the most important source of information provided to the AFP was evidence obtained by Scotland Yard. This meant that there was a fair amount of "dead time" as the AFP waited for the results of the English investigation¹²⁷. The AFP also had to go through a huge amount of material located in Dr Haneef's apartment, including 1636 photographs, a 40 gigabyte hard drive, two mobile phones, two 128 megabyte flash drives, a Cybershot digital camera and documents including emails, computer discs and

¹²⁵ P Kelly, "Crisis of Trust", *The Weekend Australian*, 4 August 2007, pp 19 and 22; J Albrechtsen, "No time to lose our nerve", *The Australian*, 29 July 2007, p 16

¹²⁶ H Thomas, "Reasons to hold Haneef stretch thinner by the day", *The Australian*, 14 July 2007, p 1

¹²⁷ loc cit

global positioning system, the total of which has been described as the equivalent of 30,000 pages of text¹²⁸.

[102] The investigating police have asserted that throughout the 12 days in which Dr Haneef was incarcerated without charge they were working feverishly to discover the truth. This may be a little difficult to accept. From its very beginning, there seem to have been problems in the way in which the investigation was conducted. The most questionable conduct of the police arose in relation to Dr Haneef's SIM card, which they told a magistrate was found in the vehicle used in the Glasgow bombing when it was actually located in Liverpool¹²⁹, and their focus on inculpatory statements in Dr Haneef's personal diary which on further investigation turned out to be notes hand written by police¹³⁰. It was even admitted that police had allowed Dr Haneef's landlord to clear his flat, potentially causing the loss of important evidence¹³¹. With little evidence being produced to go beyond what I have already outlined, it is unsurprising that the AFP did not apply to extend the detention of Dr Haneef. Nor is it surprising that he was eventually released on bail. The charges against him seem to have been weak. (This view of the AFP's case is I think supported by the decision of the DPP to drop all of the charges that were preferred against Dr Haneef.) This raises questions about the competence of the police, and may indicate that they acted pre-emptively and were a little heavy handed. But it would be melodramatic to say that the initial detention of Dr Haneef of itself undermined the rule of law.

[103] Things changed on 16 July 2007. The Honourable Kevin Andrews MP, Minister for Immigration and Citizenship, announced that he would move to deport Dr

¹²⁸ J Albrechtsen, above n 125 at 16

¹²⁹ J Gibson, "Haneef's SIM not in Jeep", *The Sydney Morning Herald*, 20 July 2007, p 1

¹³⁰ H Thomas, Haneef diary under the microscope", *The Australian*, 23 July 2007, p 1

¹³¹ S Neighbour, "Police chief on the back foot", *The Weekend Australian*, 4 August 2007, p 22

Haneef notwithstanding that he was free on bail. Mr Andrews claimed that as Minister for Immigration he had a responsibility to protect the Australian people, and had a reasonable suspicion that Dr Haneef would fail the “character test” because he was known to have associated with suspected terrorists¹³². This move was greeted with scepticism, and allegations that it was motivated more by political expediency than law. Stephen Estcourt SC, President of the Australian Bar Association and a former member of the Administrative Appeals Tribunal, claimed that the Minister was “usurping the role of the court” and that “usually this sort of visa cancellation takes place after charges have been laid against someone and they’re run their course and they’ve resulted in a penalty being imposed.” He concluded by arguing that the deportation “has got to be seen as a threat to the rule of law if a ministerial discretion is used to effectively reverse, or to reverse for practical purposes a decision of the court. And it’s sophistry to say that one’s got nothing to with the other.”¹³³

[104] The “character test” to which the Minister referred, and the Minister’s powers (among other things) to cancel a visa, are referred to in s501 of the *Migration Act 1958* (Cth). The Minister may cancel a visa if the Minister reasonably suspects that the person to whom it has been granted does not pass the character test and the person does not satisfy the Minister that he or she does pass the character test (s501(2)). Section 501(3) provides that the Minister may cancel a visa if the Minister reasonably suspects that the person to whom it was granted does not pass the character test and is satisfied that cancellation is in the national interest (s502(3)).

¹³² M Davis and J Gibson, “Bailed then jailed: justice in the new age of terrorism”, *The Sydney Morning Herald*, 17 July 2007, p 1

¹³³ P Coorey and J Gibson, “Haneef detained after bail win”, *The Sydney Morning Herald*, 17 July 2007, p 4

The rules of natural justice do not apply to a decision under subsection (3) (s502(5)).

Subsection (6) sets out the character test as follows:

Character test

- (6) For the purposes of this section, a person does not pass the **character test** if:
- (a) the person has a substantial criminal record (as defined by subsection (7)); or
 - (b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or
 - (c) having regard to either or both of the following:
 - (i) the person's past and present criminal conduct;
 - (ii) the person's past and present general conduct;the person is not of good character; or
 - (d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:
 - (i) engage in criminal conduct in Australia; or
 - (ii) harass, molest, intimidate or stalk another person in Australia; or
 - (iii) vilify a segment of the Australian community; or
 - (iv) incite discord in the Australian community or in a segment of that community; or
 - (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Otherwise, the person passes the **character test**.

[105] Thus, from a legal perspective, the Minister undoubtedly has the power, on appropriate facts, to revoke a visa. (The decision to revoke Dr Haneef's visa has been quashed, although on grounds relating to the manner of exercise of the power, not because the power did not exist.) As the advice drafted by the Commonwealth

Solicitor General, David Bennett QC¹³⁴, and the decision by Emmett J in *Minister for Immigration and Multicultural Affairs v Wai Kuen Chan*¹³⁵ indicate, the Minister's discretion under s 501 of the *Migration Act* is extremely broad. A person may be deemed to be an associate of a terrorist even if not himself involved in a terrorist attack. This does not mean that the Act itself is not problematic. It may well be argued that the "reasonable suspicion test", which is lower than even the civil standard "balance of probabilities test", is intolerably low. Spender J in setting a date for the hearing of the challenge to the Minister's decision noted that he had grave concerns with the Commonwealth's approach, in that having "a cup of coffee, or a picnic with the kids" might be enough to engender a reasonable suspicion. As his Honour explained "I have been associated with persons involved in criminal activity. I have defended them, charged with murder. Unfortunately I wouldn't pass the character test in your statement."¹³⁶

[106] Spender J has now ruled that the Minister's decision should be quashed¹³⁷. (His Honour's reasons are lengthy and detailed. What follows is taken from the summary provided, and therefore there are no references to the judgment). He did so on the basis that the Minister had applied the wrong test in reaching the decision that he did. It appears from the Minister's submissions, and the reasons of Spender J, that the Minister concluded that even "innocent" association between the holder of a visa and people suspected of criminal activity was sufficient to enliven the power to cancel the visa. That approach was supported by the decision of Emmett J in *Chan*.

¹³⁴ David Bennett QC, Solicitor-General for the Commonwealth, "Dr Mohammed Haneef: Opinion" (Press Release, 31 July 2007) < http://www.minister.immi.gov.au/media/media-releases/2007/pdf/Solicitor-General_Advice.pdf > at 5 August 2007

¹³⁵ (2001) 34 AAR 94. Note however para [103] below.

¹³⁶ J Gibson and C Skehan, "The bumpy road to justice of a non-citizen doctor", *The Sydney Morning Herald*, 19 July 2007, p 1

¹³⁷ *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273

[107] Spender J held that *Chan* was wrongly decided. He said in essence that it was insufficient to consider whether the holder of a visa had an association with a person or group, and then to consider as a separate question whether that latter person or group was reasonably suspected of involvement in criminal activity. It was necessary to consider whether that association extended to the person or group in their capacity as persons reasonably suspected of involvement in criminal activity.

[108] Before too much is made of the decision of Spender J, I should not that his Honour concluded also that if the Minister had applied the correct test, it would have been open to him, acting reasonably, to form a decision to cancel Dr Haneef's visa.

Conclusion – the courts do have a role

[109] A political columnist recently and predictably warned readers to “be aware of the false solution propounded by the lawyer lobby that the answer lies in strengthening judicial review against the executive. That is the great myth of our age.”¹³⁸ Nothing could be further from the truth. For centuries the judiciary has stood between the state and its citizens. That is why, in despotic governments and, increasingly, in democratic governments, the executive arm of government seeks by legislation to ring fence its activities so as to put them beyond the realm of judicial scrutiny. The corollary of the author's view would appear to be that the solution (to whatever is the problem) lies in strengthening the executive against judicial review.

¹³⁸ P Kelly, above n 125, at 19

The most obvious problem for which that could be a solution is: “how can we accelerate our slide into tyranny?”.

[110] In truth, the columnist either does not understand, or deliberately seeks to misrepresent, the full nature of the democratic system of government under which we live. I have explained that in some detail earlier. Arguments such as those to which I have referred confound democracy with populism. As too many tragic events in the last century have shown, populism leads not to the enhancement but to the destruction of democracy.

[111] As long ago as 1690, John Locke observed that “wherever law ends, tyranny begins”¹³⁹. Nothing in the three intervening centuries has done anything to invalidate that observation. Those who inveigh against “the lawyer lobby” or the judiciary would do well to consider it.

[112] The decisions to which I have referred do not undermine our democratic institutions. Nor do they seek to frustrate government for the sake of it, although this may be a consequence. They involve a careful analysis of values that ordinary people would consider to be indispensable to a free and functioning democracy. Such values include an individual’s right to liberty, freedom from the exercise of arbitrary power, transparent government and basic human rights. To say that these values are a myth and should be overborne by crude theories of populism and preventative executive action, misconceives the true nature of our democracy.

¹³⁹ Second Treatise of Government (1690) chapter XVII, s202.

[113] Critics of the counter terrorism laws claim that the executive and the legislature have deprived the judiciary of its power to undertake judicial review. This argument too is fallacious. Australian courts, most recently in the High Court's ruling in *Thomas v Mowbray*¹⁴⁰, have applied the anti-terror laws according to their terms. Sometimes this has required courts to make unpopular decision that do frustrate the government. However, not once has an Australian court balked from making a difficult decision when it is seen to be just and right to do so. Australian courts have shown that in the age of terror, laws are not silent.

¹⁴⁰ [2007] HCA 33