

## The 20th Lionel Murphy Memorial Lecture

by the

**Hon Neville Wran AC QC**

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at the

Visions Theatre

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### **CIVIL LIBERTIES: AN ENDANGERED SPECIES**

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A few weeks ago, addicted as I am to the ABC, I was watching *Lateline* when the program's presenter, Tony Jones, announced that the Melbourne University wanted the Federal government to reconsider a ban on research books.

The Vice-Chancellor, Glynn Davis, had been in touch with the Federal Attorney General asking him to review the ban saying it restricted academic learning.

The two books which were removed were written by the Islamist, Abdullah Azam, who has been described as the Godfather of Jihad. Academic staff believes that the volumes are important for researchers who want to understand radical Jihad.

Apparently a University historian and lecturer bought the two books in question to help his students better understand Jihad or the Holy War waged by some Muslims. A year later the books have had to be taken off the library shelves.

Needless to say my ears pricked up when Glynn Davis, the University's Vice Chancellor, came on the screen and revealed in an interview that the University had no choice but to remove the books because the law requires it and the breach of that law carried fines of up to \$27,000 and imprisonment of up to two years and the Vice Chancellor quite properly felt the University could not ask its library staff to risk that.

The two books have been refused a classification which means they cannot be sold, displayed, loaned or hired out.

I might add that the first edition of these books was published in 1984 and, amongst other things, was a call of arms against the invasion of Afghanistan by USSR—an invasion which ironically was condemned at the time by much of the Western world, including Australia, the United Kingdom and the United States.

The book was re-printed in English in 1996 and again in 2002. It was not until the year 2006 that the ban was imposed and the ban ran to a university in which knowledge and understanding are normally prized commodities. This extraordinary ban has put the whole issue of human rights fairly and squarely on the University's international calendar for as the Vice Chancellor said in the program and I quote:

“This is, for us, a very rare occurrence, so rare in fact, that we’ve had media inquiries from around the world about it because most people don’t think of Australia as the sort of country that bans books.”

Mr Ruddock, our nation’s Attorney General, responded to this request to reconsider the ban on research books in terms that he would be prepared to discuss with his own officials and State government officials whether or not, on a limited basis and a structural basis, material necessary for research can be made available for that particular purpose.

Mr Ruddock expressed concern that the book in question might encourage people to carry out terrorist acts. As I mentioned earlier, the books removed were written by the Islamist, Abdullah Azam, who has been described as the father of Jihad. The books removed from the Melbourne University library were there for research purposes—research, in an academic environment.

There are plenty of copies of Azam’s book circulating in the world and the full text of the book is available for download for anyone with internet access. It is quite frankly ridiculous and taking the intention of the law to its extreme and beyond to ban a book intended to be used for analysis of Jihad, in an academic environment—for the acquisition of knowledge for the purpose of understanding, however perverse, its cause and effect and so on.

Of course we are all aware of the need for strong security measures after September 11, Bali, London and a host of other atrocities at the hands of radical Muslim organisations. Not many people would argue that some modicum of freedom should not be traded for some assurance of greater security.

However, in fighting terrorism we must be careful not to stifle the very democratic values that we are trying to preserve. In the vernacular, we must take care not to throw the baby out with the bath water.

Freedom of speech, freedom of assembly, and so on we have always taken for granted in this country. Indeed, one of the things we have always prided ourselves upon is the sort of egalitarianism, a sort of equality which in life’s endeavour gives everyone a “fair go”.

It may be true that Australia is the only OECD country without A Bill of Rights, but then, we have always taken for granted our freedoms. Julian Burnside put it succinctly when delivering the 16th Lionel Murphy Memorial Lecture and I quote:

“... most ordinary people in Australia have thought that human rights are not an issue, because they are not under threat.”

Well, it’s time to re-think that statement. There is a growing threat to our civil liberties—perhaps not blatantly intended, but rather on a generous view, the result of overkill, in response to the threat to the nation’s security which unquestionably exists.

Indeed, the man whose life and career we are honouring today—Lionel Murphy—with extraordinary prescience on 17 August 1983 delivered an address to the National Press Club. During the course of the question session, our late colleague said:

“It is very difficult to predict the future but if present trends in Australian society continue, the most powerful public official in the year 2000 may not be the Prime Minister or any other Minister but the official in charge of police and security.”

The whole issue or raft of issues which arise from the stress and strain of rights versus security demand measured and sensitive consideration or else the very fabric we are trying to save risks being lost. People of goodwill and reasonable intellect must face up to this issue and not give way to populism and excess.

Recently, the British Lord Chancellor, Charles Falconer visited Australia and in the course of his visit he gave the Magna Carta Lecture at the NSW Supreme Court, attended by the chief justices of the High Court, Federal Court and NSW, plus a host of other senior judges and lawyers. I shall quote one or two of the Chancellor's observations:

“Laws do have to be changed to deal with this new and sustained threat. But the response to terrorism must be conducted in accordance with fundamental human rights principles or we have ceded to the terrorist.

“The rule of law must prevail just as much in times of terror, as it does in times of peace.”

I repeat his words:

“The rule of law must prevail just as much in times of terror, as it does in times of peace”.

Quite frankly, while the message is self evident, Lord Falconer expressed it so clearly and powerfully that its impact is worth hundreds of lectures and tens of thousands of words.

Taking the most charitable view one can, Mr Ruddock is treating our fundamental rights with scant respect. Intellectually his attitude to the preservation of those rights is quite flippant and he should realise not only the seriousness involved in banning books, but the damage that it does to our national psyche which prides itself on its entitlement, as a matter of course, to essential freedoms.

Going back to Lord Falconer and his credo, once again he said it all when he observed:

“Of course you should change the law and we have done that to ensure that the security services have got the tools they need, but it also is a battle about values. And we have to be clear what our values are.”

If this book banning episode was an isolated example of the negation of a fundamental right it would be worrying enough, but Mr Ruddock provided us with another benchmark recently by which I think it's possible to measure his values and how such values should be applied. The result is not really comforting. I will come to the matter in issue in a moment.

First, let me give you another example of what I am trying to convey in relation to the threat (direct and indirect) to our civil liberties.

Through a process of the issue of warrants, ASIO operatives, merely on the basis of a suspicion of wrong-doing, may arrest, detain and interrogate ordinary citizens. The victims of these relatively new ASIO powers will be the innocent.

Anybody who has spoken to a person who happens to be a terrorist (known or otherwise), could be subject to this process.

People such as journalists, doctors, religious figures, teachers, charity workers, even lawyers, who during the course of their work are thought to have some information about a person in which ASIO "has an interest", may be arrested and interrogated; forced to break their confidentiality or even jailed, if they are deemed uncooperative or fail to answer questions.

ASIO is now able to arrest innocent people and hold them up to 14 days without even their family knowing their whereabouts.

As far as I am aware, Australia is the only Western country to allow such tactics to be used against non-suspects—in other words, innocent and ordinary Australians who have done nothing wrong.

Powers like these in the hands of clandestine agencies can create serious ramifications for the democratic lifestyle we enjoy, long after the terrorist threat has diminished. Bluntly, there is no place in a democratic country like ours for powers like these and history is cluttered with examples where authorities have misused or abused powers to detain and question citizens.

These possible consequences of some of our anti-terrorist laws are depressing enough. However, the attitude of people in high places in the Government is even more depressing. It is as if no concern existed or ought to exist, in respect of the loss of, or threat to, our civil rights.

A few weeks ago President George W Bush acknowledged the existence of secret CIA prisons and the President said he was making a limited disclosure for two reasons:

Interrogation of the men held was now complete and

Because a Supreme Court decision had stopped the use of military Commissions for trials.

Amongst other things, Mr Bush said that the US does not use torture. Our Attorney General, Mr Ruddock wasted no time in including himself in the debate which followed on what constituted torture in a given context.

On the first day of this month, a mere 3 weeks ago, the Attorney General of the Commonwealth of Australia, a constitutional monarchy, a democracy held up as an example of constitutional government to emerging nations—on that day, the Attorney General of our country is reported to have said that the use of sleep deprivation to gain intelligence from terrorist suspects should not be considered torture. Sleep deprivation, Mr Ruddock is reported to have said, is not torture.

“I don’t regard sleep deprivation as torture”, he said, “I have not heard it being put in that way.”

That depressing view by the Attorney General was best answered at the political level by the Australian Greens leader, Bob Brown who said that:

“Using ghetto blasters and extreme cold and light to keep prisoners awake for days on end is part of new torture techniques aimed to scar the mind but not the body.”

However, more significantly, within a few days of the publication of the Attorney General’s remarks, the Chief Justice of Australia, Murray Gleeson, in a speech to the annual Judicial Conference of Australia in Canberra noted that torture was:

“Never lawful in Australia” and was abolished in Britain in 1640 after Guy Fawkes was forced to sign a confession under torture in the Tower of London.”

On that occasion the Chief Justice also remarked that whilst it was the Government’s duty to ensure public safety its actions had to be subject to the law. The Chief Justice said pointedly:

“The rule against the admissibility of involuntary confessions is no doubt an inconvenience for those who enforce the criminal law. The alternative—receiving evidence of forced confessions—is a price we are not willing to pay in order to secure convictions”.

He acknowledged that such a position would antagonise some, but it was the responsibility of courts to uphold the rule of law, including individual rights.

“Issues of terrorism and public safety present great challenges to the law,” the Chief Justice said. “In a climate of fear and insecurity, the public commitment to the rule of law, and its confidence in the power of an independent judiciary may be tested in the furnace.”

The Chief Justice also said:

“Declaring the limits of the power of the other branches of government is not a task that leads to easy popularity, but judges are not involved in a popularity contest.”

The words of Australia’s own Chief Justice and the observations of Lord Falconer reflect the principled stand taken by lawyers through the ages when the individual’s fundamental human rights have been challenged.

Silence or inaction in the face of the erosion of those rights is not good enough when legislative or administrative measures threaten basic rights in the name of security or some abstract value.

So often it has inevitably been left to lawyers to ventilate the risk these measures represent. It is comforting to observe that the Lord Chancellor and Chief Justice have spoken in accordance with the highest traditions that lawyers have observed over the centuries. What is needed are more voices in high places in defence of our basic civil liberties and traditional safeguards against the uncontrolled exercise of the powers of the State.

I am not suggesting that Australia is on the verge of a police State, what I do suggest is that we should not remain silent whilst freedoms are whittled away. At the very least, it is time to re-think and strive to ensure that an appropriate balance exists between the interests of the community and the rights of individuals.

In this context one is reminded of the famous and compelling statement of Pastor Martin Niemoeller and I quote:

“In Germany they came first for the Communists, and I did not speak up because I was not a Communist. Then they came for the Jews, and I did not speak up because I was not a Jew. Then they came for the trade unionists, and I did not speak because I was not a trade unionist. Then they came for the Catholics, and I did not speak up because I was a Protestant. Then they came for me, and by that time no-one was left to speak up”.

In our marvellous country the focus of those sentiments is probably a bit over the top. However what Niemoeller has said should be a constant reminder of the danger of silence and inaction when basic human rights are threatened.

The dignity of the individual and the recognition of fundamental human rights are vital to the health and the democracy: disregard for, or dilution of those elements, inevitably leads to a break down of accepted democratic values.

Historically and traditionally it has been largely left to lawyers and academics to resist attempts to water down human rights. Who else steps forward when the right to silence is challenged; phone tapping powers are extended; when asylum seekers are mandatory detained; when Australians face the possibility of execution abroad?

It has been the role of the lawyers and academics and their associates to assume the role of the challenger. In my view when human rights are threatened it is not only the role of lawyers to resist such threat, but it is their duty to stand and be counted when others have fallen silent.

One wonders whether despite the predictable opposition of the Prime Minister, Mr Howard and the Attorney General, whether now is the time to give serious consideration to the introduction of a Bill of Rights—A Bill of Rights against which new measures and changing laws relating to our security can be benchmarked and, if found wanting in terms of human rights compliance, those laws can be struck down or amended to comply with the rule of law.

Our late lamented colleague and dear friend Lionel Murphy, when Attorney General, introduced a Human Rights Bill, the progress of which was aborted by the subsequent dissolution of Parliament. Sir Robert Menzies and our late colleague engaged in exchanges on the legislation.

I recently stumbled on the reply by Lionel to a series of articles by Sir Robert Menzies on the Bill. As you would expect Lionel's reply was as passionate as it was logical and I thought it would not go astray if I cited to you the first three paragraphs:

"Thomas Jefferson, a founding father of the United States Constitution, once said that 'a Bill of Rights is what the people are entitled to against every government on earth'. I believe that the Australian people are entitled to a Bill of Rights to protect them against infringements of their fundamental rights and freedoms.

It is not to secure any partisan advantage that the Australian Government has introduced the Human Rights Bill. It has taken this action because we believe it is time that the fundamental rights and liberties of the individual, recognised and declared by the community of civilized nations in the Universal Declaration of 1948 and in many subsequent international treaties, were firmly enshrined in our law.

We are legislating now for the protection of human rights because too often in the past our courts and our parliaments have let us down. The legislators have told us to look to the common law for our protection, the judges have excused themselves by pointing to the enactments of 'responsible legislatures', and between the two of them a series of grave injustices have been perpetrated, mainly on those groups in the community who lack the power or the popularity effectively to answer back."

Some of the States and Territories frustrated by the lack of activity at the Federal level, have their own Human Rights legislation under consideration. This is no answer to the need for the introduction of Human Rights legislation at the national level and our Federal Government should take a leaf from the book of the English Lord Chancellor who observed that having a Bill of Rights (which incidentally was enacted in 1998) had assisted the United Kingdom Government in its fight against terrorism.

He said that having a Bill of Rights allowed the Government to know as he expressed it "where the outer limits were in the fight against terrorism."

Lord Falconer expressed the view that the United Kingdom Government "was greatly strengthened by having that legal set-up."

Remember these are the words and views of England's most powerful lawyer uttered after the London bombing and at a time when there was great stress and strain between the ordinary laws of the land and the measures considered necessary to combat terrorism.

Lord Falconer most of all recognised that the forces of terror represented more than a short term attack upon our way of life and the values we live by. He observed, and I agree wholeheartedly with him, that laws do have to be changed to deal with this new and substantial threat. But the response to terrorism must be conducted in accordance with fundamental human rights principles or we have ceded to terrorists.

The present Australian Government may not be interested in considering a Bill of Rights as one of the long term tools necessary to protect our rights and liberties whilst we strive to make our country and its citizens secure in the fight against terrorism.

Certainly, without Human Rights legislation Australia is somewhat isolated. Australia is the only western nation without constitutional or statutory protection of the rights of its citizens. The United Kingdom, New Zealand and Canada have such protection. Internally, the ACT Government has such legislation, the State of Victoria and other States are considering Human Rights legislation appropriate for that particular State.

So, the Australian States are on the move towards legislation to provide protection against abuse of State Government powers. That's fine and it's a step in the right direction.

However, what we need is a national Human Rights Act to protect our traditional rights. It is hardly a radical aspiration at this time in our history and more so in view of the long term involvement of Australia in the protection of its citizens against terrorist activities.

Since Mr Howard is ideologically opposed to human rights legislation, the path to the enactment of such legislation will not be easy. However, a strategy and a campaign should be initiated now especially crafted to communicate to the ordinary men and women of Australia (not only the lawyers and academics) what the issues are and what human rights legislation means to the average Australian and to the continued enjoyment of the rights and liberties we have experienced over the years.

May I, more in sorrow than in anger, comment that in its human rights affairs and record, Australia is far from being a "lily white". By way of illustration, the United Nations Human Rights Commission has found on several occasions that Australia has breached the fundamental human rights of people living in Australia.

Indeed, since 1990 the United Nations Human Rights Commission has heard almost 50 complaints against Australia and in respect of 14 others found that we had violated the international covenant on civil and political rights.

Since Australia does not have a Bill of Rights, our own Courts cannot hear complaints about human rights violation which would normally arise for adjudication under such constitutional or legislative provision.

In no area is Australia's image more tarnished than in relation to border control measures and asylum seekers. Indeed, our record over recent years has been appalling.

On 18th April this year, United Nations Human Rights Commission spokesperson, Jennifer Pogonis expressed serious concerns with Australia's intention that persons who land on the Australian mainland—(who should normally fall under the Migration Act and have their claims processed in Australia) —will be taken off-shore for assessment of their claim.

The Spokesperson continued,

“If this were to happen it would be an unfortunate precedent, being for the first time, to our knowledge, that a country with a fully functioning and credible asylum system, in the absence of anything approximating a mass influx, decides to transfer elsewhere the responsibility to handle claims made actually on the territory of the State.”

She later says “It is not one that meets the same high standards Australia sets for its own processes, this could be tantamount to penalizing for illegal entry.”

The result, of course, is that Australia's reputation for fair play and transparency in migration is tarnished. Although the language of the United Nations official is deliberately diplomatic what she is really saying is that Australia's behaviour is more akin to that of an alley cat than of a sovereign State honouring its international obligations involving human beings and human rights.

When originally I was asked to present this lecture, I had intended to make its centrepiece an analysis of the absolute mess the Federal Attorney General had made of sedition laws in this country.

In the meantime, however, my intention has been over taken by events: principally a report of the Australian Law Reform Commission which is so critical, so powerful and so sensible that it is highly unlikely that Mr Ruddock can ignore it.

The sedition laws enacted last year as part of the wider anti terrorism legislation were at the time condemned by civil liberties groups and major media organisations.

The Law Reform Commission has criticised the new laws and recommended that large sections of the new code be scrapped and replaced with laws that better safeguard freedom of speech.

The reality is that over the past decade or so most western nations have repealed the offence of sedition, regarding it as archaic in nature and politically-charged in its application. The Attorney General, Mr Ruddock, on the other hand, introduced a new offence of sedition that greatly expands its potential use in Australia.

The new law of sedition extends the operation of the offence into many unchartered areas, in particular “urging” of assistance which may not involve violent activity.

The new law targets freedom of expression and lacks sensible defence for artistic displays or normal acts of political expression. The new laws go far beyond what was recommended by the Gibbs Report that reviewed Commonwealth Criminal Law in 1991.

The Howard Government argues that these laws are required to regulate racial vilification and limit terrorist activity. The reality is that there are already provisions in various vilification laws that deal with acts of incitement by way of civil proceedings, such as the Anti Discrimination Act 1977 (NSW), and the major activities that might be sought to be governed by a sedition law were already covered by such offences as treachery in s 24AA of the Crimes Act 1914 (Cth) or violently interfering with elections as covered by s 327 of the Commonwealth Electoral Act 1918.

The new law introduces the element of recklessness into the crime of sedition which is a crime of simply spoken words or urging. There should be a clear criminal intention to cause violence in order to uphold any conviction, but this is not the case. The law now makes no distinction between public or private utterances.

The sedition law has the potential to turn legitimate political activity and dissent into prima facie criminal behaviour, where people would then have to seek to rely on one of the defences. There is no general or overarching defence available to journalists, academics, teachers, cartoonists and satirists who risk being criminalised under what is a broad definition of sedition.

The political nature of the offence is reinforced as it requires the consent of the Attorney General to conduct a prosecution so it is only ever those people who express a view that the government objects to that will be charged with sedition.

Indeed, the new laws are a mish mash of inconsistencies amongst the central elements of sedition. For instance, it is conceivable under the new code that a person urging the removal of the monarch and the substitution of an Australian as Head of State could commit an offence under the new code.

That is pretty much the view of the Law Reform Commission. The Attorney General has said that he will consider the Australian Law Reform Commission recommendation, and quite frankly the quicker he does so the better, and in the process the law will better safeguard free speech in this country.

Finally, I would like to say a few words about the incarceration of an Australian citizen, David Hicks in Guantanamo Bay.

I have no brief for David Hicks and I know as much or as little about him as you do. But I do know this—that if an Australian is an alleged terrorist he should be charged and given a fair trial in a court of law, an Australian court of law, not a kangaroo court, not a specially established court in a foreign land. In the meantime, pending trial he should be treated as a human being.

David Hicks has lived in a caged cell, held against his will, for most of the time, without clear accusation, charge or conviction for over five years. Australia is probably the only country that accepts the legality of Guantanamo Bay's conditions and its tribunals. As to the process and procedure, David Hicks has been abandoned by his country of birth.

Whilst it is true that the world has changed a lot since September 11, there is something wrong with our values when we are willing to go to war to defend or

promote our fundamental democratic principles, whilst at the same time we are prepared to abandon those same democratic principles when it comes to David Hicks.

I repeat, if Hicks is alleged to have committed a crime, he should be returned to Australia and tried before an Australian court, not an American military tribunal dressed up to look like a court. If David Hicks is a traitor, or otherwise has criminally acted against Australian's interest, he deserves the full punishment of the law—our law, not the law of some specialist tribunal of a foreign country.

<http://lionelmurphy.anu.edu.au>