

CLARKE INQUIRY PUBLIC FORUM

22 September 2008

The Hon Sir Gerard Brennan, AC KBE

Today we have gathered to discuss some issues of major importance to our community – the physical security of all people within our shores and freedom from unjustified interference with their liberty and human rights. These are issues on which minds may differ in good faith, but they are not party political issues, even if political parties embrace different views about them. They are too important to become the subjects of controversy designed to win political points. Such controversies inevitably polarize opinions and complex problems are simplified in order to permit presentation in a brief television interview or in a few column inches in the daily press. The issues which we are gathered to discuss require consideration in depth, the weighing of countervailing factors, the nice adjustment of immunities and obligations and the nuanced articulation of laws.

We start with an acknowledgement of the difficulty in evaluating the danger which is said to threaten our physical security. This is not an easy task for a public forum. We do not know whether the threat is grave and imminent or whether it is minor and remote. Is the threat diminished now that our troops are being withdrawn from Iraq? Does the threat remain because our troops are in Afghanistan? Are there active domestic terrorist cells? The answers to these questions are likely to be answered more accurately by our intelligence services than by members of the public. But we have seen some terrible instances of terrorist activity in other places: the *Rainbow Warrior* in New Zealand in 1985, the bombing in Bali in which Australians were killed and injured in 2002, the destruction in the train station in Madrid in 2004, the bombs in the London underground in 2005, in Mumbai in 2006 and now in Islamabad, and, of course, the almost daily atrocities in Iraq. So there are grounds

for concern about the possibility of terrorist action. The question is: what should be done to safeguard us against that possibility.

I venture to suggest that effective protection must depend upon community consensus. We need a community consensus that the risk of terrorist activity is to be deplored, that it is right to expose and condemn anything that tends to give succour to such an activity, that the intelligence agencies and police are to be assisted with whatever information is available to forestall terrorist activity and to apprehend those who engage or assist in engaging in such activity. This is the kind of consensus which has traditionally kept our societies relatively free of crime. Such a consensus, shared by every section of the community, is the essential weapon for combating terrorism.

To create and maintain such a consensus, it is not enough to rely on community fear. Fear is the most malleable of emotions, especially in politics¹. Yet fear can lead us in the wrong direction. It can lead us to destroy the freedom which marks our way of life and which terrorists would hope to destroy. The Council of Europe, in a preface to its Guidelines on Human Rights and the Fight Against Terrorism², warned:

“The temptation for governments and parliaments in countries suffering from terrorist action is to fight fire with fire, setting aside the legal safeguards that exist in a democratic state. But let us be clear about this: while the State has the right to employ to the full its arsenal of legal weapons to repress and prevent terrorist activities, it may not use indiscriminate measures which would only undermine the fundamental values they seek to protect. For a State

1 Sir Robert Menzies described fear in the dark days of July 1942 as a “potent instrument of domestic policy”, reported at –
<http://www.menziesvirtualmuseum.org.au/transcripts/ForgottenPeople/Forgotten7.html>

2 Adopted by the Committee of Ministers, 11 July 2002, at the 804th Meeting of the Ministers’ Deputies at pg 5, cited by Hon Arthur Chaskalson, sometime Chief Justice of South Africa and President of the Constitutional Court in his Seventh Sir David Williamson Lecture: *The Widening Gyre: Counter-terrorism, human rights and the rule of law.*

to react in such a way would be to fall into the trap set by terrorism for democracy and the rule of law”.

To ensure that the community is firmly in support of the measures taken to combat the possibility of terrorist activity, it must appear that the special laws and practices that are put in place are both necessary and efficacious and do not trespass too far on the human rights of the people, especially the right to liberty of mind and body.

At the outbreak of the Second World War, the Prime Minister, Sir Robert Menzies said³:

“Whatever may be the extent of the power that may be taken to govern, to direct and to control by regulation there must be as little interference with individual rights as is consistent with concerted national effort ... the greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and to lose its own liberty in the process.”

This statement reflected the traditional values of the common law which underpins a free society

In 1925, Sir Isaac Isaacs wrote that⁴ "...there is always an initial presumption in favour of liberty” and, fifty years ago, Fullagar J spoke⁵ of an interference with an individual’s person and liberty as “prima facie a grave infringement of the most elementary and important of all common law rights”. Having regard to the presumption in favour of liberty, I have previously expressed⁶ what I regard as the law’s approach in striking the balance:

“It is of the essence of a free society that a balance is struck between the security that is desirable to protect society as a whole and the safeguards that are necessary to ensure individual liberty. But in the long run the safety

³ Hansard, House of Representatives, 7 September 1939, 164

⁴ *Ex parte Walsh & Johnson; In Re Yates* (1925) 37 CLR 36 at 79.

⁵ *Trobridge v Hardy* (1955) 94 CLR 147, 152

⁶ *Alister v The Queen* (1984) 154 CLR 404, 456

*of a democracy rests upon the common commitment of its citizens to the safeguarding of each man's liberty, and the balance must tilt that way”.*⁷

I wonder whether, in recent times, fear has pushed the balance too far the other way. Have we become so worried about our physical safety that we are willing to compromise our human rights in the belief that only by forfeiting liberties can the agencies of the Executive Government be enabled to protect us? Or, perhaps more accurately, are we willing to compromise the human rights of others, believing that the laws and practices we have accepted will have no impact on ourselves? This is a serious question because laws that strip away human rights and immunities and practices that ignore human rights and immunities are apt to alienate at least some sections of the law-abiding community. Doubt and cynicism may replace the consensus needed for effective law enforcement and the protective functions of government may thus be prejudiced. We cannot afford to imperil general political support for security.

There are provisions in our laws which warrant consideration to determine whether too great an erosion of our fundamental rights has occurred. That is one of the purposes of this Forum. There are, I suggest, three areas of concern: unjustified discrimination which drives a wedge between elements of our society, excessive interference with human rights, and absence of judicial supervision which exposes individuals to oppressive exercises of power.

First, unjustified discrimination. It is common knowledge that many horrific acts of terror have been perpetrated by Islamic extremists. Some

⁷ *cf. Sankey v. Whitlam.* (1978) 142 CLR, at pp 42,61-62

of these acts have been committed by suicide bombers who, we are told, believe that their death is their guarantee of immediate, eternal and joyful salvation. Granted that their acts are committed “with the intention of advancing a political, religious or ideological cause”, does it follow that those words are needed in the key definition of a “terrorist act” in s.100.1 of the *Criminal Code (Commonwealth)*? If the terrible crimes proscribed by reference to that definition – killing or seriously injuring a person or causing serious damage to property or to an electronic system – were engaged in to advance the interests of, say, organized crime, or industrial espionage or - like the bombing of the “*Rainbow Warrior*” - to stifle dissent, would the crime be any the less reprehensible? The motive adds nothing to the criminality of the acts constituting terrorism. Indeed, it brands the advancing of a religious cause as an element in a heinous crime. Inclusion of the motivational element in the definition may easily be misunderstood as targeting Muslims, the vast majority of whom pride themselves on being peaceful citizens, sharing Australian values. And it is the Muslim community who, sharing the general consensus, are likely to be most effective in exposing any dangerous Islamic terrorists. It is the law-abiding consensus of Australian Muslims which should be esteemed and encouraged. Support of a religious cause should not be an element of a heinous offence. A law which leaves itself open to such an interpretation fosters dissent. And dissent can fester into an ambition to destroy the values which the law is intended to defend.

Secondly, do the anti-terrorism laws go too far in removing human rights? Legislation empowering law enforcement agencies to carry out surveillance, or to search and to seize property can be justified when there are reasonable grounds shown, provided such powers are precisely targeted. In 1975, the Law Reform Commission’s Interim Report on

Criminal Investigation (ALRC 2) recommended that police be permitted limited time for questioning a person arrested for an offence but the Commission refused to “countenance any encroachment [on the freedom of the individual] which was not based at least on an objectively testable reasonable belief that the person had committed a crime”. (Par 8, p 4). The anti-terrorism laws are much more drastic. They confer a power to compel submission to interrogation, a power to detain and interrogate without charge, a power to charge, detain and submit to interrogation and a power of preventative detention.

An exercise of these novel powers constitutes a substantial reduction of common law immunities. Two questions arise: first, whether the novel powers are necessary and are likely to be efficient in combating terror; second, is the exercise of these powers justified on balance having regard to their impact on human rights and immunities? The onus of giving an affirmative answer to these questions rests on Government and its agencies but, in discharging that onus, they cannot be expected to disclose publicly information which might realistically expose the community to the risk of terrorist action.

Then, thirdly, there is an absence of judicial supervision. Remember the centuries old wisdom of Blackstone who warned⁸ that:

“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 of all other rights and immunities.”

Many anti-terrorism laws deny natural justice to a person who is detained and preclude that person from obtaining effective access either to legal

⁸ Commentaries on the Laws of England (Oxford 1765), Bk.1, pp.120-121,130-131 cited in *Williams v The Queen* (1986) 161 CLR 278, 292.

advice or to a court having power to review the detention. When statute exempts a repository of power from the obligation to observe natural justice, an exercise of the power is attended with the risk of injustice – injustice which is not curable by subsequent judicial intervention and which may not even be revealed if the repository of the power does not have to disclose the material on which he or she acted. It was John Locke who pithily observed: “*Where-ever law ends, tyranny begins*”⁹.

Experience has shown that the due exercise of any form of executive power demands transparency of operation and accountability, both legally and politically. It is not a sufficient safeguard – indeed, it is not any kind of safeguard – to have assurances given by the repositories of power that their powers are properly exercised. Nor is it sufficient that judicial or quasi-judicial officers are involved in the procedure, if they do not have the benefit of evidence and informed submissions from the person against whom the powers are exercised.

Is it possible to devise an effective pathway to legal advice and to a court exercising habeas corpus jurisdiction, casting on the Commonwealth authorities the burden of justifying detention, compulsory questioning and isolation of individuals from contact with family and friends? Perhaps a first step would be free and automatic contact with the detainee’s lawyer of choice or – if that is thought to create an unacceptable security risk – contact with a lawyer on a panel provided by a Law Society or Bar Association. If effective access to the courts were available, there would be an assurance that the powers conferred on

⁹ John Locke, *Second Treatise of Government* (1690), Chap XVII, s.202 (Cambridge University Press, 1988), quoted by Lord Bingham in *The Rule of Law*, the Sixth Sir David Williams Lecture, Cambridge, 16 November 2006.

Commonwealth agencies would be exercised reasonably and for the purpose for which they were conferred.

The solution to these questions must be propounded in due course by Mr Clarke. We shall be both informed and benefited by his recommendations. He seeks the input of this Forum to assist in his important task.