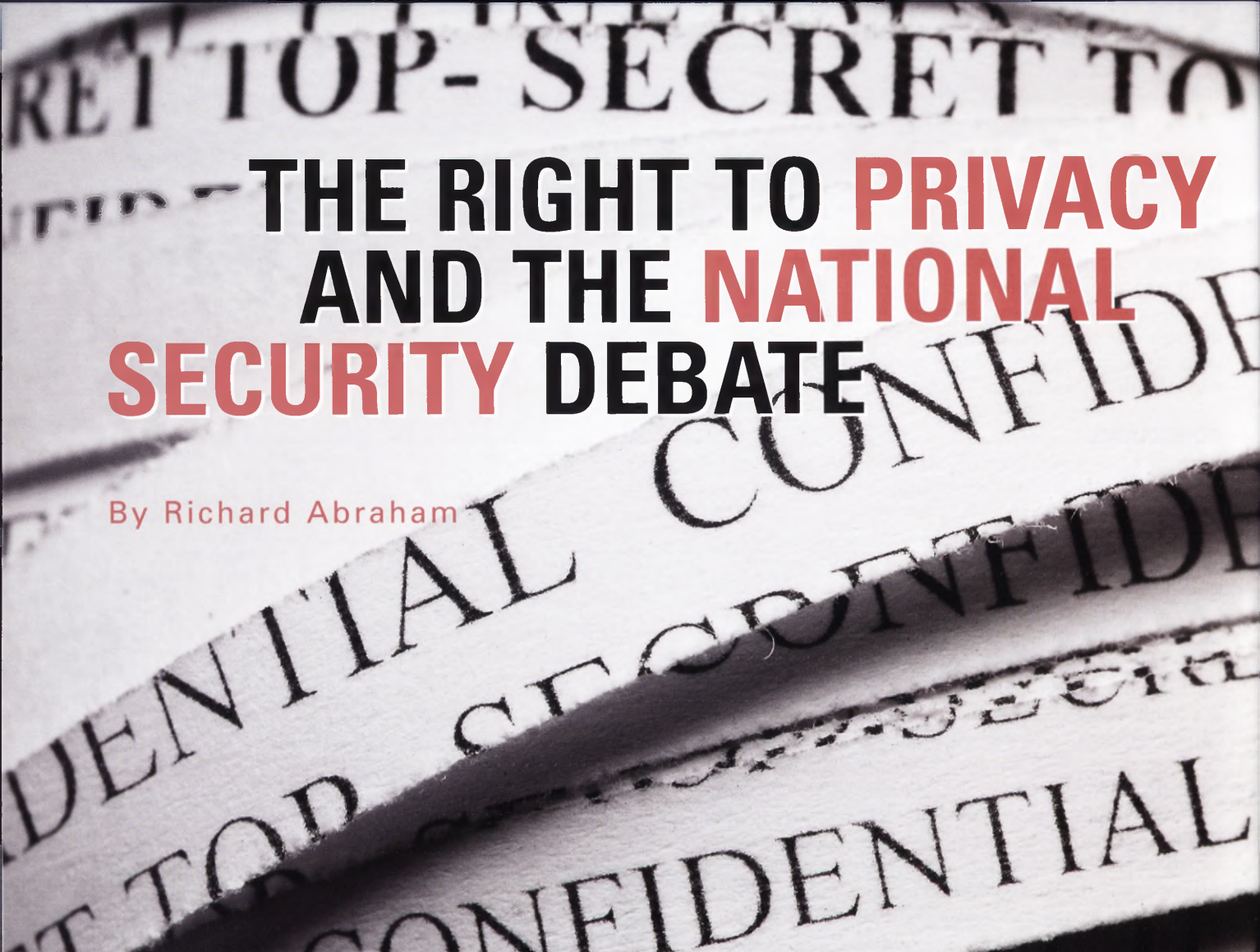
THE RIGHT TO PRIVACY AND THE NATIONAL SECURITY DEBATE

By Richard Abraham



The terrorist attacks of 11 September 2001 have been likened to 'a flash of lightning on a summer's evening that displayed an altered landscape'.[1]

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While no terrorist attack has been perpetrated on Australian soil since 1978, the Bali bombings claimed a large number of Australian lives, and we identify with the victims of attacks in places like Spain and London. Concern that it will be Australia's turn next has created an environment in which the bulk of the population 'perceives itself to be under no threat from the new laws, and under great threat from terrorists'.[2] Indeed, there appears to be popular support for the anti-terror legislation, perhaps reflecting a failure to understand its impact on people's rights and the tendency to view it as a necessary trade-off between rights and security. Ignorance and apathy in this regard are alarming and even dangerous.

Terrorism is a violation of human rights and a threat to national security. As such, the government has both a right and a duty to take action. But questions arise as to how it should be exercised, and for how long. This debate is not new; the 2,000-year-old Roman maxim, *inter arma silent leges* ('in time of war, the laws are silent') still resonates today.

Contemporary concepts of rights have shifted the debate, however, and liberal societies face a unique challenge. Legislation must provide an effective response to terrorism 'without abandoning the fundamental human rights principles that are the hallmark of free and democratic societies'.[3] Privacy is one such right. While this may represent a check on the effectiveness of the response, 'this is the destiny of democracy. She does not see all means as acceptable, and the ways of her enemies are not always open before her.'[4] To fail to abide by this creed, and trample upon our rights in the name of freedom, is to 'proffer the terrorists the greatest tribute'.[5]

Privacy is considered to be 'the quietest of our freedoms'.[6] In the face of the terrorist threat, many people have found it difficult to muster enthusiasm for its protection. Indeed, Justice Kirby suggests that many were reluctant to engage in debate for fear of being marginalised. As a result, it has not featured prominently in the debate over the terror laws,

although the unprecedented build-up of state surveillance powers could fundamentally shift the balance between the state and the individual.

LEGAL AND CONCEPTUAL FRAMEWORK

There is little legal protection of the right to privacy in Australia. Without a Bill of Rights, deciding whether a particular law that abrogates human rights is appropriate is a purely political question, 'a matter of chance, not a matter of procedure'.[7] Assertions that the terrorist threat is being dealt with 'through constitutional means' mean little, since the Constitution can provide the basis for legislation that offends fundamental human rights. While it is clear that Australians would not accept security at the cost of living in a totalitarian state, a large area of contested ground remains.

The political framework

The debate began within what may be described as the 'zero-sum game model': achieving national security would require the sacrifice of certain rights and freedoms. Lord Denning eloquently captured this conflict: 'when the state itself is endangered, our cherished freedoms may have to take second place'.[8] The attorney-general, Philip Ruddock, argued that out of necessity there would be 'some diminution of rights', and that during the war on terrorism 'many of the subtleties usually associated with the fair and even application of the rule of law are not neatly applied'. According to this view, the protection of one aim undermines the protection of the other, with the state 'simultaneously protector and threat to vital personal and political values'.[9]

Facing strong public and academic criticism, the government has subsequently departed from the zero-sum model and attempted to reinvent the framework of the debate by adopting the language of its critics. This new framework, developed primarily by Canadian attorney-general Professor Irwin Cotler, is described as 'human security' legislation. It claims that national security and human rights are not mutually exclusive, since 'human security' requires not only the absence of violent conflict, but also respect for human rights and fundamental freedoms. With its premise that 'if we are to preserve human rights then we must preserve the most fundamental right of all – the right to human security'[10] – it essentially argues that, for our rights to mean anything, 'antecedent structures of stability and security must be firmly in place'.[11] So national security and human rights are explicitly linked, and any criticism of national security legislation on human rights grounds is therefore misguided: 'failing to recognise that national security can in fact promote civil liberties ... will inevitably lead to the incorrect conclusion that civil liberties have been overlooked in an effort to promote national security'.[12]

A critique of the political framework

Does this framework of 'human security legislation' stand up to critique? The answer is 'no'. First, it offends the cardinal rule that in enacting legislation of this type, 'every erosion of liberty must be thoroughly justified'.[13] Instead of providing rigorous justification for derogations from human rights, the 'human security legislation' concept effectively stifles criticism and debate. Further, by focusing on the ends of the debate, it ignores the means. In fact, there is no logical end-point – this could lead us to dark places.[14]

The second criticism is that it creates what Hocking describes as an 'intellectual fortress'.[15] Justification for extreme measures rests on a universalised notion of threat rather than any specific threat, thus shifting the focus away from the present and into the fear of an unknown future. This has two consequences. First, when 'the enemy is undefined, the goals are unclear, the strategy is uncertain and there is no way of determining when the war will be over'.[16] With no way of deciding that we are 'safe', we may be waiting for our liberty indefinitely. Secondly, fear is limited only by our imagination, so we must guard against everything.

Underneath the rhetoric, our government's approach amounts at worst to a view of human rights as 'some kind of fancy optional extra' that should be forgotten in times of crisis so as to allow the more effective operation of police and security agencies.[17]

Nor does national security depend entirely on physical security. Political and civil rights and a robust democratic process are key elements in maintaining national security. Whereas for some, like Hocking, rights and security are mutually reinforcing, the 'human security' proponents see security as a necessary precondition for the enjoyment of rights. Sacrificing basic freedoms may in fact undermine security and, in the long run, aid the agenda of the terrorists. Furthermore, the legislation may isolate and marginalise sectors of society, and potentially drive individuals into the arms of the terrorist cause. In this way, ill-considered policy may feed the problem it aims to address.

The final consideration is practical. Political scare-mongering and an irresponsible media intent on exploiting our 'fascination of the abomination' have retarded rational debate.[18] Overstating the terrorist threat brings political benefits because no matter what the cost, 'nothing builds support for governmental programmes more effectively than the idea that life is not safe'.[19] Community concern for privacy is diminished when people feel insecure.

While the true nature of the terrorist threat is in many ways unknowable, the subjective sense of danger that many people feel bears little relation to any objective measure of likelihood. Chris Leithner recently calculated the 'annualised risk of death from terrorism' to be 0.000003%, concluding that 'to assert that terrorism poses a grave threat to our safety is simply false'.[20] If the threat to the individual is overstated, so too is the threat to the nation. In the words of Lord Hoffman:

> 'I do not underestimate the ability of fanatical groups of terrorists to kill and destroy. But they do not threaten the life of this nation... Terrorist violence, serious as it is, does not threaten our institutions or government or our existence as a civil community.'[21]

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Despite this evidence, the concept of 'national security' is a powerful rhetorical and political tool. Brett Mason argues that privacy rhetoric can be used to 'shout down other interests and render debate sterile'.[22] No better description could be afforded to the concepts of 'terrorism' and 'national security'.

In the face of this political rhetoric, a legal framework that demands justification and balance is vital.

THE LEGISLATION, ITS DEVELOPMENT AND DEBATE

The government has claimed that the new powers 'protect Australians' right to life, liberty and security without offending any other rights'.[23] This claim is not only questionable, but illogical. For example, *any* covert surveillance of the individual is a *breach* of their right to privacy. The real question is whether this breach is justified.

Before 2002, Commonwealth law did not deal specifically with terrorism.[24] ASIO, however, already possessed a formidable range of surveillance powers, arguably sufficient to meet the terrorist threat. Despite being described as an 'unfinished canvas', the response to terrorism has been comprehensive, with 37 pieces of legislation enacted over the past 5 years and 5 bills currently before parliament.[25] Australia has been able to claim that it is 'leading the world in implementing counter-terrorism legislation';[26] indeed, elements of the Australian response go beyond those developed in countries where terrorist attacks have actually taken place. The laws have already resulted in arrests and convictions for terrorist offences, and a number of cases are pending.

The new federal legislation

The new legislation has serious implications for bodily, territorial, communications and information privacy, specifically the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act* 2003 (Cth); *Anti-Terrorism Act (No. 2)* 2005 (Cth); and the *Telecommunications (Interception) Amendment Act* 2006 (Cth).

In its original form, the ASIO Bill was subject to enormous criticism. Commentators described it as 'establish[ing] part of the apparatus of a police state', while a senate committee saw it as a threat to the legal rights and civil liberties 'that make Australia a leading democracy'.[27] Amendments were made to remove the most offensive elements of the Bill. Nevertheless, it has major privacy implications. The *ASIO Act* allows, under warrant, the detention and interrogation of Australians not suspected of any involvement in an offence but who may have information relating to terrorism. Individuals may be detained for up to 7 days, and interrogated for up to 24 hours (or 48 hours if an interpreter is present). Following the expiry of a three-year sunset clause, the legislation was re-enacted with a ten-year sunset clause.

The *Anti-Terrorism Act* presents an even greater challenge to privacy. Schedule 4 introduces powers to issue control orders. The Jack Thomas saga has made this a live political issue. (see article by Philip Lynch on p43). Control orders can amount to house arrest without charge for up to 12 months – a period that may be renewed. Under these orders, which arguably breach the right to privacy (among others), a suspect can be made to submit to photography and fingerprinting, and while safeguards exist they have been criticised as insufficient. Control orders can require the wearing of a tracking device, and they may authorise ordinary and frisk searches. It is very difficult to see how these intrusions into the territorial and communications privacy of an individual can be justified if s/he has not been charged or had the chance to challenge the charge in court. The Act also allows preventative detention, a scheme that raises similar privacy issues. Of particular concern is the monitoring of all contact between the suspect and their lawyer. Both these regimes will result in the collection and use of greater quantities of personal information.

Schedule 6 gives additional powers to the Australian Federal Police to collect information in relation to terrorism offences without a warrant, thus by-passing the procedural protections that usually govern the collection of evidence. Further, it gives the AFP the power to do so for 'serious offences' – a term not limited to terrorism. This represents an expansion of police powers for ordinary criminal activity that is entirely unrelated to terrorism, and is one of a number of examples of the exceptional threat of terrorism being manipulated to justify measures that would normally be considered an impermissible intrusion on privacy and liberty.[28] As such, the Federal Privacy Commissioner recommended that it should be 'pursued through separate legislation after appropriate scrutiny and consultation'.[29] Elements of schedules 8, 9, and 10 may be viewed in the same manner. Further, the provisions of schedule 8 pose the risk of 'unnecessary routine and indiscriminate surveillance of large numbers of people, about whom there may be no cause for suspicion'.[30]

The *Telecommunications (Interception) Amendment Act* also gives rise to significant privacy concerns. The Act allows the interception of 'B-Party' communication: the B party being a non-suspect who has been in communication with someone suspected of committing a crime punishable by seven years' imprisonment. This is the first time in Australian history that law enforcement agencies have been given the power to intercept telecommunications of people who are not suspects and who are, more than likely, innocent. Further, the Act allows ASIO to enter the B party's premises without notice. Despite assurances that they are an 'investigatory tool of last resort', the discretion to issue a B-party warrant is overly wide. Finally, the Act makes it easier to issue stored communications warrants than it has previously been to issue telecommunications interception warrants. Apart from the unacceptable loss of privacy for innocent individuals, it is another example of 'legislation by stealth,' as it is not limited to the investigation of terrorism offences.

State and territory legislation

Legislative enthusiasm is not confined to the federal government. All state and territory jurisdictions have enacted legislation in a process that has at times resembled an auction where

the successful bidder is the legislature that is toughest on terror. Such an approach is wholly unsatisfactory since 'anti-terror policy should be developed following careful consideration, not by way of competing press releases'.[31] The impact of the ACT and Victorian Bills of Rights upon the future development of legislation in those jurisdictions should prove interesting.

Speed, shouting and secrecy

The speed and timing of the legislative process has been the cause of much criticism. For example, laws passed after the London bombings came into force before two inquiries reached their conclusions on the effectiveness of existing laws. This speed was justified as responding to the quickly changing terrorist menace, and the need for urgency was described as 'apparent'.[32] However, such extraordinary legislation and the classification of the legislative changes as urgent makes its proper scrutiny all the more important. While post-enactment review is occurring, it is retarded by the lack of a Bill of Rights against which to test the law, and it provides a poor substitute for considered pre-enactment review. Furthermore, short sunset provisions have been resisted on the basis that the agencies involved should be fighting terror, not preparing for review. But the notion of review lies at the core of democracy. We must not allow 'the shield of military necessity and national security [to] be used to protect governmental actions from close scrutiny and accountability'.[33]

Another consequence of Australia's weak rights protection has been the often bitter and politicised nature of the debate. In submitting bills for senate committee consideration, Labor has been accused of being 'anti-Australian ... not patriotic, not committed, not anti-terrorist'.[34]

Finally, legislation that has made disclosure of the use of certain powers an offence is feeding a disturbing trend of increasing secrecy.[35] While operational security is a legitimate concern, the breadth of these offences creates uncertainty and 'effectively remove[s] the capacity for informed public debate and policy consideration'[36] about the law and its implementation. In doing so, accountability is reduced.

CONCLUSION

Weak human rights protection means that Australia lacks an adequate framework for balancing the right to privacy (and human rights in general) against competing rights and interests. The political framework does not provide an adequate substitute for a legal framework that allows for derogation from rights in situations where it is justified. This is not an argument against maintaining a strong security agency or enacting national security legislation. Instead, it is a call to improve the process by ensuring the effective protection of the very rights they are said to protect. ■

Notes: **1** Joseph S Nye Jr, 'US Power and Strategy after Iraq' (2003) 82(4) *Foreign Affairs* 60, 60-1. **2** Sarah Joseph, 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' (2004) 27 *UNSW Law Journal* 428, 451. **3** John von Doussa QC, President of the Human Rights and Equal Opportunity Commission, 'Reconciling human rights and counter-terrorism – a crucial challenge' (speech delivered at the Annual James Cook University Mayo Lecture, 12 September 2006), www.hreoc.gov.au/about_the_commission/speeches_president/mayo_lecture.html **4** *Beit Surik Village Council v Government of Israel,* unreported, HCJ, Supreme Court of Israel, 2056/04 at [86] per Barak P. **5** The Hon Justice Michael Kirby, 'National Security: Proportionality, Restraint + Commonsense' [2005] PLPR 8. **6** Paul Chadwick, 'The Value of Privacy' (speech delivered at Law Week 2006, State Library of Victoria, 23 May 2006). **7** Von Doussa, above No. 3. **8** *R v Secretary of State for the Home Department; Ex parte Hosenball* [1977] 1 WLR 766. **9** Laurence Lustgarten and Ian Leigh, *In From the Cold: National Security and Parliamentary Democracy* (1994), 23. **10** The Hon Philip Ruddock, 'A New Framework: Counter-Terrorism and the Rule of Law' (Autumn 2004) 16 *The Sydney Papers* 113, 113. **11** Nicholas Southwood, 'Preserving Liberty' in Nicholas Southwood and John Humphreys, 'Can We Preserve Liberty in an Age of Terrorism? Two Perspectives' (2004) 20 *Policy* 28, 30. **12** Ruddock, above No. 10, 117. **13** The Hon Justice Michael Kirby, 'Australian Law – After September 11 2001' (2001) 21 *Australian Bar Review* 253, 263. **14** One need only consider Alan Dershowitz's argument that torture may be used as a legitimate national security tool in the war on terror. (See: Alan Dershowitz, 'Stop Winking at Torture and Codify It', *Los Angeles Times*, 13 June 2004, M5.) This is utilitarianism at its most frightening. **15** Jenny Hocking, 'Australian Terror Laws: A Historical Critique' (paper presented at National Forum: The War on Terrorism and the Rule of Law, New South Wales Parliament House, Sydney, 10 November 2003). **16** *Ibid.* **17** Hilary Charlesworth, 'Human rights in the wake of terrorism' (2003) 82 *Reform* 26, 27. **18** Southwood, above No. 11, 29. **19** John Humphreys, 'What price security?' in Nicholas Southwood and John Humphreys, 'Can We Preserve Liberty in an Age of Terrorism? Two Perspectives' (2004) 20 *Policy* 28, 33. **20** Chris Leithner, 'The Terror Trap' (2001) 19(1) *Policy* 34, 35. **21** *A & Ors v Secretary of State for the Home Department* [2004] UKHL 56 at [96] per Lord Hoffman. **22** Brett Mason, *Privacy Without Principle: The Use and Abuse of Privacy in Australian Law and Public* Policy (2006), 2. See review on p50. **23** The Hon Philip Ruddock, 'National Security and Human Rights' (2004) 9 *Deakin Law Review* 295, 300. **24** The NT had a terrorism offence on its books – Criminal Code Act 1983 (NT) Pt III Div 2. **25** As at November 2006. **26** Ruddock, above No. 23, 299. **27** See, for example, George Williams, 'Australia's Legal Response to September 11: The Need to Safeguard Democracy While Fighting Terrorism' (Paper presented at *'The War on Terrorism': Democracy Under Challenge*, Victorian Trades Hall Council, Melbourne, 9 August 2002). **28** Gilbert + Tobin Centre of Public Law, Submission to the Senate Legal and Constitutional Committee inquiry into the Anti-Terrorism Bill (No. 2) 2005, 10 November 2005, 16. **29** Australian Government, Office of the Federal Privacy Commissioner (2005, November), submission to the Senate Legal and Constitutional Legislation Committee's *Inquiry into the Provisions of the Anti-Terrorism Bill (No. 2)* 2005, 8. **30** *Ibid,* 15. **31** Law Council of Australia, *Terrorism: The New Law and Order Auction* (Press Release, 14 September 2005) http://www.lawcouncil.asn.au/read/2005/2417440788.html at 25 January 2007. **32** Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 March 2006, 98 (Philip Ruddock, attorney-general). **33** The Hon Justice Michael Kirby, 'Liberty, Terrorism and the Courts' (2005) 9 *University of Western Sydney Law Review* 11, 27. **34** ommonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1148 (Alan Cadman) quoted in Robert McClelland, 'The Legal Response to Terrorism: A Labor Perspective' (2004) 27 *University of New South Wales Law Journal* 262, 263. **35** For example: *Crimes Act 1914* (Cth) s3ZQT (disclosure of the existence or nature of a 'notice to produce'); *Criminal Code 1995* (Cth) 105.41 (disclosure offences relating to detention orders). **36** Jenny Hocking, 'Protecting Democracy by Preserving Justice: Even for the Feared and Hated', (2004) 27 *UNSW Law Journal* 319, 329.

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