

# **RESPONSES TO TERRORISM;**

## **Have we gone too far?**

**TOM PERCY, QC \***

### **1. Introduction**

The events of 11 September 2001 changed the world forever, politically, philosophically, and in many other ways.

The events of 11 September also caused a legislative knee-jerk reaction which set in motion a raft of measures previously unprecedented in Western democracy. Subsequent events in Bali in 2002, Madrid in 2004 and London in 2005 ensured that the juggernaut of legislative reform continued.

This paper sets to examine whether the reforms we have put in place are justifiable, or merely an unnecessary infringement on our fundamental human rights and freedoms? Eight years on, the question needs to be asked, have we gone too far?

### **2. The Australian Experience**

The Australian Government reacted swiftly to the events of 11 September 2001 with the introduction of over 40 new counter-terrorism Bills.<sup>1</sup>

The primary and perhaps most controversial legislative reform was the implementation of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*. The powers contained in this Act radically derogate from traditional criminal law ideals such as:

- the presumption of innocence,
- the right to remain silent,
- the right to legal representation, and
- the right not to be detained without trial.

For instance, section 34G(4) of this Act places an initial evidentiary burden on the individual. It effectively removes the presumption of innocence. According to the then Justice Minister Chris Ellison this merely reversed the 'evidentiary burden', not the onus of proving guilt. What exactly the minister meant by this is unclear. Any onus of proof is always a matter of evidence.

One observer, Greg Bradshaw, noted in relation to the loss of the presumption of innocence:

*Under the new laws, people can be detained who are not suspected of being involved in any crime. You don't have to have committed, be committing or be suspected of any involvement in, a terrorist incident. The suggestion that they have passively acquired information will be enough.*<sup>2</sup>

Another provision, section 34G(1), removes an individual's right to remain silent. It has been suggested that such a provision could go as far as to compel doctors, lawyers and other professionals to answer questions that would cause them to breach their ethical obligations and that this would result in violations of charters such as the *United Nations Basic Principles on the Role of Lawyers 1990*.

Speaking on the introduction of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, Senator Len Harris commented:

*It is critical that, in responding to a terrorist threat, we hold fast to the rule of law. Secret detentions fail that test. Abolition of the right to remain silent fails that test. Detention without access to legal advice for 48 hours fails that test. On the scales of justice, we are simply losing the balance.*<sup>3</sup>

Whilst sections 34D(5) and 34F(5) of the Act require the Minister to ensure a warrant permits contact with an individual's lawyer; another provision, section 34ZO, allows for the relevant authority to prohibit an individual from contacting a lawyer in certain conditions. Arguably, this may be in conflict with the *United Nations Basic Principles on the Role of Lawyers 1990*.

Even when access to a lawyer is permitted, any discussions between an individual and his or her lawyer may be monitored. This may arguably be in breach of a number of similar international enactments such as the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988* and the *UN Standard Minimum Rules for the Treatment of Prisoners 1977*.

Despite these derogations, Daryl Williams QC, former Attorney General, commented:

*These measures are extraordinary, but so too is the evil at which they are directed. These measures are transparent and subject to considerable safeguards.*<sup>4</sup>

This was rejected by the opposition. Simon Crean observed:

*Labour are committed to protecting Australia from terrorism, but we do not have to turn it into a police state to achieve it. The*

*government's legislation is flawed because it does not provide sufficient protection for our citizens. The Attorney General indicated that what he wanted was a capacity for intelligence gathering and questioning by ASIO. Now he is turning it into a detention regime. We have been prepared to support the means by which ASIO gets that additional questioning capacity in it's ability to intelligence gather. But we are not going to create an environment in which people who are being questioned are treated worse than suspects..<sup>5</sup>*

It is probably not surprising that this Bill did not pass in its original form. It did however pass with minimal changes in 2003.

In its final form, it radically enhances the powers of the Australian Security Intelligence Organisation to arrest, detain and question individuals in relation to terrorism related offences. A warrant to exercise these powers will be granted on the basis that the issuing authority has:

*... reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.*

In 2004, the Australian Government introduced the *Anti-Terrorism Bill 2004 (No. 2) and (No. 3)*. This Bill contained an array of terrorism related offences as well as "preventative" measures such as detention and control orders.

The then Attorney General Phillip Ruddock commented:

*This Bill responds proactively to the legal challenges that I have mentioned. Importantly, it will give police the ability to do their job properly while preserving the important safeguards already in Part 1C of the Crimes Act. This Bill is very much a part of this government's commitment to making Australia a safer place in which to live..<sup>6</sup>*

After an internal review of counter-terrorism legislation, more changes were made to the Bill and the key provisions were extended to include incitement offences and extended the criteria by which an individual could be convicted of a terrorism related offence.

By 2006 the legal landscape in Australia had effectively changed to the extent that any person suspected of involvement with a terrorist act, of any description, at any level, had forfeited the vast majority of his or her statutory and common law rights.

### 3. Dr Mohamed Haneef

The practical application of the new legislation didn't take long to be seen in action.

On 2 July 2007, the Australian Federal Police arrested a Dr Mohamed Haneef ('*Dr Haneef*') at Brisbane Airport. The underlying basis for the arrest was that Dr Haneef, when he departed England over a year earlier, had given his mobile phone SIM card to his cousin Sabeel Ahmad so the latter could make use of its remaining free calls.

In late June 2007, Sabeel Ahmad's brother Kafeel drove a Jeep, laden with explosive materials, into the doors of Glasgow International Airport in a spectacularly unsuccessful terrorist attack.

At this early stage, Dr Haneef requested a lawyer but was denied this right, which in itself would appear to be a breach of the *Crimes Act*.<sup>7</sup> From the airport he was taken to the Australian Federal Police headquarters where he was finally allowed to sleep. He was questioned at length the following day. The police obtained an order at 10:15am to extend the period of questioning from 4 hours to 12 hours. Of those 12 hours, 11 hours and 43 minutes were used and 1, 615 questions were asked and answered.<sup>8</sup>

At 11:05pm on the same day, a further order was made permitting the AFP to hold Dr Haneef for a further 48 hours without questioning. At the expiration of the 2 days, another order was made, this time for 4 more days. At this point, Dr Haneef again requested a lawyer to be present when this application was made. This was allowed and a Brisbane solicitor, Mr Peter Russo was allowed to see Dr Haneef. Mr Russo was not however permitted to see the materials which formed the basis on which the order was made.

Dr Haneef's solicitor shortly thereafter engaged a Brisbane barrister, Steven Keim SC as counsel. On 9 July 2007 another Police application was made, this time for 5 more days. Mr Keim acknowledged that the legislation forbid him to see any confidential material but submitted that he was entitled to sufficient information to allow any submissions drafted to be meaningful. The police were then instructed to obtain instructions regarding this and ordered a further 2 days so that they could do this.

On 11 July 2007, the Australian Federal Police appeared in the Magistrates Court and submitted that they were attempting to put together information, which could be disclosed but that they needed further time to do this. By default, Haneef was held for the original 5 days that the Australian Federal Police had requested. On the same day, the police gave Haneef's legal team access to 10 pages of information, which set out their reasons for holding Haneef for the further 3 days.

On the expiry of the 5 days, the Australian Federal Police made, but then withdrew their application for an extension of time leaving them with 12 further hours only to question Haneef, which they did. Following this, on 14 July 2007, the Australian Federal Police charged Haneef with recklessly giving a SIM card to a terrorist organisation. His legal team applied for bail and the Magistrate reserved her decision for 2 days. On the 16 July, the Court granted bail subject to a surety.

On the same day, Immigration Minister Kevin Andrews announced that Haneef's visa was cancelled on the grounds that he did not satisfy the "character test". The timing of the decision was somewhat curious. It had the desired effect of ensuring that Dr Haneef remained in custody.

On 18 July 2007, an application was filed in the Federal Court to have the decision to cancel Haneef's visa set aside.

Black CJ, French and Weinberg JJ considered the history of the character test. In doing this, they emphasized the principle that statutes should be interpreted in a way in which does not infringe common law rights and fundamental freedoms.<sup>9</sup> The Court ultimately found that the cancellation of a visa under the *Migration Act* requires:

*... some sympathy, or support for, or involvement in, the criminal conduct of person, group or organization.*<sup>10</sup>

As a result, the application to reinstate Haneef's visa was successful.

On 24 July 2007, Haneef's legal team filed another application in the Magistrates Court requesting that the charge as laid out, ought to be struck out. The application was scheduled to be heard on 27 July 2007 and on this day the Director of Public Prosecutions withdrew the charge against Haneef.

This was due to the fact that at some point between the date of the bail application and 27 July 2007, it was revealed that the information presented in court regarding the SIM card was incorrect. It was accepted that the charges against Dr Haneef were completely unfounded.

#### **4. The Inquiry**

In March 2008, the Attorney General, the Honourable Robert McClelland MP announced the appointment of the Honourable John Clarke QC to conduct an inquiry into the case of Dr Mohamed Haneef. In November 2008, Mr Clarke presented his report to the Attorney General, which recommended there be an inquiry to answer, *inter alia*, the following questions:

1. *How it came to be incorrectly asserted that the SIM card, which Dr. Haneef gave to Sabeel Ahmed, was found in the burning Jeep at Glasgow Airport.*
2. *Who in the Australian Federal Police (AFP) first obtained the information that Dr. Haneef's SIM card had not been found in the burning Jeep at Glasgow Airport, and when that information was obtained, when the information was given to senior officers of the AFP, and why the information was not given to Dr. Haneef's lawyers, and why no correction had been made to information that was tendered to the Magistrate's Court in Brisbane.*
3. *Who in the AFP first obtained the information that an email had been sent by Kafeel Ahmed to his brother, Sabeel Ahmed that effectively demonstrated Dr. Haneef's innocence of the crime with which he was charged.*
4. *How the AFP came to be interested in Dr. Haneef's immigration status and the reasoning which four AFP officers employed in coming to their decision to arrange for Dr. Haneef's visa to be cancelled.*
5. *What information was given to the then Minister of Immigration, Mr. Andrews, which persuaded him that Dr. Haneef's visa should be cancelled.*

The report that followed this enquiry was released in January 2009 and contained ten key recommendations. These included:

- Amending part 1C of the *Crimes Act*, which permitted the detention of Dr Haneef for 12 days without charge;
- Appointing an independent reviewer of terrorism laws; and
- Amending the offence of providing support to a terrorist organization, with which Dr Haneef was eventually charged.

Other recommendations were directed towards improving cooperation and information sharing between key government agencies.

Following the release of the report, the Government announced its response to Mr Clarke's recommendations. It also announced its response to a number of previous reviews of Australia's anti-terrorism laws, including the Parliamentary Joint Committee on Intelligence and Security's review of terrorist organization laws, and the Australian Law Reform Commission's review of sedition laws.

In its response to these reviews, the Government has indicated that it will consider appointing a new National Security Legislation Review Monitor to review Australia's anti-terrorism laws and report to Parliament.

The Government has also indicated that it will consider amending the terrorist organisation offences and the procedure for listing a group as a terrorist organisation, sedition offences and the definition of 'terrorist act'.

If implemented, these reforms could go some way to restoring fundamental human rights and rule of law principles within Australia's anti-terrorism laws.

## **5. Jack Thomas – A Judicial Challenge**

In *Thomas v Mowbray* (2007) 81 ALJR 1414; [2007] HCA 33, the plaintiff, Joseph (Jack) Thomas admitted he had undertaken training, including weapons training, at an Al Qa'ida camp in Afghanistan in 2001. In order to protect the public from an apprehended terrorist attack, the first defendant, Mowbray FM, made an interim control order against Thomas under section 104.4 of the *Criminal Code* (Cth). Without those controls, Mowbray FM held, Thomas' knowledge and skills could provide a potential resource for the planning or preparation of a "terrorist act".

The order required Thomas to remain at his residence in Williamstown, Victoria, between midnight and 5 am each day unless he notified the Australian Federal Police of a change of address. It also required him to report to the police three times a week and submit to having his fingerprints taken. He was prohibited from leaving Australia without the permission of police and was prohibited from acquiring or manufacturing explosives, from communicating with certain named individuals, and from using certain communications technology.

A majority of the High Court of Australia upheld the constitutional validity of "anti-terrorism" laws that allow courts to impose interim control orders upon persons believed to pose a threat to public safety because of their connections to listed terrorist organisations.

## **6. Backtracking**

Moves afoot to amend the current legislation were brought about early this year with the *Anti-Terrorism Laws Reform Bill 2009*. In essence, it seeks to address the mistakes made in the haste to have "... 200 pages of legislation and explanatory memoranda"<sup>11</sup> pushed through Parliament overnight. More specifically, this Bill seeks to:

- Amend various provisions in the *Criminal Code 1995* related to the definitions relating to terrorism offences, provisions relating to the proscription of

'terrorist organisations', offences relating to interaction with 'terrorist organisations', 'reckless possession of a thing' and the offence of sedition.

- Amend various provisions in the *Crimes Act 1914* relating to detention of terrorism suspects.
- Amend various provisions in the *Australian Security Information Organisation Act 1979* relating to the questioning of terrorism suspects and the detention of terrorism suspects.
- Repeal the *National Security Information Act 2004*.

Indeed, as noted in the Second Reading Speech of this Bill, Senator Scott Ludlam commented:

*Australia's parliament and community did not get an opportunity to hold a thorough, calm and considered debate over the terrorism laws when they were introduced; nor did they consent to the substantial reallocation of resources away from health and schools to security and defence. Now is the time for a thorough, calm and considered debate about methods for dealing with terrorism that strengthens our democracy and are consistent with Australian values. That process includes the appointment of the long-awaited independent reviewer of terrorism laws, whose time need not be wasted on the draconian measures amended or repealed in this Bill.*<sup>12</sup>

## **7. Lessons for the Future**

The democratic state that we once were has, as a result of some of these fundamental changes to our law, at least partially surrendered to terrorism.

The Australian Federal Police, Australian Security Intelligence Organisation, the Attorney General and the State Police are, as the law currently stands, empowered to arrest, detain and question individuals in relation to terrorism related offences with little or no evidence which draws a link between an individual and a terrorism related offence.

In *A v Secretary for State for the Home Department* [2005] 2 AC 68 [at 97], Lord Hoffman observed in this regard:

*The real threat to the life of the nation is the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve.*

The Haneeef saga demonstrates the extent to which events such as 11 September 2001 have restricted and imposed upon our human rights and fundamental

freedoms. In a country that does not provide for the protection of these basic rights, the prospect of such draconian counter-terrorism laws should instil fear in all of its citizens.

The intention of the terrorists is, at least in part, to cause western democracies such as ours to so restructure their way of life so as to bring them more in line with the regimes that exist in their own forms of society.

They would look on with pleasure to watch us queuing at airports and undergoing invasive personal searches, the likes of which we have never been required to submit to previously. They would have even greater pleasure looking on as our parliaments fell over themselves in their haste to enact laws taking away the sorts of privileges that we have enjoyed for generations, like the right to silence, the right against self incrimination, the unrestricted right to legal advice and the right not to be detained without charge.

They may not have taken over our cities or our homes, but in a very real sense, they have already won a large part of the war.

It is incumbent upon those of us who, through our legal training, or through positions of influence that we may hold within the community, to raise awareness of these matters, lest be war lost forever.

As one British commentator, C. Walker<sup>13</sup> observed:

*There is no final victory in the war against terrorism. Equally, in an asymmetric conflict, the terrorists cannot destroy western polities, but they may be able to provoke western polities to destroy their own spirits.*

Perhaps the final word on the subject should lay with Kirby J, who in his dissenting judgement in Thomas' case (at [387]), said that Australians would look back with '*regret and embarrassment*' at the decision in Thomas.

It might not unfairly also be suggested that we might look back with the same sort of regret and embarrassment at the legislative changes adopted in Australia since 2001 in relation to terrorism.

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<sup>1</sup> A chronology of the legislative and other developments between 11 September 2001 and December 2007 can be found at: <http://www.aph.gov.au/library/intguide/law/terrorism/html>

<sup>2</sup> Greg Bradshaw, ASIO Anti Terrorism Bill Exposed (2003) Socialist Party Australia <http://www.socialistpartyaustralia.org/archives/105> at 7 August 2009.

<sup>3</sup> Commonwealth, *Parliamentary Debates*, Senate, Monday 21 October 2002 (Senator Harris).

<sup>4</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1932 (Daryl Williams MP, Attorney-General).

<sup>5</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2002, 10429 (Simon Crean).

<sup>6</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 2004, p 44 (Phillip Ruddock).

<sup>7</sup> Rod Hodgson, 'Haneef, Waiting for the Clarke Report' (2008) 28(11) *Proctor* 29-30.

<sup>8</sup> Peter Russo, 'Haneef: Peter Russo's Story' (2008) *Brief, Law Society of Western Australia Publication*.

<sup>9</sup> *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203, 107.

<sup>10</sup> *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203, 130.

<sup>11</sup> Commonwealth, *Parliamentary Debates*, Senate, Tuesday 23 June 2009 (Senator Ludlam).

<sup>12</sup> Commonwealth, *Parliamentary Debates*, Senate, Tuesday 23 June 2009 (Senator Ludlam).

<sup>13</sup> Cited by Greg Martin in 2008 32 *Crim Law Journal* 114.