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Good morning The Hon John Clarke QC, Sir Gerard Brennan, distinguished guests, ladies and gentlemen. I would first like to thank the Clarke Inquiry for the opportunity to speak today. Ad hoc inquiries such as this one play a vital role in scrutinising the special laws adopted to counter terrorism since 2001. Given the extensive departures made from regular law and procedure in the field of counter terrorism powers, such scrutiny assumes special importance in maintaining the rule of law. Indeed, that is why there is currently a bill before the federal parliament to establish an Independent Reviewer of terrorism laws, just as in Britain, to place such independent scrutiny on a permanent footing, and not limited to the circumstances of a particular case.

In my view, there are at least three ways of thinking about what went so badly wrong in the case of Dr Haneef. **The first** is to benevolently believe that this was simply a case of growing pains, in which law enforcement officials were handed a set of new and unfamiliar laws, which they sought to apply to an apparent but mistaken terrorist threat, in a heightened environment of crisis triggered by a terrorist crime in Britain. The result may have been unfortunate for Dr Haneef, but ultimately the system worked by exonerating him in the end, and in future cases all can be put right through better training of officials and improved coordination between relevant agencies.

The second way of thinking about this episode is to believe not only that unfamiliar law was poorly applied, but to further question the appropriateness, on policy grounds, of some of the laws themselves. On this view, new and special counter-terrorism powers are surely warranted, but the Haneef case forces us to think again about whether we have come up with the right set of powers to deal with the challenge at hand. This view takes on a technocratic complexion, since it is really a matter of fiddling with the laws we have adopted, recalibrating them here and there, in pursuit of the much-heralded ideal ‘balance’ between liberty and security.

The third way of approaching the Dr Haneef case is in a fundamentally more radical and no doubt less popular manner. This view calls not for merely tweaking the counter-terrorism laws, but attacks their very necessity and their reason for being. In a judicial context, the view is best put by Lord Hoffman of the House of Lords in dissent in the *Belmarsh* case:¹

¹ *A v Secretary of State for the Home Department* [2004] UKHL 56 at paras 95-96.

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.

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 that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation.... Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

On this view, alarmism, anxiety, panic and the politics of fear have driven us into reconfiguring our legal responses, without fully considering the costs of such measures or the need for them. We have sleep-walked into a state of exceptionalism and chronic, perpetual emergency, in which the prevention of speculative future terrorist attacks justifies the suppression of centuries-old freedoms. As Conor Gearty of the London School of Economics puts it, “our preoccupation with the unknown unknowns of a terrifying future leads us into bad policy decisions”.²

Crises are bad paradigms, and there is a grave risk in being mesmerized by the scale, symbolism, and emotional resonance of the September 11 attacks, and thereby acceding to unnecessary or imprudent modifications of the law. In this context, the treatment of Dr Haneef was inevitable; bad law leads us inexorably to bad places, even with the best of intentions.

I described this third view as radical because it seems so out of step with the prevailing bipartisan political consensus on terrorism, which assumes the need for more and new laws and mainly quibbles about how far they should go. Just last week the Attorney-General stated that terrorist groups have “radically changed the way Australia perceives and responds to threats. Our mindset has changed from ‘defending’ against attacks to taking steps to prevent such attacks”.³ He went on to assert that “[a]dhering to old methods of response is not going to be enough”.⁴ Yet political claims about the novelty of contemporary terrorism tend to underestimate the durability and flexibility of the existing law – and underplay the risks of new laws.

The central question posed by this third view is not radical at all; in fact, it is a deeply cautious and conservative one: “in what way does the current framework of... criminal law fail to deal with the problem of terrorist violence?”⁵ For Gearty, the “orthodox criminal law [is] far better able to deal with violent subversion than its ill-informed critics so often assume”.⁶ In our obsession to legislate terrorism out of existence, and then to use those laws to get results, we have not stopped to think whether the existing law was enough.⁷ New law proceeds on the assumption that the current law is deficient; but the assumption is rarely tested in any empirical sense.

At this point I need to respond to the previous speaker, Mr David Bennett, who sought to put the case in favour of the new laws. I agree with one thing he said – that “slogans answer nothing”. That is why I was surprised to hear Mr Bennett describe Al Qaeda as “the most evil organisation” known to mankind, thus necessitating the new laws. That statement would certainly disappoint the Nazis, and surprise their victims. Such a statement is typical of the hyperbole which often characterises justifications for new anti-terrorism laws.

² Conor Gearty, ‘The Superpatriotic Fervour of the Moment’ (2008) 28 Oxford Journal of Legal Studies 183, 199.

³ Attorney-General Robert McClelland MP, Security in Government Conference 2008, Canberra, 16 Sept 2008, para 23.

⁴ Ibid, para 37.

⁵ Gearty, 185.

⁶ Gearty, above, 200.

⁷ See, eg, Simon Bronitt, ‘Balancing Security and Liberty: Critical Perspectives of Terrorism law Reform’ in M Gani and P Mathew (eds), *Fresh Perspectives on the ‘War on Terror’* (ANU E-Press, Canberra, 2008), 65, 73-74.

Mr Bennett asserted that the risk of weapons of mass destruction falling into the hands of such evil organisations further justifies the laws, and he pointed in particular to the spectre of 100,000 or even one million deaths. Yet here he bases the case for new laws on the most extreme, remote and speculative risk, rather than on a measured appreciation of the danger. Like so many proponents of extreme laws, he also glosses over historical experience – the world has faced chemical and biological weapons for at least a century, and for much of that time they were available to non-state actors, and yet never before have we felt the need to respond quite so drastically.

Even if it were true that terrorism is such an existential threat to humanity (which is doubtful), then it must still be shown that each particular measure adopted in response is necessary, proportionate and effective in meeting that threat, and this certainly has not been individually demonstrated in relation to each of the anti-terrorism laws adopted by Australia since 2002. In fact, most terrorist attacks which have succeeded would not have been stopped by the kinds of new laws which we have adopted, since for the most part such attacks succeeded because of failures in regular intelligence gathering and policing. For that reason, one of the best ways of countering terrorism remains improving our intelligence and policing capabilities – not legislating our way to safety.

Mr Bennett also criticised human rights law as absolutist and lacking the necessary exceptions to deal with security threats, and therefore preventing effective counter-terrorism. That view seriously mischaracterises, or misunderstands, human rights law. Modern human rights principles were adopted in the immediate aftermath of the Second World War, a global conflagration in which 50 million people died as a result of the most serious security threats imaginable.

In that context, nobody can seriously believe that the drafters of human rights law were not conscious of security risks, coming out of a war which involved all manner of militias, paramilitaries, partisans and terrorist groups. The drafters deliberately built mechanisms into human rights law for dealing with security problems: limitations or restrictions on many rights are permitted on grounds of public order, and in extreme cases of public emergency, certain rights can be derogated from (or suspended). Indeed the problem is not that human rights admits too few exceptions, but that the breadth of the exceptions arguably allows States to do too much – to take measures which would not be permitted under, for instance, the protective scope of the common law, administrative law, or constitutional law.

Now my own position in this debate is somewhere between the second and third views I have described. In my book *Defining Terrorism in International Law* (Oxford, 2006), and in advising foreign governments, I have called for the international community to define a new and distinctive international crime of terrorism. There is value in more precisely naming and stigmatising those who use political violence to destabilise democratic, rights-respecting, constitutional orders.

Here I respectfully disagree with Sir Gerard Brennan that the motive element in the definition of terrorism necessarily leads to discrimination or undue impacts on free expression. The motive element operates as an additional safeguard which reserves the label of terrorism for only the most serious forms of political or religious violence, and it is no surprise that the federal Director of Public Prosecutions has argued for its repeal, which would make prosecuting terrorism easier.

In short, I accept that limited modification of traditional legal responses is appropriate in countering terrorism. Terrorism is a significant risk to society which requires careful management, but it is not so catastrophically threatening as to justify the kind of drastic and whole-scale revision of our legal system which has been supported by most of our reactive Parliament in recent years. The availability of stronger criminal law controls may also serve as a disincentive to developing more invasive emergency powers or militant responses to terrorism; the criminal law offers the promise of restraint, rationality, fairness and transparency.

At the same time, I am deeply suspicious of what governments have sought to hang off even the most narrowly formulated definitions of terrorism, some of which measures are pertinent to the treatment of Dr Haneef: wide preparatory or inchoate offences, and organisation-based offences, which extend criminal liability too far without justification; protracted, arbitrary detention in police custody; preventive detention and control orders; ASIO detention of non-suspects; reversing the presumption for bail; modifications to sedition and censorship law; and measures preventing a person from seeing and testing evidence in proceedings which detrimentally affect them.

It is one thing to prosecute a new offence of committing a terrorist act; it is something quite different to prosecute (or indeed deport) someone for, for example, threatening to possess a thing to be used in the commission of a (but not one specific) terrorist act, and based on secret, undisclosed evidence. This is particularly so given the breadth of the Australian definition of terrorism, which oddly criminalises everything from legitimate militant resistance against the Sudanese or Burmese governments, to the conduct of Australian armed forces abroad, to throwing a brick through the window of the local MP's office.

There is something perverse and disproportionate about the extraordinary investment of regulatory energy in the domain of terrorism in light of other pressing legal needs. For instance, Australia has had federal war crimes legislation in place since 1957 and yet we have never brought a single prosecution in 50 years. We signed the Genocide Convention in 1948 but could not be bothered to criminalise it in domestic law until 2002. Genocide, war crimes, crimes against humanity and torture have long been regarded as universal international crimes. The commission of such crimes has caused untold human suffering since the end of the Second World War.

There are tens of thousands of people suspected of committing such crimes around the world, some of them who have lived in or visited Australia. The number and magnitude of such crimes vastly outstrips the problem of terrorism. Yet Australia has never invested comparable resources in bringing to justice perpetrators of those most serious of crimes, even where they involved exterminating our Timorese neighbours. Nor have we ever sought to hand a myriad of special powers or modified procedures off these crimes in the way we have done for terrorism offences.

All of this points to a deeper problem affecting the Australian government's response to terrorism. Countries like Britain and France have long experience in combating terrorism, whether the Irish Republican Army in Northern Ireland or in the Algerian war of independence. Both countries soon realized that overreacting to terrorism was counter-productive. Internment in Northern Ireland was an abject failure, and succeeded only in radicalising resistance to British rule. In Algeria, the ruthless torture of suspects by French paratroopers helped to win battles but lost the war.

Australia has had no comparable experience of sustained terrorist violence on its home soil, with only one minor hotel bombing in the late 1970s. Confronted with real terrorist threats for the first time, Australian governments are susceptible to the kinds of overreactions which plagued other democracies in the past. I would now like to address three specific issues in the case of Dr Haneef. I agree with most of what has been already said by Mr Ross Ray QC of the Law Council of Australia.

1. The extended police detention powers for terrorist suspects infringe freedom from arbitrary detention as provided for under international law.

Dr Haneef was detained for 12 days of pre-charge investigative detention under legislation which allows a maximum of 24 hours of questioning in terrorism cases. In my view, the 'dead time' provisions in ss 23CA and 23CB of the *Crimes Act 1914* (Cth) infringe the right to freedom from

arbitrary detention recognised in international human rights law.⁸ The European Court of Human Rights has found that detention is arbitrary if it is *unpredictable* its duration; a law must *clearly* define the conditions for deprivation of liberty and be *foreseeable* and *certain* in its application in order to safeguard this freedom.⁹

Sections 23CA and 23CB of the *Crimes Act 1914* (Cth) do not meet this test. The lack of a *maximum* limit on the allowable period of dead time, and the fact that the grounds for dead time applications are so numerous, variable and unpredictable in their duration in effect provides for an indefinite period of arbitrary detention without charge for suspects in terrorism cases. Administrative convenience in facilitating ongoing investigations is not a sufficiently strong basis on which to deprive liberty.

In Dr Haneef's case, 12 days of detention still used only half of the allowable 24 hour period of active questioning time, indicating that the authorities are able to extend the investigation period over a number of weeks through 'dead time' provisions. Suspects are thus unable to know with any certainty the length of their detention, an outcome clearly inconsistent with article 9 of the ICCPR, as well as the fundamental general principles of legal certainty and protection from arbitrary executive power central to the common law. Freedom from arbitrary detention assumes particular importance in any police investigative phase prior to a full criminal hearing and adjudication of guilt leading to imprisonment.

The role of a judicial officer under s 23D in determining what is 'reasonable' dead time does not remove this arbitrariness, since the quality of the hearing is deficient. This is in part due to the difficulties suspects face in seeking to be heard fully before a court. For example, the fact that the time taken to make and dispose of a dead time application automatically extends that dead time may deter suspects from challenging evidence or raising points of law for fear of delaying the judicial officer's verdict on the application.

Further, the suspect may not be able to fully defend themselves in the application process on a practical level; for instance in Dr Haneef's case his legal representative was not permitted to hear evidence presented by police in support of their s 23CB application, prohibiting an effective response on his behalf. The judicial supervision provisions are also ineffective in removing the arbitrariness of the proceedings because of the low threshold test required to establish the reasonableness of the period of dead time sought, which under s 23CB(5) enables police to cite even routine investigation activities as supporting a need for dead time.

It is recommended that s 23CA be amended to impose a maximum cap on the allowable amount of dead time, either for all dead time activities or specifically for activities under s 23CA(8)(m). Alternatively, it is recommended that an absolute maximum period of detention be provided for, which encompasses both any questioning time and any time out periods which may be granted.

2. The 'character grounds' under s 501 of the Migration Act 1958 (Cth) are too broad, encourage the arbitrary exercise of executive power, permit interference in the independent judicial administration of criminal justice, and affect fair trial rights.

Immediately after Dr Haneef was granted bail on 16 July 2007, the former Minister for Immigration cancelled his s 457 work visa under s 501(3) on the grounds that he 'reasonably suspected' that Dr Haneef had an association with people involved in terrorism and therefore failed the character test. The revocation exposed Dr Haneef to the risk of immigration detention if he posted bail, which he

⁸ International Covenant on Civil and Political Rights (ICCPR), art 9.

⁹ *Melnikova v Russia* [2007] ECHR Application No 24552/02 (21 June 2007).

elected not to do. When the charge against Dr Haneef was dropped on 27 July 2007, the revocation remained, although Dr Haneef was allowed to enter residential detention before returning to India.

In the United States, Britain and Canada, immigration law has been commonly used to detain and deport suspected terrorists. It is attractive to governments because it offers wide discretionary power subject to far fewer procedural protections than the criminal law. There is, of course, a contradiction in using immigration law against suspected terrorists, since if terrorists are so dangerous, it makes little sense to send them overseas to unleash terror on other countries. If Australia were truly committed to the international struggle against terrorism, it would deal with terrorism through those legal processes which properly prevent it, including the many news laws since 9/11.

Immigration lawyers are all too familiar with the often subjective decisions about the bad character of non-citizens which lead to the cancellation of visas. But the use of such power against Dr Haneef was unusual because of its timing – immediately after bail was granted in a criminal proceeding, when there is already a presumption against bail in terrorism cases which makes it hard to be released unless the evidence is fairly weak. Exercising the immigration power at that time raised genuine public perceptions of interference by the executive in the ordinary course of a judicial proceeding. It appeared that immigration law was wielded as a trump card to detain someone of bad character, pre-empting the court's own assessment of criminal guilt or innocence.

Of primary concern is the possibility that the cancellation of an accused's visa on character grounds may detract from the presumption of innocence to which they are entitled during a criminal trial, especially if the Minister makes public that his decision was made based partly on 'secret information' not available to the court. This damaging secrecy also risks rendering the criminal process arbitrary if the trial is haunted by the possibility of unseen evidence, and is likely to undermine public confidence in the judicial process and in the laws themselves.

Even senior judges were not to be trusted with sensitive intelligence information, in case they might leak it, yet Australians were expected to have faith that a politician would exercise the power responsibly, in an area of law which has been chronically maladministered and heavily politicised in recent years. It is well accepted that governments should enjoy a wide sovereign discretion to protect the community by excluding dangerous non-citizens. But that power should not be exercised arbitrarily or with immunity from effective supervision, which is not possible if the evidence on which a decision is based cannot be seen or tested.

On the face of the law, the subjective character grounds, as interpreted by the Minister during the cancellation of Dr Haneef's visa, were too broad and uncertain in scope, and thus permitted a potentially arbitrary exercise of the executive power to refuse or cancel a visa. Fortunately the Federal Court held that that the Minister had misconstrued the legislation and Dr Haneef's visa was reinstated. The Federal Court found that a person who associates with a suspected criminal is only of bad character if the association involves some complicity in the criminal conduct of another; that is, something more than innocent association among family or friends.

The decision is a welcome interpretation of immigration law, consistent with the Australian law's foundation in personal responsibility rather than collective liability. It is, however, recommended that s 501(3) of the Migration Act should be formally amended to expressly require that suspected criminal association is required, to clarify and put beyond doubt that mere innocent association with others suspected of crime is not an adequate basis for refusing or cancelling a visa.

In light of the above, it is recommended that the Migration Act be amended to allow a merits review of any visa cancellation on s 501(3) grounds. In conjunction with a repeal of s 503A, this would prevent those affected by an adverse decision from being arbitrarily denied access to the

information on which that decision was made. It is further recommended that s 501 should be amended to provide that, if a visa is cancelled but a criminal justice stay certificate issued, the person must be granted a bridging visa, enabling a court to decide whether the person remains in detention pending trial. Finally, it is recommended that where criminal charges are pending against a non-citizen, the Minister should be required under s 501(3) to consider the impact of any cancellation of that person's visa on their ability to receive a fair trial.

3. *The s 102.7(2) of the Criminal Code (Cth) 'terrorist organisation' offence is too wide and is unnecessary in combating modern terrorist threats.*

Under s 102.7(2) of the *Criminal Code (Cth)* it is an offence to intentionally provide support or resources to a terrorist organisation which would help the organisation directly or indirectly engage in 'preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs)' when the person is reckless 'as to whether the organisation is a terrorist organisation.' It was under this section that Dr Haneef was briefly charged with providing support to a terrorist organisation.

The vagueness and breadth of the Division 102 terrorist organisation offences, including the wide definition of 'terrorist organisation' as encompassing even 'informal' members of an organisation 'indirectly' involved in terrorist activities, endow police with extremely wide powers to arrest and charge 'suspects' based on genuinely innocent interactions with others.

Whilst the intent element of the offence was intended to limit the scope of the offence, in Dr Haneef's case this requirement was applied very broadly, enabling the offence to seemingly encompass his ordinary family interactions. The offences as a whole, including s 102.7(2), potentially criminalise a person's associations rather than their individual conduct, expanding criminal liability in an unsound manner, given existing principles of accessorial liability. As Dr Andrew Lynch and Professor George Williams have written:

In criminalising the very formative stages of an act, they render individuals liable to very serious penalties despite the lack of a clear criminal intent... [and] far removed from the commission of an unlawful act.¹⁰

If modern anti-terrorism laws are constructed on a precautionary or preventive rationale,¹¹ only acts which can be shown to causally contribute to the commission of a terrorist act should be criminalised – not every act that poses even the slightest or remotest risk. People often think or do hasty, stupid, rash, careless or thoughtless things; they change their minds or renounce former beliefs; they associate with people they shouldn't; subsequent events intervene, and so on.

Strict criminal offences which capture remote preparatory conduct and which do not allow for the ordinary behaviour of human beings are ill-suited to regulating terrorism; such offences risk both criminalising the innocent and are likely to be seen as increasingly ineffective and illegitimate. They also begin to embody to the neurotic preventive justice espoused by Cardinal Richelieu during the French Revolution, when he said (without irony) that:

In normal affairs the administration of justice requires authentic proof; but it is not the same in affairs of state... There urgent conjecture must sometimes take the place of proof; the loss of the particular is not comparable with the salvation of the state.

¹⁰ A Lynch and G Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (UNSW Press, Sydney, 2006), 18.

¹¹ A Goldsmith, 'Preparation for Terrorism: Catastrophic Risk and Precautionary Criminal Law' in A Lynch, E MacDonald and G Williams (eds), *Law & Liberty in the War on Terror* (Federation Press, Sydney 2007), 59.

Instead, the focus should be on those who are directly responsible for violence, not those who are far removed from it or marginal to it. Accordingly, it is recommended that the terrorist organisation offences in s 102.7(2) are amended to include a more substantial focus on individual conduct rather than guilt by association. It is further recommended that the definition of a terrorist organisation in s 102.1 is amended to ensure that only listed organisations are included.

Conclusion

The advantage of being an international lawyer is that one is often able to take a wide comparative view of how different societies have grappled with common problems such as terrorism. Before 11 September 2001, terrorism offences were extremely rare in most legal systems – and the world appeared to cope quite well without them. Even under Britain’s earlier Prevention of Terrorism Act, 97% of those arrested between 1974 and 1988 were released without charge and only 1% were convicted.¹²

Even after 9/11, despite the rapid proliferation of special anti-terrorism laws, the practical application of those laws remains underwhelming. In six years from 2001 to 2007, of 1228 arrests under in terrorism investigations, 669 were released without charge – or over 57%.¹³ Only 21% were charged with any terrorism offence and another 7% were handed over to immigration authorities. The 41 convictions under the Terrorism Act 2000 (UK) represent about 3.5% of all suspects arrested as part of terrorism investigations.

These figures suggest that we are largely succeeding in sweeping up and casting suspicion upon a great many people from whom we have nothing to fear. We are creating new crimes where previously there were none. In the process, we risk radicalising those who are genuinely dangerous – not deterring them – and probably generating new threats to our society. We confirm to terrorists what they already thought was wrong with us; and we lose something of ourselves – our values and our culture of legality – along the way. Thank you.

¹² G Younge, ‘No tails or tridents’, *Guardian Weekly*, 29 July-4 August 2005, 13.

¹³ UK Home Office: www.homeoffice.gov.uk/security/terrorism-and-the-law/.