

'Too Safe or Too Sorry'

CLARKE INQUIRY PUBLIC FORUM

22 September 2008

Presentation by Mr David Bennett AC QC

Part 1 – Preventative legislation against terrorism

It is frequently said that terrorism is not new (cf Guy Fawkes or the anarchists) and that it is “just like any other crime”. As a matter of degree, this is certainly not so. The combination of the following factors is unique:

1. Our society places a high value on human life.
2. It is heavily dependent on vulnerable infrastructure.
3. We have large cities with huge numbers of people, many of whom are frequently in the same place at the same time (eg football stadia).
4. Aviation is particularly vulnerable.
5. Weapons of mass destruction in the form of explosives are readily available to all.
6. Al Quaida has massive resources and it desires to inflict the maximum possible loss of life and property on the West.

These factors make it vital to defend ourselves. The criminal law is a crude weapon because it depends on the harm having been done. We need prevention not cure after the event.

One of the arguments frequently deployed by those who oppose anti-terrorism legislation, particularly legislation providing for preventative detention or control orders, is based on the presumed motivation of terrorists. Terrorists, it is said, oppose the Western ideals of human rights (which presumably include freedom from preventative detention). Therefore, the argument runs, if we limit human rights in any way in order to prevent terrorism, we are being hypocritical by accepting modifications of the very freedoms which we claim to be fighting to preserve.

This argument is fallacious.

In summary, there are two fallacies:-

1. The argument assumes that the principle “preventative detention and other preventative orders which restrict a person’s freedom of action are wrong” has no exceptions.
2. It is not hypocritical to create an exception to a general principle in order to preserve it or the milieu in which it exists.

I will deal with these separately.

First, there are very few general principles which have no exceptions. Most principles are ultimately nothing more than general conclusions based on numerous examples which point in a particular direction. This is the basic problem both with bills of rights (which need to have a mechanism for spelling out exceptions) and with many religious or ethical principles. We can all agree that killing people is wrong yet that killing in self-defence or in the defence of others is justifiable. Whether or not euthanasia ought to be permitted depends on more complex questions than the simple generalisation that killing people is wrong. To take a more specific example, discrimination in employment on the basis of religion is wrong. There is a clear exception where a religious body is proposing to employ a religious leader and requires that person to belong to its own religion. This creates a need to answer the following syllogism:-

All discrimination in employment on the basis of religion is wrong.
(Major premise)

For the Catholic Church to insist that priests be Catholics is discrimination in employment on the basis of religion. (Minor premise)

Therefore for the Catholic Church to insist that priests be Catholics is wrong. (Conclusion)

The conclusion is clearly wrong. The difficulty is to ascertain where the fallacy lies. It is undesirable to seek to refute the minor premise by twisting the meaning of the word "discrimination". The better answer is that the major premise is not universally true. It should be expressed: "Subject to certain narrow exceptions, all discrimination in employment on the basis of religion is wrong," or, in formal logical terms: "Some discrimination in employment on the basis of religion is wrong."

This effectively invalidates the syllogism. It now contains an undistributed middle (as: Some X are Y, Z is X; therefore Z is Y).

Reasoning which assumes the universality of moral or ethical principles is frequently used in political debate. When so used, it is frequently little more than a device to avoid sensible inquiry into the merits and demerits of the particular proposal under consideration. This tendency is well illustrated by Senator Brett Mason in his recent book: "Privacy without Principle", in which he demonstrates how an uncritical approach to the idea that privacy is a universal good can lead to a failure to examine the relevant issues in political debate.

The present example is a good one. In general, people ought not to be imprisoned without conviction for crime after a fair trial. There are, however, some exceptions to this generalisation. Obvious examples are remand pending trial where bail is refused, quarantine, dangerous mental derangement and jury sequestration. To argue from such a generalisation to the proposition that one should not have preventative detention for suspected terrorists is to avoid the real issues that must be faced involving, among other factors, weighing the risk of wrongful incarceration against the risk of a preventable terrorist act occurring. The risk of mass destruction and loss of life is clearly a highly relevant consideration. On the other hand, the prediction of the future is less accurate than the determination of what has occurred in the past and this is a relevant factor to be placed in the scales (cf. The film "*Minority Report*"). The Government claims to have found the appropriate balance. Whether it has done

so is a matter for legitimate debate. One should not seek to foreclose that debate by reliance upon a general principle which already has exceptions and to which this may well be another.

The role of religion in this type of question is interesting. Religions tend to develop general principles and then petrify them as absolutes. If there had been roads and traffic at the time when the major Western religions were developing, it may well be that keeping to a particular side of the road would have become a religious duty. Religious leaders might well have described those who sought to develop one-way streets as proponents of moral relativism because they necessarily permit departure from the hypothetical religious duty to keep to a particular side of the road.

In fairness it should be noted that the mediaeval church recognised to some extent the need to depart from rigid principle. It developed the doctrine of economy under which certain rules could be waived where necessity required it (This is discussed by Young J in the *Assyrian Church case*). St Cyril gave the example of a cargo ship whose purpose is to transport cargo encountering a storm. The mariners must throw some of the cargo overboard to save themselves, their ship and the remaining cargo. The law also has analogies. One is the standard rule in rules of court which permits the court to dispense with particular procedural rules or to extend or abridge time in particular cases. The history of the development of Equity is a history of realisation that fixed rules (of the common law) might have undesirable consequences in particular circumstances. Indeed, the standard provision in Australian criminal legislation permitting the court to find the offence proved but, without proceeding to conviction, to impose no penalty is a recognition of the approach for which I contend.

The second fallacy in the proposition is that it sets up a false paradox. I am reminded of the standard placard in anti-war demonstrations which reads "Fighting for Peace is like ----ing for virginity." The analogy and the paradox are erroneous. If peace is an ultimate good, there may well be circumstances where a country or body wishes to destroy peace and the only way to prevent this is to fight by defending oneself against that country or body. Neville Chamberlain is almost universally excoriated for failing to recognise this in 1938. Indeed, if a principle is an important one but has exceptions, it is hard to imagine a stronger case for the creation of an exception than the situation where the preservation of the principle itself requires an exception to be created.

Here again, one can find a useful analogy in anti-discrimination law. It is well-recognised that affirmative action for the purpose of mitigating the consequences of past discrimination is a vital weapon in the armoury of those who wish to fight discrimination. It would be ridiculous to argue that, because affirmative action necessarily involves discrimination, it is hypocritical to use it in the fight against discrimination. It is the need to fight discrimination which makes this exception necessary. Killing in self-defence or defence of others is another example. The need to preserve life may necessitate taking it. This is not hypocritical.

The argument under consideration is in the same category. The preservation of our way of life and our rights and freedoms against those who seek to destroy them is essential. If that involves the creation of a new exception to one of those rights or freedoms, that issue should be weighed without pre-judgment on the basis of a false suggestion of hypocrisy or paradox.

The proposition that prevention is better than cure applies to migration legislation and decision-making. The definitions which permit the Minister to exclude potential

immigrants need to be drafted bearing this in mind. Much of the decision-making in this area necessarily involves risk management.

We need to reason from pragmatism not slogans and, if I may conclude this section with a slogan, we need to strike a happy medium

Part 2 – Confidentiality under the Migration Act

The second matter with which I seek to deal is the strictness of the non-disclosure rules in the Migration Act. If immigration information comes from virtually any Australian government agency (state or federal) or virtually any foreign country or agency of a foreign country and it is marked as confidential, it receives a high degree of automatic protection. Obviously this may be necessary in some cases. If a friendly foreign country were to report to the Minister for Immigration (perhaps through ASIO, ASIS or the AFP) that it had a spy in Bin Laden's personal staff who had reported that the immigration applicant was an *Al Quaida* sleeper, clearly that source could not be disclosed. On the other hand, suppose that the New Zealand police were to send the Minister a copy of an applicant's criminal record in that country and, in accordance with usual practice, mark it "confidential". Clearly it should not be confidential from the applicant – the confidentiality is only to protect his privacy. Yet this is what the Act requires. There should be a simple procedure for removing the confidentiality (in whole or in part) where this is desirable. The attitude that "one size fits all" has struck again.

Privilege prevents me from disclosing much about the *Haneef* case in the Federal Court. I can disclose, however, that deference to the concerns of the British Police about the confidentiality of some quite innocuous material caused me difficulties in running the Commonwealth case as did AFP confidentiality about an Internet conversation the details of which were substantially in the public domain. In short, the provisions are too absolute.

Part 3 – Correction of the Record

Notwithstanding one misattribution by Spender J, I did not in the course of the *Haneef* case ever submit that "any association" satisfied the statutory test. I was at pains to eschew mere family relationship or mere relationship in the course of an occupation (eg solicitor and client or shopkeeper and customer). My argument was that "association" roughly corresponded to the colloquial phrase "good mates with". The area of dispute was as to whether it required knowledge of or participation in the criminal activity. This was the issue on which the Commonwealth failed.