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**Remarks on the occasion of the launch of the Special edition of the Australian Law Journal 'National Security and the Law'**

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It is a great, indeed, unique honour, to be sitting, at least virtually, with the Honourable Virginia Bell AC, the ALJ General Editor Justice Kunc, and the Law Council of Australia President, Dr Brasch QC. My formal task is to thank our guest of honour, former High Court Justice Virginia Bell, for her remarks which capture the essence of this special edition and bring out many key themes in it. I thank you most sincerely.

Perhaps the only silver lining from the Covid pandemic is that this virtual launch will reach a far larger audience than the traditional in-person event. Its dissemination will also, I hope, encourage wide circulation of the important and lasting contributions to legal policy and learning contained in the articles in this special edition. As I say in my own article *'I trust that judges, legislators, academics and practitioners will find this edition useful and thought-provoking, and that it fires the imagination of students.'*

I acknowledge the kind words about my guest editing, but in truth there can rarely have been a more conscientious (and distinguished) group of authors, all of whom proved the adage that it is best to ask the very busy person to do something as they will somehow find time to do it. The only complaint I received was from the Honourable Michael Kirby AC who complained of being given too *much* time to write his article. I can cope with that sort of complaint. So, I record my thanks to Lord Carlile, Sir

Charles Haddon-Cave, Assistant Professor Blackbourn and the following 'Honourables' Michael Kirby, Mark Weinberg, Tony Whealy, George Brandis, and last but not least Margaret Stone whose fine contribution has turned out to be posthumous.

May I also thank the tireless Sue Milne, Senior Editor from Thomson Reuters, who translated the drafts to the final printed version in typical meticulous fashion. And of course, I must thank the General Editor, Justice Kunc, for the trust he placed in me.

I was grateful for the opportunity to edit this special edition not least because it provides an opportunity to pause and reflect on a vital, difficult and dynamic area of the law, to draw comparisons which might otherwise be overlooked between Australia and England – and to encourage in that context a revival of links between us – and to bring to wider attention in Australia the significant roles of the PJCIS, the IGIS and the INSLM. Let me touch briefly on these issues before I conclude.

All countries have at least some institutions which exist to provide defence and national security capacities. Up to a point in Australia they can operate under the executive power of the Commonwealth.[1] But coercive powers such as search warrants require 'the authority of positive law', as, of course, does the creation of new criminal offences.[2] Over 120 new or amending laws have been enacted in Australia in the last 20 years,[3] a remarkable figure that, of itself, justifies courses of academic

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[1] Constitution s 61.

[2] The common law of both countries recognises the authority of what Gageler J, in, Smethurst v Commissioner of Police (2020) 94 ALJR 502, called: [T]he celebrated judgment of Lord Camden in Entick v Carrington [(1765) 19 St Tr 1029] [which] cemented the position at common law that the holder of a public office cannot invade private property for the purpose of investigating criminal activity without the authority of positive law'.

[3] Dennis Richardson AC, "Comprehensive Review of the Legal Framework Governing the National Intelligence Community"
(Report, December 2020) Vol 1, 3.9.

study in this largely new branch of the law, which is situated at a point where aspects of international, constitutional, criminal (substantive, procedural and sentencing), public and human rights law converge, and sometimes fundamental principles clash.

There are two fundamental forces at work as to threats.

First, the geo-political factor of terrorism threats and attacks, whether motivated by religion or ideology, of which there are many shocking examples, and increasingly foreign interference and espionage..

Second, what Sir David Omand has rightly described as:

> *the beginning of a revolution in human affairs enabled by the digitization of information and the means of communication through the Internet, the World Wide Web, and mobile devices (with the Internet of Things rapidly growing)… [but, as he goes on to say] The Internet, and the World Wide Web that it carries, were not originally designed with security in mind, and many seek to exploit this weakness for their own antisocial, criminal, or aggressive ends.* [4]

Thus, encryption which protects lawful commercial dealings may enable a criminal or other bad actor to plan or engage in espionage - both state based and commercial – and terrorism (which in Australian law extends

[4] Sir David Omand and Mark Phythian, Principled Spying: The Ethics of Secret Intelligence, (Georgetown University Press, 2018) Ch 5. See also the detailed discussion in Trust But Verify: my 2020 INSLM report on Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and related matters <https://www.inslm.gov.au/reviews-reports/telecommunicationsand-other-legislation-amendment-act-2018-related-matters>.

beyond inflicting harm on others, to disruption to critical infrastructure such as a telecommunications or electricity network.)

An often  similar threat environment in the United Kingdom and Australia has produced often similar policy responses, although, notably, the UK has passed far fewer laws.  We have much to learn from each other, including in the conduct of terrorism trials which have significantly tested the limits of the principles of open justice, the capacity of juries, the impact of technology on prosecutorial obligations of disclosure, and the question: 'how complex do sentencing laws need to be?'  It may also require expanded judicial training in technology.

So the Haddon-Cave, Carlile, Whealy and Weinberg articles are of particular relevance here.

And although we must hope for a world where terrorism is no longer a serious threat, and strive to achieve that end, I cannot at present forsee such a world.  If, in our democracies, we are to be left with such exceptional laws  - and that is what they mostly are - we need exceptional and continual oversight of the laws and how they are used, especially given the utilisation of such laws involves secret sources or methods, whether human or technological, so that much occurs out of plain sight.

What are the key aims of that oversight? I cannot improve on the celebrated statement by former Independent Reviewer of Terrorism Legislation, Lord David Anderson QC, in  his report A Question of Trust. He said this:[5]

> *Public consent to intrusive laws depends on people trusting the authorities, both to keep them safe and not to spy needlessly on*

[5] Report of the Investigatory Powers Review 2015, UK Government, London, 2015, [13.3]–[13.4].

> *them ... Trust in powerful institutions depends not only on those institutions behaving themselves (though that is an essential prerequisite), but on there being mechanisms to verify that they have done so. Such mechanisms are particularly challenging to achieve in the national security field, where potential conflicts between state power and civil liberties are acute, suspicion rife and yet information tightly rationed ... Respected independent regulators continue to play a vital and distinguished role. But in an* age where trust depends on verification rather than reputation, trust by proxy is not enough. *Hence the importance of clear law, fair procedures, rights compliance and transparency.*

Now in both countries we have three somewhat similar intelligence and counter-terrorism oversight institutions.

First, we have the key parliamentary committees, the UK Intelligence and Security Committee and the Australian Parliamentary Joint Committee on Intelligence and Security.

Second we have the intelligence Ombudsmen: the Inspector-General of Intelligence and Security (most recently headed by Margaret Stone and now by former justice Dr Chris Jessup) and the UK Investigatory Powers Commissioner, presently Sir Brian Leveson.

Finally, we have the Independent Reviewers of Terrorism Legislation, since 2001 being Lords Carlyle and Anderson, then DPP Max Hill QC and now Jonathan Hall QC, and in Australia the Independent National Security Legislation Monitors, now Grant Donaldson SC and whose alumni include Roger Gyles QC and Bret Walker SC.

In this special edition the articles by Kirby, Blackbourn, Brandis and Stone are of most relevance on oversight.

May I conclude by saying something about Margaret Stone, whose last article appears in this edition. I had the honour of being INSLM during much of her tenure as IGIS. We had adjoining offices and spoke often. She saved me from many errors.

The office of IGIS was established as a result of one of the recommendations of Royal Commissioner Justice Robert Hope AC. It performs the vital role of Ombudsman to the Australian Intelligence Community (AIC), measuring its activities against standards of legality, human rights and propriety. It has complete and constant access to all personnel, premises and information held by each part of the AIC. It is often described as 'the gold standard' of such oversight and Margaret's tenure is a key reason for that description. Fearless and independent, universally respected within government and the AIC, uncompromising in her work but never humiliating of individuals, Margaret set a standard unlikely to be surpassed.

In her final article, Reflections on Oversight of Intelligence Agencies, she wrote:

> *The tension between secret intelligence and civil rights and liberties is not reconcilable; inevitably, secrecy threatens rights, and rights weaken secrecy. Each is compromised. In broad terms, it is for government and the Parliament to decide what is an appropriate compromise between the secret collection of intelligence and the protection of civil rights and liberties and to*

*embody that compromise in legislation. What is clear from Australia's present legislation is that the Parliament has agreed that the intelligence agencies should be accountable for the way in which they discharge their responsibilities and, except where secrecy demands otherwise, that accountability should be transparent.*

It is a mark of her achievement as IGIS that she ensured accountability of the AIC, upholding civil rights and liberties while not diminishing the effectiveness of the AIC. Australia is in her debt.

I commend the special edition to you all.
Good evening.