Australia's response to terrorism

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Thank you for the opportunity to speak here today. As a former public defender, I have a particular interest in this conference. And I was delighted when my friend and colleague, Phil Boulten, suggested that we work on this joint paper. Unfortunately, Phil could not make the conference because he has work commitments, and so I will deliver it on our behalf.

The topic for this paper is **'Australia's response to terrorism'**. There are two broad areas that I would like to discuss. The first is the legislative response to terrorism, which includes the controversial package of specific laws introduced to Parliament last year, as well as what I will call the "policy responses". The second broad area I would like to investigate is how Australia's response to terrorism is shaping new – and often disturbing – directions in our criminal law.

Responding to terrorism

All the evidence suggests that if truth is the first casualty of the war on terrorism, then democratic freedoms must be the second.

That proof is immediately apparent in the detention of two Australian citizens in the legal limbo of Guantanamo Bay in Cuba. Those two citizens are David Hicks and Mamdouh Habib. In many ways, the response of the Australian Government to the plight of these two men provides a great deal of insight to how we as a country have reacted to the threat of terrorism.

David Hicks was captured by the Northern Alliance in Afghanistan in December 2001 before being handed over to the American forces. He was then moved to Guantanamo Bay and labelled a "battlefield detainee", something less than a prisoner of war. The Americans denied him and the others held there of any rights under the 1949 Geneva Convention.

The second Australian citizen, Mamdouh Habib, was detained in Pakistan in early October 2001. He was then moved to Egypt before being transferred to United States custody.

My concern since these two Australian citizens were first captured by American forces 18 months ago is very simple: no Australian citizen should be detained without charge. And where Australian citizens are locked up without charge, they should rightly expect their Government to intervene on their behalf. Instead, Australia has done nothing to protect its citizens. Recently the *New York Times* reported that the Americans wanted to hand the two men back to Australia, but the Australians had washed their hands of the deal. The Howard Government denies any such discussions.

It gets worse. The Los Angeles Times reported on the third of June that US officials in Cuba were discussing plans to build a death row and an execution chamber in Guantanamo Bay. They're doing this because a military order issued by President Bush in November 2001 allows the people detained in Guantanamo Bay to be tried by special military commissions that fall short of international standards for a fair trial.

These military commissions are not independent courts, they curtail the right of appeal and they allow a lower standard of evidence than in ordinary courts. Most disturbingly, people found guilty by these military commissions may face the death sentence. This is spelled out in the special instructions released by the US Department of Defense on the second of May this year.

So here we have a situation where Australian citizens are held for 18 months, without charge, without any real access to the outside world, and now facing the prospect of a military commission that might send them to the execution chamber.

And the most chilling aspect of the whole sorry saga is this: Australia has not raised a single concern. In the context of a war on terrorism, it is apparently okay to walk away from the very democratic freedoms we are supposed to be fighting for, and to leave these men to rot in legal limbo.

Anti-terrorism package

The Hicks and Habib cases are perhaps the clearest possible demonstration of the danger of a knee-jerk response to terrorism. The danger is that we end up abandoning the very democratic freedoms we are meant to be protecting.

The point was driven home one night in the middle of March last year, when the Attorney-General walked into the House of Representatives and, under cover of darkness, tabled 119 pages of legislation and 123 pages of explanatory memoranda. It was Australia's package of anti-terrorism laws.

It had taken six months to prepare, it was tabled at 8pm, and the Attorney-General wanted us to debate it the very next day. As you might expect, it did not happen that way.

In response to the Bills, I told the Parliament on 13 March 2002 that:

> *Our commitment to fighting the threat of terrorism is driven by our desire to protect the very systems and institutions that set us apart from the terrorists. I am talking about the reason for the war on terrorism in the first place: to protect the rights and privileges that we enjoy in a functioning democracy. It is about protecting such principles as the rule of law, freedom of speech and the right of free movement. I worry that the freedoms we cherish are threatened by this government's package of antiterrorism laws.*

By sticking to those principles, we were able to secure important amendments to the Government's package of legislation. Let me list just a few:

- We ensured that humanitarian groups would not be affected by the sloppily drafted new treason offences.

- We ensured that the definition of terrorist act contained the necessary higher level of intent associated with the grave nature of terrorist offences, and that

the offences target only terrorist activities and require the prosecution to prove knowledge of and intent to commit a terrorist act.

- We ensured that the bill would target only terrorists. The original definition proposed by the government was astonishingly wide. It did not distinguish terrorist violence from offences or forms of violence appropriately covered by other legislation.

- We ensured that any possibility that legitimate protest or industrial action could be dealt with as terrorist offences was removed.

- We ensured that there would be a full, thorough, independent, public review of these antiterrorism laws three years after they came into being.

These are important changes, and as criminal lawyers, chances are that you will end up dealing with them in practice.

The real action in the last few months has been with the ASIO Bill. It was a very controversial piece of legislation. But I believe we have achieved important amendments to the law and I would like to take you through them.

Let me start with the provisions of the ASIO Bill as they stood when the Bill was introduced last year. The original Bill did not place any age restrictions on who may be detained by ASIO. It would have allowed ASIO to **indefinitely** detain any Australian **without** charge or even suspicion. While detained, they could be strip-searched, questioned for unlimited periods and prevented from contacting family members, their employer or even a lawyer - not even to say they had been detained.

Under the Government's original ASIO Bill, a 10 year-old girl could be held in detention by ASIO, in secret and alone. The only concession was that a child's parent would have to be present for the strip search. The parent would then have to leave, as they did not have the right to be present during questioning.

The detention would have been in secret and ASIO's handling of these new powers would also have been kept a secret. There were no proper review mechanisms and no review by the Courts.

It is fair to say the original ASIO Bill was perhaps the **worst** drafted Bill ever introduced into the Australian Parliament. It would have given ASIO extraordinary powers with almost no safeguards. It would have made ASIO more like a secret police force than a specialist intelligence agency.

Labor rejected the Government's incommunicado detention regime and insisted that anyone being questioned by ASIO should have access to legal advice for the duration of questioning.

Two scathing bipartisan committee reports in 2002 brought the Government closer to reality on the ASIO Bill. When the Bill was debated last December, gone was the power to detain and strip search young children. Gone was the complete denial of

legal representation. And gone was the capacity for ASIO to hold someone indefinitely in secret.

The Bill that passed both Houses last month was a radically different Bill to the one presented last year. The Opposition had argued that the period and conditions of questioning should be comparable to those permitted under the *Crimes Act* and to those used by other agencies whose task it is to investigate crime. The Government changed its approach to allow questioning to be conducted, if absolutely necessary, over three separate eight hour questioning periods. According to the Protocols that accompany the legislation, the maximum period of continuous questioning will be limited to four hours, with breaks for meals, rest and other normal personal requirements.

It was a radically different Bill in many ways, but let me highlight six of them:

- **Gone** from the legislation is the power for ASIO to detain and strip search young children.
- **Gone** is the denial of legal representation.
- **Gone** is the capacity for ASIO to hold someone indefinitely
- **Gone** is the capacity for ASIO to hold someone in secret.
- **Included** is high-level judicial supervision.
- **Included** are three strong review mechanisms. Namely,
  - A three-year sunset clause;
  - A review by the **Parliamentary Joint Committee on ASIO, ASIS & DSD** of the operation, effectiveness & implications of the Act after three years; and
  - A requirement for ASIO to provide detailed statistics in its annual report on the number of warrants, questioning times and the Prescribed Authorities who were used. That report is tabled in Parliament.

Labor successfully insisted that persons being questioned by ASIO should have access to legal advice for the duration of questioning. Labor successfully insisted that young children are not exposed to this regime and that the age limit should be 16. Only 16-18 year olds who are suspects can be questioned by ASIO.

We have successfully insisted that detention be supervised by former or current judges – that is, by experienced judicial experts independent of ASIO, independent of the Government of the day, and not vulnerable to political pressure or Prime Ministerial displeasure. And finally, we successfully insisted on a sunset clause of three years.

In summary, we delivered legislation that aims to strike the balance between protecting the community against acts of terrorism while also protecting the liberties that define our system of democracy.

Criminal law: shaped by Australia's response to terrorism

I would now like to turn to the second broad topic for this speech – how our response to terrorism has shaped criminal law and practice in Australia. One of the first tests of the Australian legal system's response to terrorism came only days after the attacks of September 11. The scene was the Federal Court of Australia, and there was a heady mix of Nine-Eleven and the Tampa affair.

It was Monday 17 September 2001. Talk back radio was running wild with the suggestion that the Twin Towers attackers were tied to the Muslim asylum seekers on board the Tampa, who were trying to bully their way into Australia. On that day, the Federal Court delivered its verdict in the Government's appeal against an earlier decision that the asylum seekers had been unlawfully detained and should be brought ashore from the Tampa.

The appeals against Justice North's decision were allowed. The Government was triumphant. And it wanted its costs against the *pro bono* lawyers who had acted on behalf of the asylum seekers.

In the words of Justice French, that *pro bono* team had acted:

> *"according to the highest ideals of the law. They have sought to give voices to those who are perforce voiceless and, on their behalf, to hold the Executive accountable for the lawfulness of its actions."*

They had performed the most fundamental role of lawyers in a democratic system operating with the rule of law – that is, to stand between the powerful executive and the individual. Under normal circumstances, the victorious Commonwealth would wear the costs of trying such an important public issue.

But in the wake of the terrorist attack of September 11, precedent was swept aside. The Attorney-General, Daryl Williams, declared that the *pro bono* lawyers should be made to pay because by taking their case to court, they were:

> *"from a government perspective, promoting unlawful activity".*

I highlight this incident because its significance was never widely examined in the mainstream media, although David Marr and Marian Wilkinson mention it in their recent book, *Dark Victory*. Yet it was a very telling indicator of the shape of things to come.

In short, Australia's response to terrorism has been characterised by the erosion of the protections traditionally afforded to citizens, coupled with enhanced powers for the apparatus of the state. We have already paid a high price.

That trend was again highlighted last year when the former National Crime Authority was overhauled to form the new Australian Crime Commission.

You may recall that in the run-up to the last Federal election in November 2001, the Government gave a commitment to hold a special Leaders' Summit to deal with transnational crime and terrorism.

The Prime Minister said the summit would look at "options for reforming or replacing the National Crime Authority to ensure we have a national body fully equipped to deal with future transnational criminal activities." Even in the context of September 11, it was odd to hear that the NCA was marked for the chop, given the praise poured on it by the Prime Minister and successive Ministers for Justice.

A defining feature of the former NCA was that it held coercive powers similar to those of a Royal Commission. These were the powers to obtain documents and other evidence, and to summons a person to appear at a hearing to give evidence under oath.

Under the old system, these coercive powers could only be exercised in very defined circumstances. Ultimate accountability lay with an Inter-Governmental Committee made up of the various State and Commonwealth police ministers.

At the time the NCA was set up, there was extensive debate in the community about the nature of these coercive powers. It was recognised that no government would allow them to be solely in the hands of a police force or bureaucrats. That is why the architects of the NCA devised a references system whereby the Ministerial-level Committee referred matters to the NCA for investigation.

Last year, the Government came up with plans to completely overhaul that system. In effect, they were prepared to put the coercive powers right into the hands of the police, with no oversight. At the height of the war on terrorism, there was barely a whimper of protest.

Under the new model, the Crime Commission is managed by a Board. And that Board is made up of police commissioners and bureaucrats, including the director-general of ASIO.

Under the Government's original plans for the Crime Commission, the Board was to be given the power to 'press the green button' on the use of the coercive powers. The Board could also approve the use of the powers for the purpose of intelligence gathering, a move away from the investigative focus of the NCA.

It was a major departure from the original regime, where special powers could only be exercised after a matter was referred to the NCA by the Inter-Governmental Committee.

The Federal Opposition fought against the proposal and sought amendments that ensured Ministerial accountability under our system of responsible government. The Bill was finally amended to effectively give the Ministerial-level Committee a power of veto over any decision of the Board to authorise the use of coercive powers. It was a significant improvement on the original model, which would have given the Board an unfettered power to approve the use of coercive powers.

On the topic of policing, another worrying trend has emerged in Australia's response to terrorism. That trend is the increase in state snooping in the shape of telephone tapping and covert surveillance activities.

We are now in the position where Australian law enforcement agencies are resorting to telecommunications interception much more than their American counterparts. In fact, after adjusting the figures to take account of population size, they are tapping the telephones of Australian citizens at more than 20 times the rate in the United States.

Although intercept warrants could originally be issued only by Chapter Three judges acting *persona designata*, those powers were later extended to members of the Administrative Appeals Tribunal. Today, applications for intercept warrants are almost automatically approved by AAT members and judges of the Federal and Family courts.

In the year 2000-01, only seven of the 2,164 applications were refused or withdrawn. That is a remarkable error rate of only 0.3 percent. Very few other areas of public administration could boast such an achievement! Last year, 94 per cent of warrants were issued by the AAT.

I recently had a meeting with the NSW Law Society. The CEO is Mark Richardson, a man I greatly respect and a former Legal Aid lawyer. We were chatting about changes to the law that allowed incursions into civil liberties. And we both agreed that in all the time we have been involved in the law, neither of us had ever witnessed a diminishing of the powers that had been allowed to displace a civil liberty.

As a society, we are compelled to give very serious consideration before making concessions to any of our hard-gained liberties. I say 'compelled' because the incremental nature of so many concessions disguises the reality of their sum total. And the depressing reality is that the powers we give way to will rarely contract – they just keep on expanding. There are plenty of examples:

- witness the expansion of the offences for which telecommunications interception warrants can be obtained;
- the expansion of the powers of the Australian Crime Commission;
- the expansion of the powers held by ASIO – not merely interception powers, but the ability to obtain listening device warrants, search warrants, computer access warrants and to use tracking devices.

Into the future

Looking to the future, there is a real possibility of another wave of legislation that threatens our civil liberties.

The British Government has just published what *The Guardian* newspaper last month called:

> *"the greatest threat to civil liberty that any parliament is ever likely to consider."*

That threat is the *Civil Contingencies Bill*. It is open to consultation until September 11 – the date is ironic, I'm sure you will agree – and will preserve ancient arbitrary powers.

Here in Australia, the Government has already resurrected its plans to give the Executive the power to ban an organisation. That idea was knocked back last year. Instead, we came up with a regime that hangs off UN listing of terrorist organisations. The Prime Minister himself acknowledged that the regime settled on last year 'got the balance right'. So why is the government now trying to dismantle the whole deal? The simple answer is wedge politics. The Howard government is up to its old tricks of trying to drive a wedge between itself and us.

Another Bill introduced to Parliament in the last sitting week of the session also aims to give new 'search and seizure' powers to Australian Protective Service officers.

The track record of Australia's response to terrorism highlights the need for people like you – criminal lawyers – to stay involved in the process. The legal profession played a crucial role in helping amend the counter-terrorism legislation.

In the age of the war on terrorism, those of us who are concerned to protect our hard-earned liberties need to be both alert **and** alarmed!

Thank you.