



The Australian National University  
Cultures of Human Rights Network (CHuRN)

*Paper given at the*  
CHuRN Symposium

## THE END OF HUMAN RIGHTS?

11 April 2006 | National Europe Centre | The Australian National University | Canberra ACT

---

# Security Culture, Human Rights and 'Extraordinary' Law Reform

**PROFESSOR SIMON BRONITT**

ANU College of Law, The Australian National University &  
Director, National Europe Centre

---



## Introduction: An Uncivil Politics of Law Reform?

I was recently called to give evidence before an ACT Legislative Assembly Committee on the bill dealing with preventative detention. One of the first questions (directed to all witnesses) was whether I had been privy to various AFP or ASIO briefings on the terrorist threat to Australia. The import of this line of questioning was unsettlingly clear to me—clearly, the proposers of preventative detention (namely the PM and Premiers who form COAG) had received such a briefing, and on the basis of this intelligence were prepared to adopt these measures. Those who oppose are simply not qualified to know the seriousness of the threat and what drastic steps are need to avert devastating terrorist acts. Of course I am not privy to the briefing, but more significantly, nothing contemplated (including threats affecting me directly) would change my views on the fundamental importance of human rights protection. How did I answer the question: somewhat provocatively I sought to turn the security culture back on itself, saying that if I had been given such a briefing, then I might well be breaching a federal offence! More seriously, the line of questioning illustrated the power of security culture to disempower dissenting views: the true nature of the terrorist threat is not publicly known (we should here note that the official alert level has not changed) and probably not knowable as the 9/11 Commission itself found to be so (Luban 247). The sense of desperation that intelligence gatherer may feel in responding to these threats is apparent in the news today which reveals a AFP officer consulting psychics to determine the nature of a threat to assassinate the PM, revealing how detached agents in the field can become.

This experience before the ACT Legislative Assembly brought home to me how difficulty law reform has become in an age of terror. There prevails, what may be termed an uncivil politics of law reform<sup>1</sup> that human rights defenders occupy a very narrow ledge of legitimacy. The product of this security culture based on risk management and secrecy is to promote what Cass Sunstein calls the "Laws of Fear" in which the precautionary principle rather than evidence based approaches drives public policy in the field of counter-terrorism.

The purpose of this paper is to contest the underlying assumption of security culture on a number of fronts:

### Assumption 1: Extraordinary Times Demand Extraordinary Powers

The implicit and explicit view is that the very foundations of liberal democracy around the world are under threat. This manifests at an international level with the various actions taken to label terrorism a threat to the universal values and human rights protected by the UN Charter. At the national level, apocalyptic vistas encourage resort to a military model based on war rather than traditional law enforcement model, though as Andrew Goldsmith has recently pointed out both models can co-exist. The problem with emergency wartime responses is that rights and due process values must be suspended, derogated or heavily qualified. But the problem with this war (at least waged here in Australia) is that it appears to be a state of affairs of unlimited duration, with combatants comprising internal as well as external enemies.

---

<sup>1</sup> This is adapted from the phrase "uncivil politics of law and order", coined in the pre 9/11 context, to describe the trend in Australia to drive criminal justice reform by reference to "law and order commonsense" rather than informed expert opinion or available data: R Hogg and D Brown, *Rethinking Law and Order*, Pluto Press, 1998, Ch 1; see generally, D Weatherburn, *Law and Order in Australia: Rhetoric and Reality*, The Federation Press, 2004.

How exceptional and extraordinary are these times? The idea that certain rights are universal and fundamental flowed from periods of tumult and turmoil; whether it was wartime exigency or treasonous rebellion, states and monarchs have taken liberties with our freedoms—Bills of Rights were born in crucibles of conflict and social unrest, whether we are speaking of those charters adopted in France, the United States, or through international efforts in the 20<sup>th</sup> century, through UN Charter and European Convention on Human Rights. Rights are rarely absolute, though derogations in times of public emergency may be permitted but departures are carefully scrutinised by tests of necessity and proportionality.

Perhaps the best example of how repression and impunity promotes procedural safeguards is the history of the Star Chamber and its role in forging procedural protections. Geoffrey Robertson highlights the role of the Star Chamber in Jesuitical persecution in the 1600, which led to its demise during Cromwell's Commonwealth (Robertson: 170–172, also developed in *Tyrannicide Brief*). This is the period in which most of the fundamental due process protections were forged—trial by jury (absent in Star Chamber), open justice and privilege against self-incrimination.<sup>2</sup> By looking into the past Robertson sees that the more serious and inherently political the crime, the more the law (Anglo-American legal culture) demanded procedural safeguards—trials of treason were the first to permit defence counsel to represent prisoners. Due process was considered more, not less, important in state trials. Why is this so? The answer must be legitimacy—in cases where the political taint of crime is apparent, the state must play scrupulously by the rules. This insight seems lost in the security culture that motivates much law reform in Australia and US today. In my view, extraordinary times demand extraordinary safeguards.

### **Assumption 2: Extraordinary Times Demand Extraordinary Processes of Law Reform**

Another feature of the security culture that dominates law reform is that there is not sufficient time to permit careful review of legislative reform. The political imperative to act to reassure the electorate is a hard pressure to resist—internal reviews are conducted of the adequacy of law (which is presumed because an attack occurred). There is no systematic review of the reach of existing laws, and whether minor adaptation could achieve a result more consistent with the existing fabric of our criminal laws. Changes are foreshadowed, with no detail, by media release, softening up the public on the idea. Detail follows much later.

The amendments implementing preventative detention and sedition in late 2005, the Anti-Terrorism Bill (No 2) 2005, were adopted with indecent haste. Despite allowing only one week for public submissions, the Senate Legal and Constitutional Committee received submissions from 294 individuals and organisations. At the close of submissions the Senate committee had only 11 business days to review and make recommendations on the Bill. Not surprisingly, few significant changes were made to the Bill before its enactment.

---

<sup>2</sup> The oppressive features of the Star Chamber can be overstated. As Barnes points out, many of the modern features of due process we associate with the common law were established in the Star Chamber procedure—foremost, the right to counsel (which was denied to the common law courts in relation to felony). Moreover, the Star Chamber placed much value on procedural regularity—namely the rigour of pleadings to define issues—and copious legal argument before judgment. An enduring myth, that the chamber promoted confession by torture was not entirely true either: treason was investigated and torture was used, but never by the judges, rather it was the officers working for the Privy Council.

Another example of how the normal law reform processes are distorted by exigency is the Cronulla riots. Responding swiftly to this beach riot, the NSW Parliament introduced and passed on the same day an emergency package of powers for police, allowing them to 'lock down' suburbs: this is a potent manifestation of the war model, and martial law powers. Without the involvement of any judicial officer or court, senior police can declare an area they define as "locked down", in which case the following powers apply. Police may close licensed premises; to declare an emergency alcohol-free zone for up to 48 hours; set up roadblocks and employ stop and search (without warrant) powers to persons, vehicles, and anything in the possession of those persons; seize and detain any vehicle, mobile phone or similar device. The Cronulla reforms short-circuited the normal process of review (there are no shortage of public order powers—this is the home of move on powers and zero tolerance policing); there was no time to refer to the Legislation Review Committee to allow them to review the rights implications. The events reveal how legislators respond to the security culture and growing sense of emergency can assimilate local public order problems with terrorist violence overseas (the media linkage to the Paris riots and the failure of the Arab communities to assimilate). In this way, disorderly conduct and 'suspect communities', long been targeted by local public order campaigns, are reconstructed as threats to national security and proving grounds for homegrown terrorism.

Reviews of the effectiveness of proposed laws may occur after the enactment rather than before. Post hoc review takes two forms. At the inception stage, concern during the bill's passage may be politically assuaged by agreeing to periodic reviews by the Ombudsman or department. Sunset clauses of 10 or 5 years duration also serve the same purpose, though these are not sunset clauses applied for short term emergency conditions. After a decade, whether used or not, there would be little impetus or political will to remove these laws. The current reforms to sedition laws, which were rushed through in the final session of parliament in 2005, are a good example of how confused reviews can become. The bill was passed, but with a commitment from the Government to refer the newly minted laws to the ALRC. The pressure to push this process of review through swiftly is unabated: public consultation for this review, which looks at how the law interacts with existing offences, is proceeding with a "very tight timetable" of less than three weeks, rather than the usual 6 months community consultation. Within a security culture, community consultation is under strain for both the ALRC and the respondents.

But public or community consultation is a misnomer. The views of the wider public aren't typically involved. The process is dominated by academic experts and public interest groups, but most prominent and best resourced for this are the law enforcement agencies who lobby for the reform: the AFP's input into the ACT Committee was not a submission, but rather stage-managed media opportunity to criticise the ACT bill's failure to adopt the uniform (Commonwealth) approach. It is possible to envisage other models for law reform—allowing reasonable public consultation; using deliberative polling methods (briefing random citizens to consider the pros and cons of new laws, as applied in the adoption of the ACT Human Rights Act); resourcing Parliamentary Committees and Law Reform Agencies to gather information from their own independent academic/expert consultants.

Forging new terror legislation has occurred largely 'on the cheap'. With limited time and resources, government has been encouraged to draw on "off the shelf" solutions—for example,

the Australian definition of terrorism purports to use the *Terrorism Act 2000* (UK). This could be said to denote the worst form of legal transplantation. Not least because the UK definition is adapted, subtly but significantly, to extend its reach. One subclause was inserted, hardly noticed by anyone outside the drafting team, though added a significant transnational dimension, bringing any form of terrorism in the world within the potential reach of Australian law. This leads me to my next point.

### 3. Extraordinary Times Demands Extraterritorial Laws

The general trend, even prior to 9/11, was to adopt an increasingly broad view of jurisdiction under the criminal law. The common law view that all crime is local, has been displaced by the broader ideas of territorial nexus, with the federal Criminal Code going even further, denoting non-geographic categories of jurisdiction for many new offences—this has been liberally applied to terrorism offences.

This expanded view of jurisdiction could be less controversial in cases where the offences perpetrated overseas directly involve Australian interests. But many of these new offences do not necessarily relate to Australian interests. This is because the core definition of terrorism, underlying these offences, lacks any territorial anchor. Under the federal *Criminal Code* (Cth) the terrorist act must be done, or the threat made, with the intention, inter alia, of coercing or intimidating the "government of the Commonwealth or a State, Territory or foreign country".<sup>3</sup> While this definition of terrorism bears similarity to conventional political crimes such as treason and sedition, the extension to *any* foreign country is a clear manifestation of the globalisation of security. The recognition that the security of Australia is now dependent upon the security of other states (not just allies) justifies the adoption of expanded offences and powers that promote *global* rather than exclusively *national* security. With the adoption of such far-reaching definitions (in both senses of the term), there is a further blurring of the traditional distinction between internal and external security.

Another example of precipitous and over-reaching legislative responses is the legal response to the Bali bombings. The bombings that killed 88 Australians on 12 October 2002 demanded a swift response legislatively, even though the events occurred on foreign soil. A new part was inserted into the *Criminal Code* (Cth) (Part 5.4). Division 104 is titled "Harming Australians" and creates a range of extraterritorial offences against the person including murder, manslaughter and causing serious injury to Australian citizens or residents of Australia.<sup>4</sup> The most serious offence, murder, adopts the maximum penalty of life imprisonment. Though the perpetrators of the Bali bombings were prosecuted under terrorism laws in Indonesia, the symbolic importance of legislating to safeguard Australians overseas from harm proved to be politically irresistible. The federal offences above were expressly intended to have retrospective effect,

<sup>3</sup> *Criminal Code 1995* (Cth), s 101(1)(b) and (c) (emphasis added). The approach derogates from the standard criminal law in several respects. Motive is usually irrelevant to liability but here is the core of culpability, with the politics and religion of the defendant likely to assume a prominent focus in criminal trials: Bronitt and McSherry, n 10, 891ff.

<sup>4</sup> There are four offences in Div 104: murder of an Australian citizen or a resident of Australia (s 104.1); manslaughter of an Australian citizen or a resident of Australia (s 104.2); intentionally causing serious harm to an Australian citizen or a resident of Australia (s 104.3) and recklessly causing serious harm to an Australian citizen or a resident of Australia (s 104.4). The offences attract the following maximum penalties: murder, life imprisonment; manslaughter, 25 years imprisonment; intentionally causing serious harm, 20 years imprisonment; and recklessly causing serious harm, 15 years imprisonment.

something that even the Indonesian Constitutional Court has balked at recognising as legitimate.<sup>5</sup> Murder is clearly a crime within the core of national competency: the crime is not confined to terroristic activity and so potentially any serious offences against the person perpetrated on Australians overseas is within our jurisdiction—while symbolically significant, the potency of these crimes is illusory since most jurisdictions will rigourously defend their sovereign right to prosecute crimes of this nature committed within their territory.

#### 4. Extraordinary Times Can Produce Balanced Measures

Repeatedly, proponents of law reform promote a 'balanced approach', one which reconciles security and respect for fundamental liberal rights and values.<sup>6</sup> As the federal Attorney-General, Philip Ruddock has pointed out:

There will always be a trade-off between national security and individual rights. The task of government is to recognise these trade-offs and preserve our security without compromising basic rights and liberties.<sup>7</sup>

But the implicit liberalism in this "balanced" approach is misleading. It has been rejected by increasing numbers of legal scholars (though not all) as an appropriate model for policy development in this field.<sup>8</sup> Waldron reposes the question as how these two good (security and liberty) should be justly distributed. There are considerable problems with applying the balancing calculus to terrorism. How do we calculate and weigh the harms threatened to the majority against the harm inflicted on the few: in this case, improving the security not by interference with *our* liberty, but the freedoms of young Muslim males (Freeman: 48). These balancing becomes even harder to reconcile when we move beyond physical harm to less tangible and direct interests, such as a community's need to *feel* secure or its *sense* of security? Promoting the happiness of the majority necessarily tips the balance heavily in favour of the state over the citizen. Also in weight liberty and security, the latter tends to be viewed as paramount.<sup>9</sup> As noted above, security in the terrorism context is not national, but global, only adding weight and significance to the harm side of the calculus. Subtly the language of human security creeps in as a paramount right, as Ruddock has advocated, a community right that is uncoupled from its foundation as a right to security from arbitrary interference by the State!

---

<sup>5</sup> The provisions are specified to apply retrospectively, from 1 October 2002, as the drafters intended to use them to prosecute those involved with the 12 October Bali bombings: Parliament of the Commonwealth of Australia, House of Representatives, *Criminal Code Amendment (Offences Against Australians) Bill 2002, Second Reading Speech*.

<sup>6</sup> The balanced approach was adopted in the Senate Committee on Constitutional and Legal Affairs, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills*, Interim Report, tabled 3 May 2002. It is also adopted by G Williams, "Australian values and the war on terrorism", *Australian Financial Review*, 7 February 2003, 6–7 (edited version of National Press Club Address, 29 January 2003) and in G Williams, *The Case For An Australian Bill of Rights: Freedom in the War on Terror*, University of New South Wales Press, 2004.

<sup>7</sup> P Ruddock, "The commonwealth response to September 11: The rule of law and national security", *National Forum in the War on Terrorism and the Rule of Law*, New South Wales Parliament House, 10 November 2003, paras 28–29.

<sup>8</sup> For criticism of these balancing models, see Bronitt, n 42, and M Gani, "Upping the ante in the 'War on Terror' " in Patty Fawcner (ed), *A Fair Go in an Age of Terror*, David Lovell Publishing, 2004, 80–91; and G Carne, "Brigitte and the French connection: Security carte blanche or al la carte" (2004) 9(2) *Deakin Law Review* 573, 613–614.

<sup>9</sup> A point made by Carne, above: "The national security aspect in the balance is inevitably given special weighting, producing a structural inequality in that "balance". These considerations suggest a general unsuitability of the balancing paradigm for reconciling national security and democratic interests."

## CONCLUSION

In preparing for this symposium I read repeatedly that we lived in an 'Age of Terror'. Some commentators have argued that this best fits the US experience, and may not be replicated around the globe (Falk 2005). I remain doubtful—the US, Australia and Europe are feeling the same uncivil politics of law reform—see for example the lack of debate in the passage of the PATRIOT Act. The security culture leaves little space human rights language and instruments. Human rights are balanced or traded out of the equation in law reform as a threshold issue—the only people to invoke them during the process appear painfully and pointlessly before parliamentary inquiries, tendering submissions they suspect are unread or not digested, compared with the security-driven submissions of public officials and law enforcement officials.

The problem in the current and future law reform context will be the likely 'trickle down' effect of this security culture—the normalization of emergency powers seems inevitable, a trend long evident in the UK that has led to the demise of the right to silence after its extended trial in Northern Ireland in the 1980s. In Australia law, my prediction is that we will see an increasingly broad array of preventative powers that target groups rather than individuals, and targets a suspect person's status rather than conduct—this will not be confined to terrorism, but extend to a range of antisocial and problematic behaviours. Prosecution and deterrence seems no longer the objective or end game, but rather it is surveillance and disruption of suspect groups. The 9/11 impact on the legitimacy of law reform process has been highly deleterious—community consultation; involvement of professional law reform agencies as well as parliamentary oversight have been debased (if not sidelined entirely). The question for us to pose ourselves is how long these trends will continue and how best to promote strategies for civil politics of law reform in which human rights are protected and respected.

### A Recent Example of Security Culture

*Our Justice Minister's views on torture*

By Stephen Mayne (from Crikey: <http://www.crikey.com.au/>)

Federal Justice Minister Chris Ellison dropped a proverbial bomb at the Law Summer School in Perth yesterday during a debate on the lofty topic of the juxtaposition of anti-terrorism laws and the rule of law. Lord Justice Kennedy and Professor HP Lee spoke, followed by a panel discussion including John North (Law Council president), Alexandra Richards QC and Senator Ellison, among others. Eventually the subject was raised about what courts do with evidence obtained by torture. Lord Justice Kennedy responded in terms of an English House of Lords decision. Then came the Ellison bombshell when our Justice Minister openly declared that he had a policy of not asking if information was obtained by torture—the information was paramount, not the means of it being obtained.

He went on to say that the AFP would love to be able to torture people to get information if there was a bomb attack pending and they needed to know the details.

The rather stunned audience was then told that Amrosi and some of the other Bali bombers were convicted on evidence obtained by the Indonesian police using torture, but the AFP abided by Australian law in the investigation.

Gee, thank goodness for that. And this man is a Minister of the Crown in whom we place our trust!