

“Human Rights and Responsibilities in the Age of Terror”

**University of Melbourne
Chancellor’s Human Rights Lecture
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I would like to begin by acknowledging the Wurundjeri people of the Kulin Nations, the traditional owners of the land on which the university stands. I would like thank the University of Melbourne for asking me to give this lecture. In particular I would like to thank all of you for coming.

It is possible that the fateful and horrific events of September 11, 2001 changed our world for ever. But the change is not represented by the age of terrorism; terrorism is not new. It is not represented by the War on Terror; wars are not new. It was not even the scale or nature of the attacks themselves, terrible as they were, that brought about our changed world; we have been attacked before. But the change as I see it has been brought about by the haste with which leaders of great democratic nations around the world made the fundamentally wrong assumption that we cannot maintain liberty and the Rule of Law and defend ourselves.

In discarding these principles, Governments have created fear and practiced discrimination based on race and religion. For Australia, fear was created and deception practised in relation to the boat people and over Tampa in late 2001. There was serious discrimination against legitimate asylum seekers. This was the effective end of the liberal age and the beginning of a period of regression. As a response to the War on Terror, liberty has been seriously compromised and arbitrary powers sought by the executive.

These events have made me think seriously about my own position within the Liberal Party. I remember the party I joined, the party of Menzies, of liberal and progressive ideas, a forward-looking party, willing to make experiments. As Menzies himself put it, a party that believes fervently in the Rule of Law, in higher education accessible to all able students, in a government accepting national obligations and a vision for the future, a party that slowly abolished the White Australia Policy and broadened Australia to a more open, multicultural society. It was a party of hope and of vision.

The departures from the principles underlining that Liberal Party are substantial and serious. The party has become a party of fear and reaction. It is conservative and not liberal. It has not led in positive directions, it has allowed and, some would say, promoted race and religion to be part of today's agenda. I find it unrecognisable as liberal.

The grounds for resignation would be substantial but then I think of the future, of those within the party who hope for changed circumstances, of those within the Parliament who seek to keep a Liberal flame alive. I think of the founder of the Liberal Party, of his contribution to Australia and, not least, to this University.

I wish in this speech, in the strongest possible terms, to emphasize the departure from basic principles and to urge all of those who are concerned by events to take part in public life, in the affairs of the party, to seek change and secure liberty. It's a hard task and a long one.

Many of the reasons for these views are defined in this speech.

Fear and deception have become the order of the day.

Since September 11, 2001, fears have been aroused not only in the United States but around the world. Deception has been used to enhance those fears. Fear was created by a pretence that Saddam Hussein could drop chemical or biological weapons on the city of London within 45 minutes¹.

No one had said Saddam Hussein could do that – but the British Government had left, hanging in the air, the strong impression that he could deploy such weapons within 45 minutes, even though the Government knew Iraq had no missiles that could achieve that result.

My friends in London were fearful, believing that such a possibility justified war against Iraq. Deception was allowed to stand.

Serious qualifications placed by intelligence agencies on the possession of weapons of mass destruction were not heeded by the Coalition of the Willing. Arrangements were put in place to provide “intelligence” to justify policy already determined. Deception was practiced by depicting weapons of mass destruction as a certainty.

Deception was practiced by pretending that a decision to go to war had not been made till very shortly before the event, when recently published British Cabinet Papers have made it clear that President

¹ This claim was contained in the document commonly referred to as the “British Dossier”: Government of the United Kingdom, *Iraq’s Weapons of Mass Destruction*, published on 24 September 2002

Bush had made the decision to go to war as early as July 2002, long before the American people were told.²

Those same Cabinet papers show that deception was practiced by the United States Government, which clearly had no intention of allowing the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) to complete its task before launching an attack on Iraq³. The US did not even want UNMOVIC to conclude its weapons inspections, because its failure to find the elusive weapons of mass destruction would have taken away the primary cause for war, which the Bush Administration had already been planning for months.

Deception was practiced and accepted by the Coalition of the Willing in going along with the idea that Iraq had participated in the 9/11 attacks.

We would do well to recall some words of John Stuart Mill: “To go to war for an idea, if the war is aggressive, not defensive, is as criminal as to go to war for territory or revenue; for it is as little justified to force our ideas on other people, as it is to compel them to submit to our will in other respects.”⁴ And this is precisely what has happened.

It was clear that the world had to react strongly to the attacks on 9/11. Whether we have reacted effectively is in considerable doubt.

² See, eg, the following leaked memorandum: Matthew Rycroft, Downing Street Foreign Policy

³ See, eg, *ibid*

⁴ Owen Harries: *The Failure of the Bush Doctrine*: The Age, 28 Oct 2005

A concern, even paranoia, has developed in many places about Islamic fundamentalism and indeed, in some quarters, about Islam itself.

Recently, on 22 October 2005, a major newspaper carried a front page headline that said that up to 80 Australian Moslems could immediately be placed under effective house arrest under the Government's proposed anti-terror laws⁵. Assuming accuracy, that had to come from Government, police, or ASIO. Why would they release sensitive information that can clearly create fear, division or even hatred? It is inconceivable that, at the height of IRA action in London, reporting would have specifically mentioned the religion of those arrested. It is almost laughable to imagine a report which said: "ten Roman Catholic terrorists were arrested in Belfast today".

If we want to avoid a "clash of civilisations", as Samuel Huntington put it,⁶ we will work to bring reason and common sense to the debate and switch off the paranoia. Remember, we are still more likely to die from a road accident than a terrorist attack.

This demonstrates the need for balanced leadership. We need governments who can speak of the reality so that there can be a considered and effective response. Leaders who expand the truth, who unadvisedly support extreme action and exploit the politics of fear, will in the end, not succeed. If we are to survive the age of terrorism and protect and defend our way of life, we must understand our enemies.

⁵ The Australian, 22 October 2005

⁶ Samuel P Huntington developed this theory in *The Clash of Civilisations and the Remaking of World Order* (1996)

An example comes from Tony Blair, talking about “The Opportunity Society”⁷ in September last year. On one page he said that terrorism “is a wholly new phenomenon” ... Whose fundamental advocates... “preach hatred of the West and our way of life.” Blair speaks of these people, of the terrorists saying “They are not provoked by our actions; but by our existence. They are in Iraq for the very reason we should be. They have chosen this battleground because they know success for us in Iraq is not success for America, or Britain, or even Iraq itself, but for the values and way of life that democracy represents. They know that. That’s why they are there.”

That to me is saying they are fighting because they hate us for what we are. But then a little further on in the same speech, Prime Minister Blair says:

“After November 1, I will make its (Middle East Peace Process) revival a personal priority. Two states, Israel and Palestine, living side by side in an enduring peace would do more to defeat this terrorism than bullets alone can ever do.”

His first statement is saying terrorists have no cause but hatred. The second statement is saying they have a cause which is their perception of a fundamental injustice suffered by the Palestinians.

Both statements cannot be true. I believe his second statement is true.

There are many causes of terrorism: In the Middle East, the perception of injustice to Palestinians; In Chechnya, the desire to break away from Russia; In Basque, there are specific objectives;

⁷ Speech by Tony Blair MP, Prime Minister and Leader of the Labour Party, Labour Party Annual Conference, Brighton Centre, UK (28 September 2004)

For decades, Britain experienced terrorism practiced by the IRA. Those wanting separatism in the Philippines, over several decades, have another reason. While techniques and practices may be similar, the objectives of terrorists are varied.

None of this should be construed as justifying any element of terrorism or any sanctioning of violence against civilians.

It is a plea for our governments to ask themselves: Why do people become terrorists? Unless we understand that, our fight against terrorism will fail.

We must look at the reality.

A secret survey undertaken for the United Kingdom Ministry of Defence and seen by the press showed that 65% of Iraqi citizens believed that attacks on Coalition forces were justified and less than 1% believe that the presence of those forces advances their own security.⁸ Does that not seriously question the Coalition's propaganda concerning Iraq?

We must reduce the pool of those willing to martyr themselves for a perversion of Islam. If this is to happen, young people need to be given some hope that they can work for a better life in an equitable world. The hard core will only be defeated if they find it too difficult to gain new recruits. Unfortunately the war on Iraq has increased the numbers willing to join the Fundamentalists.

⁸ See, eg. Sean Rayment, 'Secret MoD Poll: Iraqis Support Attacks on British Troops', *Daily Telegraph* (London, 23 October 2005)

We should also look closely at the arguments we use. Nearly every religion in different stages of its history has been perverted by a minority whom today we call fundamentalists or terrorists. Even now it is not only from Islam that such fundamentalists can be found.

From the end of the Second World War to September 11, democratic powers moved - falteringly and often inadequately - to establish a world governed by law.

The *Universal Declaration of Human Rights*⁹ and the Conventions designed to give legal force¹⁰ to those rights advanced a law-based world. The Rome Statute for the International Criminal Court came into force in July 2002¹¹ - perhaps the most substantive change to international structures - since the foundation of the United Nations itself.

In these years, the ideal of a world governed by law was more than a dream. Many people worked for it.

Under the Rule of Law, there can be no discrimination. The law must apply to all people of all nations without discrimination, regardless of race, colour, ethnicity, religion or gender.

In today's world we've stepped back into a darker age.

⁹ General Assembly Resolution 217A (III), UN Doc A/RES/217A (III), 10 December 1948

¹⁰ See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS. 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹¹ *Rome Statute for the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002)

It is now common to argue that because of the nature of global terrorism, we must also alter the principles by which we have lived. I do not agree with that assumption. There are too many examples of governments and people accepting that we cannot fight terrorism and preserve fundamental rights. Indeed it has often been those in positions of legal authority who have led the charge against Human Rights.

The U.K. legislated discriminately against aliens who were thought to have some links to terrorism¹², but who were not charged and who were held in jail - the Law Lords found such laws unconstitutional.¹³ The solution required removal of discriminatory legislation and close supervision both by the Courts and the Parliament. Untrammelled use of Executive Power was checked.

The recent defeat of Prime Minister Blair in the House of Commons has also demonstrated that the Commons is concerned at the way the executive has acted and sought to conduct the War against Terror.

The arbitrary use of executive power is not new. During the Second World War, Prime Minister Winston Churchill sent a cable to Herbert Morrison, as Home Secretary. At the time, Sir Oswald Moseley, leader of the Nazi Party in Britain, and his wife Lady Diana Moseley, were to be released from custody.

They had been imprisoned under Section 18B of the Emergency Powers Act.

¹² Anti-Terrorism, Crime and Security Act 2001

¹³ *A (FC) and others (FC) v Secretary of State for the Home Department [2004] UKHL 56*

Two and a half years later, in November 1943, the war was going a good deal better for the Allies; the Moseleys had become ill; and the Home Secretary was preparing to release them, but with restrictions.

Churchill's memorandum to Morrison asked the Home Secretary to emphasise that the release of the Moseleys was also a matter of high principle.

Churchill considered “the great privilege of *habeas corpus*, and of trial by jury, which are the supreme protection invented by the English people for ordinary individuals against the State... - The power of the Executive to cast a man into prison without formulating any charge known to the law and particularly to deny him the judgement of his peers – is, in the highest degree, odious and is the foundation of all totalitarian governments... Extraordinary powers assumed by the Executive with the consent of Parliament in emergencies should be yielded up, when and as, the emergency declines... This is really the test of civilisation.”¹⁴

But today, in the name of security, the most curious and frightening provisions are justified. The United States has put hundreds of people in Guantanamo Bay, in an effort to place them beyond the reach of the law. The Supreme Court ruled that they had access to the habeas corpus jurisdiction of American federal courts, and can therefore challenge their detention¹⁵. That was a notable victory for the Rule of Law.¹⁶

¹⁴ Prime Minister Winston Churchill, Cable to Home Secretary Herbert Morrison from Cairo, 21 November 1943, ex *The Second World War, Closing the Ring*, 1952; reprinted in A W Brian Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (1944) p 391

¹⁵ *Rasul v Bush*, 124 S. Ct.2686 (2004)

¹⁶ Judge Joyce Hens Green, US District Court, District of Columbia Circuit, Judge Joyce Green, Civil Actions 2002-0299 Guantanamo Detainee Cases, January 31 2005

Military Commissions were established to try people from Guantanamo Bay.¹⁷ The legality of the Commissions remains undecided in the US, as the challenge to their jurisdiction by detainee Salim Ahmed Hamdan awaits a final decision on appeal to the Supreme Court.¹⁸

The highest law authority in the United Kingdom, the Attorney General Lord Goldsmith has said that the military tribunals would not provide the kind of justice that the British Government would expect for all British citizens¹⁹. The U.K. ensured the return of nine British citizens from Guantanamo.

The Australian Government has decided to support the United States Government. The Prime Minister gave a more open insight into why this is so on SBS World News on 11 November 2005. In his words: “the Government is committed to the Military Commission trial. If David Hicks was brought back to Australia he would go free, he could not be charged under Australian law. It is not our intention to do that.” That represents the abandonment of an Australian citizen who has not breached Australian law. It is also assumed that David Hicks is guilty, that the presumption of innocence is irrelevant. It denies the right to a fair trial. The Government has turned itself into prosecutor

¹⁷ Presidential Military Order, ‘Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism’ 66 Fed. Reg. 57833 (13 November 2001); Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, General Counsel, Department of Defense, Military Commission Order No.1 (21 March 2002).

¹⁸ Judge James Robertson of the District Court for the District of Columbia held that the military commissions were unlawful: *Hamdan v Rumsfeld*, 344 F.Supp. 2d 152 (DDC, 2004). The DC Circuit then reversed Judge Robertson’s decision, holding that the military commissions were lawful: *Hamdan v Rumsfeld*, 415 F.3d 33, 2005 (DC Cir 2005). On 7 November 2005, the US Supreme Court granted *certiorari* in *Hamdan v Rumsfeld* 415 F.3d 33 (DC Cir, 2005). Consequently, a final decision by the Supreme Court on the legality of the military commissions is expected in 2006.

¹⁹ Rt Hon Lord Goldsmith, Attorney General’s Chambers, ‘Military Commissions to Try Detainees at Guantanamo Bay’, 24 July 2003.

and judge in relation to David Hicks, before even the process of the Military Commission, which has been described by former prosecutors as being “rigged”, is fully under way. Because of the Hamdan Appeal, the Hicks trial is again in abeyance.

If the Government is prepared to so abandon the Rule of Law in relation to one Australian citizen, for how many more will that also apply? It is not the action of a democracy, it is the exercise of arbitrary executive power.

Where proper Executive Power is transgressed - as has been the case in the United States - the Courts come into play. This is to the credit of the United States.

We all need to take a long, hard look to see what Governments have executed in our name.

When we first saw the photographs of Abu Ghraib, many were horrified at the images sent around the world and many rushed to condemn torture.

But the release of the book entitled *The Torture Papers: The Road to Abu Ghraib*²⁰ by New York University’s Centre on Law and Security, and published by Cambridge Press, give a different emphasis.

The Executive wanted to know how far interrogators could go without running foul of the *Geneva Conventions*, applicable during armed conflict,²¹ or human rights obligations under both domestic and

²⁰ Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005)

²¹ In particular, *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (Entered into force 21 October 1950).

international law²². The torture trail began. The Executive wanted to know, “How do we justify the rigorous, intrusive questioning?”.

Critics from the United States have offered their own condemnation of these events.

In the *New York Times*, a long term National Security Advisor to the first President Bush, Donald Gregg, wrote that the memorandum “cleared the way for the horrors that had been revealed in Iraq, Afghanistan and Guantanamo that make a mockery of Administration assertions that a few misguided enlisted personnel perpetrated the vile abuse of prisoners. I can think of nothing that can more devastatingly undercut America’s standing in the world or more importantly our view of ourselves than those decisions.”²³

Even more recently, the willingness to use torture has been underlined by the United States defence of “rendition” for terrorist suspects: Capture them, then take them to a country where they can be interrogated without supervision. Thus torture is well and truly on the agenda.

The fact that we are having this debate about torture represents a major change in the world. British courts began to outlaw evidence taken under torture with Magna Carta in the 15th century. Today, in almost every Western country, domestic and international law absolutely condemn and outlaw torture. One does not take even the first step. It is utterly extraordinary that there is now a debate about

²² See, eg. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987; implemented domestically in 18 US Code §§ 2340-2340A.

²³ Donald P Gregg, Opinion Piece, *New York Times* (New York, 10 June 2004).

the acceptable degree of torture. How has this come about? What have we lost? What have the terrorists won? This underlines loss of principle, a loss of principle that will make our society less secure more vulnerable.

Australia is complicit in these events by openly supporting US policy in Afghanistan, Guantanamo Bay and Iraq. .

I come now to recent Australian laws, which themselves demonstrate a loss of principle.

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) of 2002²⁴ has been described as the most draconian bill any Australian Government has ever conceived.

The Legislation has been compared to Counter Terrorism Legislation in the United States, Canada and the UK and many believe it exceeds the measures adopted in any of these jurisdictions.

One person summed it up in this way: "...only Australia has sought to legislate to authorise the detention in secret of non-suspects"²⁵.

More specifically this legislation allows our government to detain a person whom authorities believe may help in counter-terrorism enquiries. The authorities do not have to believe the person is guilty of any offence.

²⁴ Introduced into Parliament in March 2002

²⁵ George Williams, "Australian Values and the War Against Terrorism" (2003) 26(1), *UNSW Law Journal*, p.191-194, 197.

They only have to believe that the person may know something of relevance to anti-terrorism enquiries, even if the person does not know he or she knows it.

While in some cases provision can be made for the person to access a lawyer, there is a general provision which prevents a detained person contacting anyone at all.²⁶

If the detained person fails to provide information requested, he or she is subject to prosecution and up to 5 years' jail.²⁷ The legislation goes on to say that if the person does not have any information, then it is not an offence; but the person has to prove he or she has no information.²⁸ The onus of proof is reversed and the right to silence abolished.

The same provision applies for the production of records.²⁹

If the authorities happen to be wrong at the outset and the person does not know anything, and does not have anything – failing to answer or to produce proof, could result in a very heavy jail term unless they can prove a negative.

It is for good reason that under British law and under our law, the onus of proof has been on the Crown and the presumption of

²⁶ ASIO Legislation Amendment (Terrorism) Act 2003, Part III, Division 3, SubDiv. A, Sect. 34F(8) Detention of Persons. Communications while in custody or detention.

²⁷ ASIO Legislation Amendment (Terrorism) Act 2003, Part III, Division 3, SubDiv. A, Sect. 34G(3), Giving information and producing things, etc.

²⁸ ASIO Legislation Amendment (Terrorism) Act 2003, Part III, Division 3, SubDiv.A, Sect 34G(4) (Note. Subsection 13.3(3)of the Criminal Code). Giving information and producing things, etc.

²⁹ ASIO Legislation Amendment (Terrorism) Act 2003, Part III, Division 3, SubDiv.A, Sect 34G(6). Giving information and producing things, etc.

innocence until proven guilty is accorded to all people, but no longer under this legislation.

As originally introduced, the legislation placed no restrictions on who could be detained or questioned. In other words, it applied to any child. The only restriction as to age was that a child under 10 years could not be strip searched.³⁰

In response to opposition from the Senate, the legislation as passed, applies to anyone over the age of 18.

So a person can disappear for the time prescribed.³¹

You might think we have a free press and that a disappearance will get reported and perhaps notoriety, but our Government has thought of that also.

The authorities have covered normal reporting of these events. Anyone disclosing somebody's detention under a warrant, or for two years from the end of that warrant, commits an offence. Under the provisions of this legislation, the penalty for such disclosure is 5 years jail.³²

There are also provisions that apply to the person subject to detention and to that person's lawyer, if that person has been permitted access to

³⁰ ASIO Legislation Amendment (Terrorism) Act 2002, First Reading, Part III, Division 3, SubDiv.A, Sect 34M. Rules for conduct of strip search.

³¹ ASIO Legislation Amendment (Terrorism) Act 2003, Part III, Division 3, SubDiv.A, Sect 34HC Person may not be detained for more than 168 hours continuously.

³² ASIO Legislation Amendment (Terrorism) Act 2003, Part III, Division 3, SubDiv.A, Sect 34VAA(1) Secrecy relating to warrants and questioning.

a lawyer, making it an offence to disclose the fact of detention and questioning.³³

How would one describe these powers? How is it that both major parties in Australia agreed with these provisions?

The legislation is contrary to the Rule of Law. It is contrary to Due Process, to Habeas Corpus, to the basic rights which we have come to understand are central to a free and open society. Such changes are unlikely to prevent a terrorist attack.

9/11 occurred in the United States, not because laws were inadequate, not because laws made it difficult for the agencies to do their job but because of a failure of intelligence and analysis. It is highly unlikely that additional draconian laws would have altered the outcome.

All this is already law.

Australian Law or lack of it has already failed many individuals and groups. Amongst these we can include: Aboriginals; people held in the Department of Immigration detention centres; an Australian citizen deported; Australian citizens wrongly held in detention centres without medical attention; a United States citizen deported without “due process” and an Australian citizen being tried before a Military Commission. By the detention of the innocent, by the questioning of people known to be innocent by the authorities, by the right confirmed by the High Court with a majority of 4 to 3, to keep a failed asylum

³³ ASIO Legislation Amendment (Terrorism) Act 2003, Part III, Division 3, SubDiv.A, Sect 34VA Lawyers’ access to information for proceedings relating to warrant.

seeker in jail for the term of his natural life, if he could not be returned to his land of origin.

Authorities in Australia now have the capacity for the exercise of extreme and arbitrary power without adequate judicial safeguards.

In Australia the exercise of these powers is undertaken in an entirely different environment from that which prevails in virtually every Western democracy. In the United States, Britain, in Europe, governments are constrained by a Bill of Rights. In Australia there is no such restraint.

Many individuals have suffered in Australia because of the gravest failure of administrative and ministerial responsibilities. As shown in the Palmer and Comrie Reports the Department of Immigration has been at the centre of much of it. Two Ministers have been in charge. Apparently neither Minister is responsible. As far as one can tell, nobody has been held accountable. The people involved appear not to have mattered to the Administration or to the Government or to the silent Opposition, which has failed to demand any adequate explanation.

Now we come to new proposals currently in front of the Parliament which would provide even greater power to the police and to the Government.

In examining the intent of the Government, we need to look at the draft proposed by the Government, not necessarily at the law as finally passed by the Parliament. While we know the intent of the Government, we do not yet know the final shape of the legislation.

Attention should in particular be turned to those provisions which alter the sedition laws and which govern the use of control orders and preventive detention.

There are two aspects of the amendments to sedition laws which I find disturbing. First, under these new provisions, it is not necessary for the person to have a “seditious intent”; it appears that a person could commit the offence if they are “reckless” as to whether they urge another to use force or violence. What does “reckless” mean? Secondly, there is some doubt as to whether there needs to be a direct link between a person’s conduct and the use of force or violence, or whether the person’s conduct need only be an indirect cause.

There is considerable doubt, therefore, as to whether words, which may well have a peaceful intent in the speaker, could be construed as recklessly urging violence in the listener, even though there is no direct link. There is a risk, therefore, that public comments, open criticism of the government with whose policies one strongly disagrees, could easily be caught by the proposed changes.

One ground for a “control order” is that a person has provided training to or has received training from a listed terrorist organisation. Does the organisation need to be listed when the training was actually received? Does the training have to be recent, could it have occurred 20 years ago in different times and different circumstances? For example, the CIA was heavily involved in training Afghan groups to fight the Soviet Union.

In one respect more severe problems arise in relation to detention orders.

There is no involvement of a court in achieving authority for an initial “preventive detention order”; a senior member of the Australian Federal Police has the power to order *initial* preventive detention. It is only an order for *continued* preventive detention which must be sought outside the AFP. There is still no consideration by a court. Such an order can be issued, amongst others, by a judge, a retired judge or a legal person, provided they are appointed by the Minister. They exercise the powers in a personal capacity. There is thus no effective check on the Executive branch of government in the exercise of this power.

The intelligence rational for a control order and a preventive detention order is not easy to grasp. If surveillance is thorough why not watch the person, collect more evidence and then charge the person with an offence?

Another consequence of a “control order” or a preventive detention order would be the immediate disappearance of all the subject’s contacts and collaborators. They would know from their point of view that something was wrong, they would fade away and disappear.

If there were valid grounds for concern, why not double surveillance, collect more information, which would enable a charge and a prosecution to be laid.

The strategy of “control orders” and “preventive detention” may have some relevance but the case has not been made. In fact, it appears that

such measures could actually reduce our ability to collect evidence and to bring charges in relation to these acts.

The lack of appropriate judicial involvement in the application for preventive detention orders is a total derogation of justice.

Legal officers would in those circumstances be disinclined to second guess the policeman. In reality, detention orders are imposed solely on the involvement of the police. The Rule of Law is abandoned. Is that not a characteristic of a police state?³⁴

As we have seen with ASIO's new powers, there are significant limitations on the ability of a person in preventive detention to disclose the fact that they are being detained. In addition, any contact with another person (e.g. a lawyer or family member) that is allowed must be monitored by a police officer (with the assistance of an interpreter if necessary). This fundamentally undermines the legal system which demands lawyer/client privilege.

Do we really believe these powers will be effective in the fight against terrorism, or do we believe that the powers themselves are likely to lead to a sense of grievance, of alienation? These are powers whose breadth and arbitrary nature, with lack of judicial oversight, should not exist in any democratic country.

If one says, but they will not be abused, I do not agree. If arbitrary powers exist they will be abused.

³⁴ Terry O'Gorman, President, Australian Council for Civil Liberties Media Release 4 November 2005

All this has happened in a country which has not experienced a significant terrorist incident for many years. What would be our Government's reaction if this great city were tied up and disorganised by terrorist attacks similar to those which recently occurred in London? How much further would they be prepared to go?

Recent arrests in Sydney and Melbourne have taken place under existing law. It was apparently part of a police and ASIO operation that had been moving forward for the best part of 18 months. Why did the Prime Minister's statement of 3 November 2005 claim that certain matters had to be rushed forward because of urgent and specific intelligence advice?

Presumably the Prime Minister and Premiers had all been advised of this continuing operation over more than a year. What suddenly made it so urgent? It is clear that some of the police were very much put out that their operation had been blown by the government. Had ASIO asked for that amendment, the substantive change of a "the" to an "a" in relation to a terrorist incident, be put in place as a matter of urgency? If not, why did the government believe it was urgent to act?

Certainly the perception of an imminent threat has been heightened and people are more afraid.

The Government is really saying on these issues, trust us, but no part of the history of the Coalition's invasion and occupation of Iraq or of the incident involving "children overboard" gives any member of that coalition the right to say on these issues: "Trust us".

Our Government has constantly said that our participation in the Coalition in Iraq has not increased the risk of terrorist attacks in Australia. But the former head of ASIO, Dennis Richardson, and the former Chief of the Defence Force Staff, General Cosgrove, have both suggested the contrary.

After the Tampa, after the Children Overboard, the experience and treatment of asylum seekers, the abandonment of Hicks, all suggest that any right to trust has been long destroyed. Would Cornelia Rau trust the Government? Would Vivian Solon trust the Government? Concerning the Tampa and Children Overboard, the Government knew they were playing to the more fearful and conservative elements in the Australian community and with great success. The Government also knows in relation to terrorism that the public is concerned, even fearful and can be made more fearful.

It may be brilliant politics but will the new laws make Australia secure? By its actions, the Government has long abandoned the middle ground. The Rule of Law and “due process” has been set aside. Has the Government already created an environment in which people will accept a serious derogation from the Rule of Law, if the Government says it will help in the fight against terrorism? How can such a situation be reversed?

No adequate case has been made that these proposed breaches in the Rule of Law will be effective in the fight against terrorism. Unless substantially amended, the laws should be opposed on the basis of substance. The powers are arbitrary altering the quality of ASIO and of the police in significant ways. There is no adequate judicial review.

The broad thrust of the legislation is wrong because it makes the fundamental assumption that liberty cannot defend itself.

The Government and the Labor Party have both assumed that we cannot fight terrorism and adhere to the basic principles of justice and democracy and the Rule of Law. They have created a situation in which some people are outside the law, beyond the reach of justice.

We would do well to heed the words of Israeli Professor Naomi Chazan in the recent Gandel Oration in Melbourne: “There is one standard and one standard for all, and the challenge that is posed by terrorism is how to defend the rights of those that we don’t agree with?...How can we defend the rights, the basic human and civil rights, of those whose ideas we simply abhor? It is the system, the process, the courts, it is the measurement of justice that determines the nature of our civilisation.”

Thomas Paine made the same point, thus:

“He that would make his own liberty secure must guard even his own enemy from oppression, for if he violates this duty, he establishes a precedent that will reach to himself.”

The fact that the Government, with the support of the Opposition, has moved so far away from the Rule of Law demonstrates the fragility of our grasp of a liberal, democratic society.

If we stand silent in the face of discrimination and in violation of the basic principles of humanity, then we betray our way of life. We must

fight extremism, fundamentalism, terrorism, whatever its origins, whatever its objectives but we must be confident we can best defend our free society by adherence to our own principles.

(5565 words)