Terrorism laws and the abrogation of the rule of law in Australia

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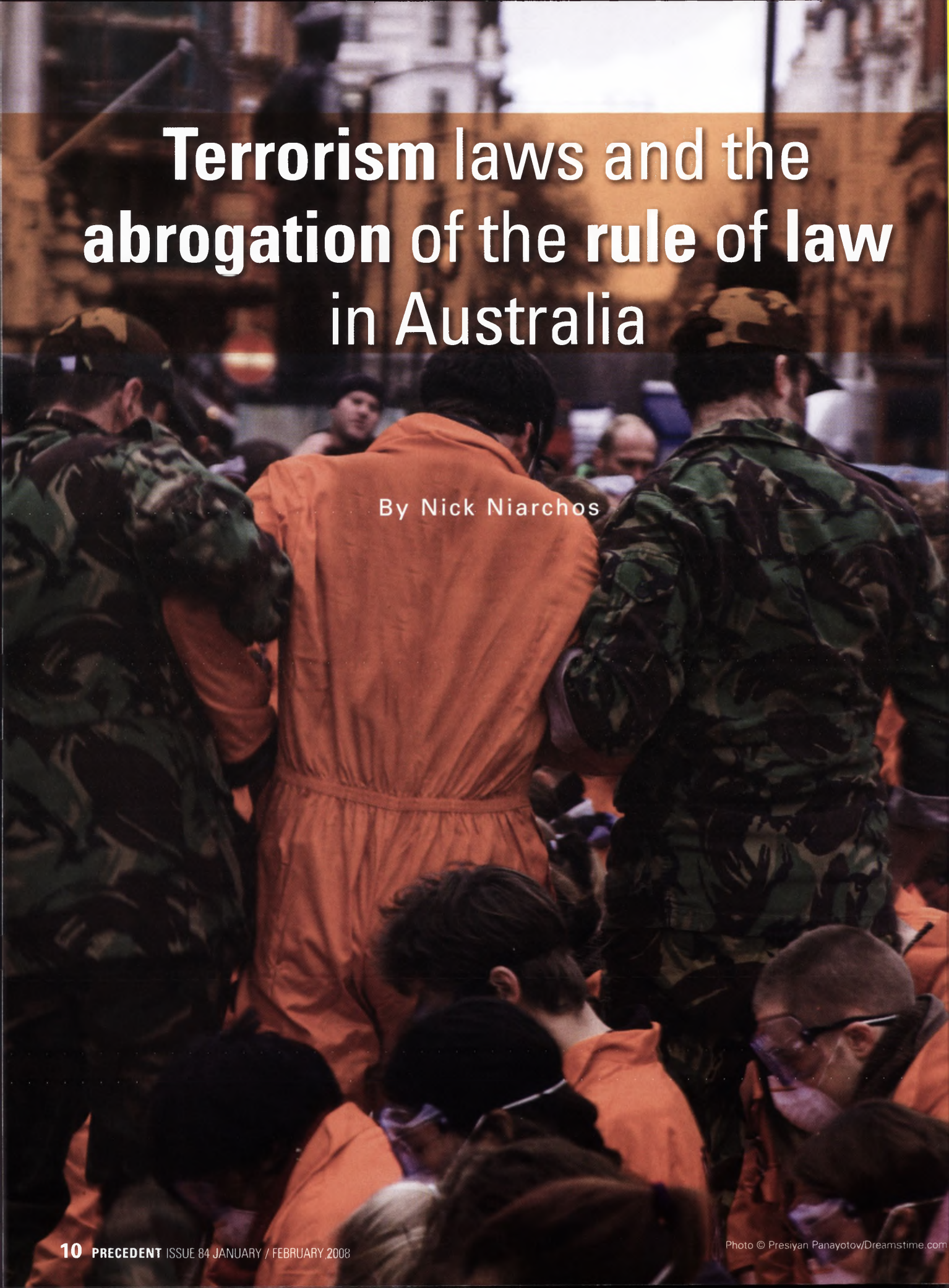

The legislative regime put in place to combat terrorism has gone too far. The nation will not be strengthened by placing suspected terrorists, and those accused of supporting or associating with them, outside the protection of the rule of law. In the longer term, such measures will have the opposite effect and jeopardise the very institutions and way of life they seek to protect. This article examines the impact of those laws on the rule of law in Australia, and asks whether the response has been proportionate to the risk.

THE RULE OF LAW IN AUSTRALIA

It has been said that the Australian Constitution is framed upon the assumption of the rule of law.[1] Statements of high principle may also be found in the common law, asserting the right of the individual to protection against unlawful invasions of personal liberty or property. One is found in the judgment of Justice Deane in *Re Bolton; Ex parte Beane*:[2]

> 'The common law of Australia knows no "lettre de cachet" or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorise or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate. ... It cannot be too strongly stressed that these basic matters are not the stuff of empty rhetoric. They are the very fabric of the freedom under the law which is the prima facie right of every citizen and alien in this land. They represent a bulwark against tyranny.'

However, in *R v Secretary of State to the Home Department; Ex parte Pierson*,[3] Lord Steyn referred to *the principle of legality* as a term encompassing the 'rule of law' and as meaning that:

> 'Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.'[4]

In *Al-Kateb v Godwin*,[5] the majority of the High Court followed that path of reasoning and upheld the indeterminate detention by administrative decision of an 'unlawful non-citizen' pending removal, when there was no prospect of such removal in reality. Their Honours held, Gleeson CJ, Kirby and Gummow JJ dissenting, that the law was clear in its intent and, construed according to its plain meaning, it was a valid law of the Commonwealth. In other words, such an individual could rot in a detention centre – which in all but name was a prison – and, provided the legislature intended that as a clear consequence, the courts were helpless to prevent it.[6]

THE RIGHT TO A FAIR TRIAL

The right to a fair trial has been referred to as an inviolable principle of the common law, and is an aspect of the rule of law that has been under attack in recent years. It is also recognised under various international instruments to which Australia is a signatory.[7] In *Barton v The Queen*,[8] the High Court acknowledged the right of an accused person to a fair trial and of the power of the courts to stay proceedings indefinitely, where appropriate, to protect the accused from having to face an unfair trial.[9]

In *Dietrich v The Queen*,[10] Mason CJ and McHugh J referred to 'the right to a fair trial as being a central pillar of our criminal justice system,'[11] as 'a fundamental element' of that system and as more accurately expressed in negative terms as 'a right not to be tried unfairly'.[12] Justice Deane observed that 'the fundamental prescript of the criminal law of this country is that no person shall be convicted of a crime except after >>

a fair trial according to law'.[13] Justice Gaudron said that 'It is fundamental to our system of criminal justice that a person should not be convicted of an offence save after a fair trial according to law'.[14]

The prospect of detention without charge and without disclosure of the reasons for that detention ought to be utterly alien to the rule of law which characterises a liberal democracy. However, it has been known for almost a century that the rule of law and Chapter III of the Australian Constitution provide no such protection during wartime.[15] The right to a fair trial and issues of procedural fairness have not affected the results in those cases. The High Court has also repeatedly held that the human rights and values embodied in international human rights instruments ratified by Australia, including the right to a fair trial and due process, are enforceable only where they have been made part of Australia's domestic legal system.[16]

While our anti-terrorism measures are as harsh as those anywhere else, we lack any constitutional protection of our rights.

ANTI-TERRORISM LAWS INTERNATIONALLY

It is true that, before 9/11 and the first of the Bali bombings, there was little evidence of any direct terrorist threat involving Australia. Other countries had not been so fortunate. The UK, for example, had faced a direct and concerted terrorist campaign of bombings and targeted assassination by the IRA for the better part of the last century and, more recently, by al Qaeda or its sympathisers. One commentator has observed that the liberal democracies have 'proven remarkably resilient in the face of domestic and international terrorism' and 'succeeded in this difficult task without destroying or eroding irreparably fundamental democratic principles and process'.[17] That is something of an overstatement, given the succession of miscarriage of justice cases related to bombings in the UK in the 1970s and 1980s.[18]

However, those states governed by the rule of law that have constitutions which entrench or protect fundamental human rights have had to take those rights into account when combating terrorism. For example, in a number of landmark 'terrorist' cases, the Supreme Court of Israel decided in favour of the rights of the individual to a fair trial and substantive due process rather than accepting at face value the arguments of the state and, in particular, of intelligence agencies and the defence force, based on grounds of asserted 'national security' or secret evidence. It did so despite the number of suicide bombings and other internal and external threats to the state.[19]

It should be noted that, although Australia has enacted anti-terrorism measures at least as harsh as those of other countries, it lacks their constitutional protection of fundamental rights.

ANTI-TERROR LAWS IN AUSTRALIA

The Australian anti-terror legislation comprises over 30 separate Acts. Each state and territory has introduced legislation to complement that of the Commonwealth. There has also been a reference of powers by the states to the Commonwealth to strengthen the constitutional basis for some of these measures.[20] A detailed analysis of that legislation is beyond the scope of this article, but some deserve special mention.

The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act* 2003 allowed ASIO to apply to an issuing authority, defined as a federal magistrate or a judge, for a warrant to detain, question and search where necessary to collect intelligence that is important in relation to a terrorism offence. This legislation had a three-year 'sunset clause' and was replaced by the more extensive provisions of the *ASIO Legislation Amendment Act* 2006. The person concerned has a limited right to contact a particular lawyer and there are restrictions on the role of the lawyer and their ability to communicate with third parties. The detention for the purpose of questioning may be for up to 168 hours continuously on any one occasion, and multiple warrants may be sought and obtained for this purpose.

The *Anti-terrorism Act* 2004 includes amendments to the *Crimes Act* 1914 (Cth), allowing for investigative detention for periods of up to 48 hours, which can be extended by application to a judicial authority by a further maximum period of up to 20 hours. The *Anti-terrorism Act (No. 2)* 2004 created the new offence of 'associating with terrorist organisations'[21] which carries up to three years' imprisonment. The *Anti-terrorism Act (No. 3)* 2004 allows for the relevant minister to direct the surrender of a passport and, in certain circumstances, for a competent authority to prevent foreign travel by designated persons. There are limited rights to seek to review the decision of a minister who orders the surrender of a passport.

Control and preventative detention orders

The regime for making interim and permanent control and preventative detention orders, brought in by the amendments to the Criminal Code, erode the right to a fair trial. Section 104.1 of the Code provides that the object of the new Division 104 is 'to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act'. An application must first be made by a senior member of the AFP to the attorney-general for consent to make an application for an interim control order [subsection 104.2]; this application must include a summary of its grounds unless the disclosure of that information is likely to prejudice

national security within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act* 2004. Section 8 of that Act defines 'national security' to mean 'Australia's defence, security, international relations or law enforcement interests'.

Section 104.4 of the Code sets out the preconditions for the making of an order by an issuing authority. An interim control order is made ex parte and is to set out prescribed information, including the grounds upon which it is made, unless 'disclosure of that information is likely to prejudice national security'.[22] The procedure for confirming an interim control order is set out in subsection 104.14. A person who is subject to an order, or the AFP commissioner, may apply to have the order revoked or varied. The commissioner may apply to have additional restrictions, prohibitions or obligations added to an order. The grounds for making such an application may not be disclosed to the person where:

> 'disclosure of that information is likely: (a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or (b) to be protected by public interest immunity; or (c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or (d) to put at risk the safety of the community, law enforcement officers or intelligence officers'[subsection 104.23(3A)].

A preventative detention order may be made under Division 105 of the Criminal Code. Section 105.1 states that the object of such an order is 'to allow a person to be taken into custody and detained *for a short period of time* in order to: (a) prevent an imminent terrorist act occurring; or (b) preserve evidence of, or relating to, a recent terrorist act'. Section 105.2 sets out the persons who may be appointed as issuing authorities for the making of continued preventative detention orders. They include judges of the state supreme courts, federal magistrates, former judges, a president or deputy president of the AAT, and legal practitioners of more than five years' standing. An initial preventative detention order, which has effect for 48 hours, can also be made by a senior member of the AFP [subsection 105.8]. As with control orders, non-disclosure provisions apply if 'disclosure of that information is likely to prejudice national security'.

A 'continued preventative detention order' may be made under s105.12 for a time not exceeding 48 hours. The order is to set out the grounds for the making of the order unless 'disclosure of that information is likely to prejudice national security'. Such an order may be further extended by further periods, each not exceeding 48 hours. In addition to a preventative detention order, the AFP may apply for a 'prohibited contact order' that 'the subject is not, while being detained under the preventative detention order, to contact the person specified in the prohibited contact order'.[23]

In *Thomas v Mowbray*,[24] a majority of the High Court, Kirby and Hayne JJ dissenting, dismissed the first challenge to the 'control order' regime. The majority found the legislation to be supported by the defence and external affairs powers and that it did not confer a non-judicial power on the issuing authority constituted by a federal magistrate (which would have been contrary to Chapter III of the Constitution). That case did not require the Court to consider issues of procedural fairness which 'could arise where, for example, particular information is not made available to the subject of a control order or his or her lawyers. Issues of that kind will be decided in the light of the facts and circumstances of individual cases.'[25]

The High Court has upheld the validity of the power to make control orders given to federal courts despite the absence of sufficient safeguards for fair procedure and mandatory disclosure of the grounds upon which the order is sought and made. It has also determined that the power to make such orders does not undermine the integrity of the judiciary and the proper administration of justice.

The ASIO powers to detain, and the Commonwealth and state legislation allowing for the making of control and preventative detention orders, erode the rule of law because an individual not charged with or found guilty of a criminal offence is subjected to imprisonment or 'detention', or to a range of restrictions on movement and association, without preserving minimum rights to a fair hearing.

Trial by secret evidence

The principles of a fair trial and open justice are plainly inconsistent with closed courts and the suppression of evidence in criminal trials, which can occur in the context of applying for control and detention orders in a trial on >>

> Procedural fairness cannot be sacrificed in the name of national security.

terrorism-related offences. The *National Security Information (Criminal and Civil Proceedings) Act* 2004 (Cth) deals in part with the suppression or protection from publication of evidence or information of certain kinds in federal criminal proceedings or any civil proceedings.

Former High Court Justice, Michael McHugh QC, considers a number of features of the *National Security Information (Criminal and Civil Proceedings) Act* 2004 (Cth) to be open to challenge on constitutional grounds, as they may be seen as an attempt by parliament to usurp the judicial power of the Commonwealth.[26] The right to procedural fairness has been regarded as fundamental to the concept of a natural justice. In the area of judicial review of administrative action, a failure to afford an affected party a right to be heard is a denial of procedural fairness. In *Kioa v West*,[27] Justice Brennan, speaking of the right to be heard, said: 'A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise.'

The appeal in *Re Criminal Proceeds Confiscation Act* 2002 (Qld),[28] concerned the validity of s30 of the *Criminal Proceeds Confiscation Act* 2002. The appellants submitted that the provision was so inconsistent with the essential character of the exercise of judicial power that it was invalid. The Court of Appeal held the legislation to be invalid because it went beyond the power of the Queensland Parliament, as it precluded natural justice in a process that concerned the possible expropriation of property.[29] The reasoning of the Queensland Court of Appeal did not find favour with the WA Court of Appeal in *Gypsy Jokers Motor Cycle Club Inc v Commissioner of Police*.[30] In that case, the legislation in question allowed for review by a court of the reasonableness of the belief expressed by the WA Commissioner of Police – that certain material should be classed as 'confidential' and therefore did not need to be disclosed to the person affected by the proposed order. The High Court has now heard and reserved judgment on the appeal by Gypsy Jokers Motorcycle Club Inc from the decision of the WA Court of Appeal.[31]

In *Lodhi v R*,[32] the accused sought unsuccessfully to overturn orders made by Supreme Court Justice Whealy for closing the court and prohibiting the disclosure of certain evidence given in the course of his trial on terrorism-related charges. Justice Whealy, the trial judge in *Lohdi*, has delivered a paper on the conduct of the trial and, in particular, on the impact of orders to close the court and not disclose evidence on the fairness of the trial. His Honour referred to the difficulties confronted by an accused and the potential for the types of orders envisaged by the legislation, which he and the Court of Appeal had found to be valid, to interfere with the fairness of a criminal trial.[33] Mr Lodhi's substantive appeal against conviction has been heard by the NSW Court of Appeal, and judgment has been reserved. One of the grounds raised relates to the use of secret evidence and the denial of procedural fairness resulting in a miscarriage of justice.

Proportionality of Australia's response and international human rights obligations

Preventative detention and control orders as envisaged by the Commonwealth and state Acts are, on their face, obviously contrary to Australia's international obligations under various human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), which was ratified by Australia in 1966. Those instruments include provisions that permit state parties to derogate from fundamental human rights by taking measures that are appropriate and proportional in a state of emergency and to counter extreme threats to national security. The *Siracusa Principles*,[34] in particular, set out the limitation and derogation provisions in the ICCPR where a there is a 'public emergency which threatens the life of the nation'.

In the *Paris Minimum Standards of Human Rights Norms in a State of Emergency*[35] the International Law Association, considering both article 4 of the ICCPR and article 15 of the European Convention, concluded:

> '2. The power to take derogatory measures as aforesaid is subject to five general conditions:... (b) Such measures must be strictly proportionate to the exigencies of the situation. (c) Such measures must not be inconsistent with the other obligations of the state under international law. (d) Such measures must not involve any discrimination solely on the ground of race, colour, sex, language, religion, nationality or social origin.'

In *A & others v Sec of State for the Home Department*,[36] the House of Lords allowed the appeals of a number of unlawful or illegal immigrants held without charge and in long-term detention, and issued a quashing order in respect of the *Human Rights Act* 1998 (Designated Derogation) Order 2001 and a declaration under s4 of the *Human Rights Act* 1998 [UK] that s23 of the *Anti-terrorism, Crime and Security Act* 2001 (UK) was incompatible with articles 5 and 14 of the European Convention, as being disproportionate to the perceived threat and permitting detention of suspected international terrorists in a way that discriminated against them on the ground of nationality or immigration status by executive order.

In rejecting the attorney-general's submission that the response was appropriate as there was a threat to the life of the nation, Lord Hoffman said:

> '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. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.'[37]

Similarly, in *Rumsfeld v Padilla*,[38] the US Supreme Court held that the detention of a citizen of the US, because the president decides that he is an enemy combatant who should be held in Guantanamo Bay for trial by military commission, violated both the Uniform Code of Military Justice and the Geneva Conventions. In the course of his reasons, Justice Stevens observed:

'At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting citizens from official mistakes and mistreatment is the hallmark of due process.'[39]

Sir Ken Macdonald, the head of the Crown Prosecution Service, had earlier described the anti-terrorism laws introduced in the UK as being 'fear-driven'. Speaking to the Criminal Bar Association, he said that 'the war against terrorism is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement.' He went on to say that it should be an article of faith that crimes of terrorism are dealt with by the criminal justice system and that the a 'culture of legislative restraint in the area of terrorist crime is central to the existence of an efficient and human rights compatible process...Otherwise we sacrifice fundamental values critical to the maintenance of the rule of law – upon which everything else depends.'[4]

At an international level, *The Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*[41] was adopted in August 2004 by 160 international jurists, brought together by the International Commission of Jurists (ICJ). The ICJ has also established an eight-member Eminent Jurists Panel on Terrorism, Counter Terrorism and Human Rights. The panel has set about exploring the scope of modern terrorism, the effect of counter-terrorism measures on the rule of law and human rights, and is expected to provide a final report to the ICJ within the next few months. Members of the panel have in the meantime held a number of hearings on measures taken to combat terrorism around the world.[42]

The President of the ICJ, Justice Arthur Chaskalson,[43] in a recent address on human rights and the rule of law, spoke of his experiences in South Africa. He drew comparisons between international developments since 9/11 and the steps taken in South Africa some 50 years earlier. He said:

'The first step towards what was to become a police state in South Africa was taken in 1950 with the passing of the *Suppression of Communism Act*. This was the time of the cold war and the rise of McCarthyism in the United States...The initial steps ...laid the groundwork for further measures including the banning of the African National Congress, the Pan African Congress and over time various other anti-apartheid organisations, and the draconian security legislation of the 1960s and later years...we should remind ourselves of the frailty of legal norms that protect human rights, of the threat to the rule of law that can be posed by measures taken in what is said to be in the interests of the security of the state, and how quickly fundamental principles such as the presumption of innocence and the right to a fair trial can unravel when rights are subordinated to security.'

In four decisions, all delivered on 31 October 2007,[44] the House of Lords has ruled that control orders based solely on secret evidence violate the right to a fair hearing and impede the basic principle of the rule of law – that everyone has the right to know the case against them even when national security is at stake. The Court held that orders confining suspects to their homes for 18 hours a day breached their right to liberty. While the judgments still allow serious restrictions on movement to continue, they make clear that procedural fairness cannot be sacrificed in the name of national security. >>

Unlike other liberal democracies, Australia has no national bill of rights compelling a judicial balancing exercise between terrorism legislation and fundamental human rights.

In Australia, however, it is clear that recent legislation has created a climate of secrecy and fear, and given the executive a worrying degree of power. If proof were needed that in a liberal democracy such untrammelled power and secrecy are inconsistent with the rule of law, it came with the case of Dr Mohamed Haneef.[45]

THE NEED FOR A BILL OF RIGHTS

The stark reality is that 'the rule of law' in Australia means something entirely different to that in the UK and most other liberal democracies. The absence of a bill of rights at a national level leaves Australian courts out of touch with the jurisprudence being developed in the UK, Canada and the US in this area. The *Human Rights Act* 2004 (ACT) and the *Charter of Rights and Responsibilities* 2006 (Vic) provide some acknowledgment, but no real protection of, such rights. They are likely to prove irrelevant in any process involving the application of anti-terrorism legislation.

In Australia, unlike in other jurisdictions such as the UK, there is no bill of rights to compel a judicial balancing exercise between compatibility of terrorism legislation and fundamental human rights. Justice McHugh referred to the absence of an Australian bill of rights when, as one of the majority justices, he upheld the constitutional validity of the mandatory and indeterminate detention regime in *Al-Kateb*. His Honour said:

> 'Eminent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights which substantially adopts the rules found in the most important of the international human rights instruments. It is an enduring – and many would say a just – criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights.'[46]

CONCLUSION

Executive governments in Australia may use their police powers to impose a penalty or punishment on an individual by inflicting loss of liberty by imprisonment, imposing fines or confiscating property. Acting in haste, and without regard to the serious erosion of the rule of law itself, federal and state governments have forced through all parliaments a series of repressive laws in the name of combatting terrorism, either real or imagined. The judiciary is unable to protect the individual against such action, because no fundamental rights are entrenched in the Constitution.

There is nothing new about the abuse of power in the hands of security and intelligence agencies. When ultimate power over the liberty of the individual is placed by the state into the hands of unnamed agents, acting on secret evidence, what is left of rule of law? As Lord Denning once observed:

> '[A]n official who is the possessor of power often does not realise when he is abusing it. Its influence is so insidious that he may believe that he is acting for the public good when, in truth, all he is doing is to assert his own brief authority. The Jack-in-office never realises that he is being a little tyrant.'[47]

Where the liberty of the individual is made subject to the discretion of the security agencies of the state, there is no rule of law, and any perceived benefits in fighting terrorism, real or imagined, have come at too high a price. An added danger is that such repressive measures may work only too well and develop a life of their own. Police forces are then likely to pursue an 'ends justifies the means' mentality, spreading into all other areas of policing. The result will be, if it is not already, a police state, one where there is neither liberty nor justice. ■

Notes: **1** Dixon J in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193. **2** (1987) 162 CLR 514 at 528. **3** [1998] AC 539. **4** [1998] AC 539 at 587, cited in Hon JJ Spigelman, 'Principle of Legality and the Clear Statement Principle', (2005) 79 *ALJ* 769, at 774. **5** (2004) 219 CLR 562, [2004] HCA 37 at [45]; see also the related decisions delivered by the High Court on the same day, 6 August 2004, in *Behrooz v DIMIA* (2004) 219 CLR 271 and *MIMIA v Al Khafaji* (2004) 219 CLR 664. **6** The decision in *Al-Kateb* is also notable for the stinging rebuke by Kirby J of the majority judgment to uphold the validity of the mandatory, indeterminate detention regime. His Honour observed that their Honours' decision had 'grave implications for the liberty of the individual in this country' [(2004) 219 CLR 662 at [148]. **7** Article 14 of the International Covenant on Civil and Political Rights to which Australia is a party attempts a broad definition of the bare minimum attributes of a fair trial. The ICCPR is set out in Schedule 2 of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) but does not itself create any enforceable right as it has still not been incorporated into Australian domestic law. **8** (1980) 147 CLR 75. **9** (1980) 147 CLR 75, per Gibbs ACJ and Mason J at 96, Stephen J at 103, Murphy J at 107. **10** (1992) 177 CLR 292. **11** (1992) 177 CLR at 298. **12** (1992) 177 CLR at 299. **13** (1992) 177 CLR at 326; see also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 56. **14** (1992) 177 CLR at 362. See also ICJ trial observation manual, *Legal Standards for Fair Trial*, Geneva, June 2002, accessible at http://www.hrea.org/erc/Library/monitoring/icj02.pdf. **15** Detention of named persons by ministerial direction under wartime regulation has been upheld by the High Court in *Lloyd v Wallach* (1915) 20 CLR 299, *Ex parte Walsh* [1942] ALR 359, *Little v Commonwealth* (1947) 75 CLR 94, and see also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; the House of Lords and US Supreme Court have also upheld the validity of similar wartime regimes: see: *R v Halliday; Ex parte Zadig* [1917] AC 260, *Liversage v Anderson* [1942] AC 206, *Korematsu v United States* 323 US 214 (1944). **16** See *Roach v Electoral Commissioner* [2007] HCA 43 at [181], per Heydon J. **17** Charters DA (ed), *Democratic Responses to International Terrorism*, n16 at 348; see also the review undertaken into the operation and impact of the relevant UK legislation, the *Prevention of Terrorism Act* 1974 (UK) and *Northern Ireland (Emergency Provisions) Act* 1973, on the rule of law, Gearty C and Kimbell J, *Terrorism and the Rule of Law*,

CLRU, School of law, King's College, London 1995. **18** Gearty C and Kimbell J, *Terrorism and the Rule of Law*, CLRU, School of law, King's College, London 1995. **19** The judgments of the court 'Fighting Terrorism within the Law' are accessible at http://www.mfa.gov.il/MFA/Government/LAW/Legal+Issues+and+Rulings/Fighting+Terrorism+within+the+Law+2-Jan-2005.htm ; see also Aaron Barak, former President of the Supreme Court of Israel, 'A Judge on Judging: The Role of A Supreme Court in A Democracy', (2002) 116 *Harvard Law Review*, 116. **20** Australia has obligations to pursue individual and collective measures to combat terrorism under a number of international instruments; see Musch DJ (ed), *International Terrorism Agreements: Documents and Commentary*, Vol 16, 2nd Series, *Terrorism, Documents of International and Local Control*, Oceana, New York 2004; Than and Shots (eds), *International Criminal Law and Human Rights*, Sweet and Maxwell, 2003; The more significant Commonwealth legislation includes the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act* 2002, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act* 2003, *Criminal Code Amendment (Terrorist Organisations) Act* 2004, *Anti-terrorism Act* 2004, *Anti-terrorism Act (No. 2)* 2004, *Anti-terrorism Act (No. 3)* 2004, *National Security Information (Criminal and Civil Proceedings) Act* 2004, *National Security Information Legislation Amendment Act* 2005, *Anti-Terrorism Act (No. 2)* 2005. A useful website for all 'terrorism-related' legislation at the Commonwealth Parliamentary Library website is http://www.aph.gov.au/library/intguide/law/terrorism.htm#terraustralia. Complementary state and territory legislation largely enacts the regime of the Commonwealth for the making of control and preventative detention orders at a local level. Anti-terrorism legislation enacted around the world is accessible at http://jurist.law.pitt.edu/terrorism/terrorism3a.htm. **21** Section 102.8 of the Criminal Code. **22** Section 104.5(2A). **23** Section 105.15. **24** [2007] HCA 33. See article on p43 of this edition of *Precedent*. **25** [2007] HCA 33, per Gleeson CJ at [31]. **26** Hon Michael McHugh QC, 'Constitutional Implications of Terrorism Legislation', (2007) 8 *The Judicial Review*, 189. **27** (1985) 159 CLR 550 at 628. **28** [2004] 1 Qd R 40 at 55, [2003] QCA 249. **29** [2004] 1 Qd R 40 at 55, [2003] QCA 249 at [57]-[58]. **30** [2007] WASCA 49. **31** Appeal heard 27 and 28 September 2007, see *Gypsy Jokers motorcycle Club Inc v The Commissioner of Police* [2007] HCA Trans 550. **32** [2006] NSWCCA 101. See also *K-Generation Pty Ltd & Anor v Liquor Licensing Court* [2007] SASC 319, where the Full Court of the Supreme Court of SA upheld the validity of legislation allowing use of secret police 'criminal intelligence' to deny a liquor licence to the applicant. The unsuccessful applicant has filed an application for special leave to appeal to the High Court. **33** The Hon Justice A Whealy, 'The Impact of Terrorism Related Laws on Judges Conducting Criminal Trials', (2007) 8 *The Judicial Review*, 353 at 363, 366, 377-8; an edited version of the paper has also been published under the title 'Difficulty in Obtaining A Fair Trial in Terrorism Cases', (2007) 81 *ALJ* 743. **34** See (1985) 7 HRQ 3. **35** (1985) 79 AJIL 1072 at 1074. **36** [2005] 2 AC 68, [2004] UKHL 560 (*Belmarsh No. 1*). **37** *A & others v Sec of State for the Home Department* [2005] 2 AC 68, [2004] UKHL 560 at [95]-[96]. The UK sequel to *Belmarsh No. 1* was the decision in *A v Secretary of State for the Home Department (No. 2)* [2006] 1 All ER 575 (*Belmarsh No. 2*) where the House of Lords unanimously ruled out the admission of evidence that may have been obtained, directly or indirectly by torture. **38** 126 S.Ct 2749 (2006), 548 US (2006), 72 USLW 4584 (2004). The US Congress then passed the *Military Commissions Act* 2006 which is now under challenge before the Supreme Court. That Act redefines US obligations under the Geneva Conventions, strips detainees of the right to challenge their detention via habeus corpus, possibly forbids them and their lawyers access to evidence to be used at trial, allows hearsay evidence and even evidence obtained under torture, among other things, virtually wiping out any semblance of fairness or due process; on 5 December 2007 the US Supreme Court heard argument and reserved its decision in two related cases, *Boumediene v Bush* [06-1195] and *Al Odah v United States* [06-1196], which raise new issues as to the legality of the trial process established under the 2006 Act. **39** 72 USLW 4584 (2004)] at 4595, Souter, Ginsburg and Breyer JJ joining. **40** The full text of the speech is available at http://www.cps.gov.uk/news. **41** Accessible at http://www.icj.org/news.php3?id_article=35038&lang=en. **42** Hearings of the EJP were held in Australia [March 2006]. **43** Former Chief Justice and President of the Constitutional Court of South Africa, President of the ICJ and Chair of the EMP in the seventh Sir David Williams Address at the Faculty of Law in Cambridge in May 2007, *The Widening Gyre: Counter-terrorism, Human Rights and the Rule of Law*, accessible at http://ejp.icj.org/hearing2.php3?id_article=1248&lang=en. **44** *Sec of State for the Home Department v E & Anor* [2007] UKHL 47; *Sec of State for the Home Department v JJ & Anor* [2007] UKHL 45; *Sec of State for the Home Department v MB, and AF* [2007] UKHL 46. **45** In *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273, Spender J ordered that the decision of the minister to cancel the business class visa held by Dr Haneef be quashed, giving a detailed analysis of the meaning of the rule of law under the Constitution with much wider relevance than just for the issues involved in that case. An appeal from that decision was dismissed by the full court of the Federal Court on 21 December 2007; see [2007] FCAFC 203. **46** *Al-Kateb v Godwin* (2004) 219 CLR 562 at [73]. **47** Sir Alfred Denning, *Freedom Under the Law*, Stevens & Sons, London 1949, p100.

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