

## Speech of Welcome at the Federal Criminal Law Conference

5 September 2008

Anna Katzmann SC

President, Bar Association of NSW

I honour the local indigenous landowners, the Gadigal people of the Eora Nation.

Yes, you are correct. I am not Ross Ray. Neither do I intend to imitate him. Ross is unfortunately caught up in a committal in Bendigo. No, he is not the defendant. He will try to make it for the close of the proceedings this afternoon.

May I then welcome you to this first conference jointly held by the Law Council of Australia and the NSW Bar Association to examine some of the more recent developments in or affecting federal criminal law. I am pleased to welcome to the conference such a distinguished panel of speakers.

May I also take this opportunity to thank Stephen Odgers SC and Tim Game SC and Cindy Penrose of the NSW Bar Association for their considerable efforts in putting this conference together. I also want to thank those of you who have sacrificed a day's work to be here.

The Law Council of Australia is the peak body of the Australian legal profession. It represents the profession at a national level, speaks on behalf of its constituent bodies on national issues affecting the profession and is dedicated to the promotion of the administration of justice, access to justice and the general improvement of the law.

The NSW Bar Association is a voluntary association of barristers formed some 112 years ago. The objects of the Association include the promotion of the administration of justice and the making of recommendations with respect to legislation and law reform.<sup>1</sup> We are the envy of the trade union movement with a membership greater than 99%.

Both our organisations have a reputation for speaking out against injustice.

This conference is designed to assist the Law Council and the Bar Association in presenting a reform agenda to the Rudd Labor Government.

The inspiration for the conference largely came from some remarks that the Minister for Home Affairs, Bob Debus, made in his maiden speech to the Federal Parliament. He promised a more consultative approach to law reform than the previous government and foreshadowed a major forum for the discussion of proposals to reform federal criminal justice legislation later this year. That forum will now be held on in Canberra on 29 September.

This conference is designed in large part to assist and inform that discussion. I encourage all of you to contribute by speaking up at the end of each session and, if so disposed, to put your thoughts in writing.

Next Thursday it will be 7 years since that dreadful day when two passenger planes flew into the World Trade Centre in New York and two others were used as missiles, killing over 2,500 people, seriously injuring hundreds more and sending shock waves throughout the world. Thus, it is almost 7 years since the US President, George W Bush, launched what he dubbed "The War on Terror".

Speaking at a lecture at the University of New South Wales 3 years ago, Gareth Evans QC, the former Australian Attorney-General and Foreign Minister, since 2000 the president of the independent global NGO, the International Crisis Group, based in Brussels, observed that:

“If the war on terrorism as it has so far been conducted has been an overall success, that’s a well kept secret. Terrorist attacks classified by the U.S. government as ‘significant’ more than tripled worldwide to 650 last year from 175 in 2003, and this was the highest annual number since Washington began to collect such statistics two decades ago. Nearly a third of those attacks – 198 of them, nine times the number of the year before – took place in Iraq, meant to be the central front of the war on terror. On the UK Guardian’s figures two weeks ago, more than 4000 Iraqis have been killed by terrorists in Baghdad alone since April. As I have said elsewhere, while the terrorist connection was the least plausible of all the reasons for going to war in Iraq, terrorist violence has now become the most harrowing of all its consequences.”<sup>2</sup>

In Australia ‘the War on Terror,’ has cost taxpayers well over \$20 billion,<sup>3</sup> including a \$74 million system to allow police and ASIO to tap phone calls, \$15 million for a public relations campaign entitled “Be Alert, Not Alarmed” and over \$2 billion for intelligence gathering and analysis. It has seen the dispatch of troops to Afghanistan and Iraq, the senseless loss of lives<sup>4</sup> and homes, the destruction of societies, and a rise in terrorist activities against Australians. It is also responsible for over 50 separate pieces of legislation<sup>5</sup> passing through the federal parliament.

Despite the massive increase in ASIO’s budget and the vast sum spent on intelligence gathering, and despite the involvement in the investigation of nearly 300 police and lawyers,<sup>6</sup> the charge against Dr Mohammed Haneef pursuant to s 102.7(2) of the Criminal Code of providing support to a terrorist group – the first laid under the section – was dropped 14 days after it was laid, the cancellation of his visa on spurious grounds was set aside in the courts and last week the AFP announced that Dr Haneef was “no longer a person of interest” and there was insufficient evidence to charge him with any criminal offence.<sup>7</sup>

Introducing the Anti-Terrorism Bill 2004 the former Attorney-General, Hon Phillip Ruddock MP, emphasised that “the safety and security of its population and national interests is the most important responsibility of any government.” He boasted that since the attacks on the twin towers in 2001, the Howard Government had “overhauled Australia’s legislative framework in relation to terrorism”.<sup>8</sup> He told the Parliament that it was still necessary to “adjust Australia’s investigatory procedures to meet the new terrorist environment”. Nonetheless, he also said that the Government recognised “the need to ensure that appropriate safeguards are put in place to maintain the balance between security and individual rights and freedom”.<sup>9</sup> Many, however, believed that the Government had failed to achieve the correct balance.

Writing in the *Australian Bar Review* in 2005 Ian Barker QC described ‘balance’ as “a word in grave danger of falling into disrepute, because of its constant misuse by politicians. “‘Balance’”, in this context, he noted, “ought to mean the achievement of harmony between opposing forces, or interests.” He considered that the previous Government’s anti-terrorism laws, struck no such balance. “Accepting that all penal laws reflect some attempt to reconcile the interests of individuals and the general community”, Barker wrote, “I cannot accept that Australia’s anti-terrorism laws are the product of any fair balance. They go much too far the State’s way, to the detriment of the individual”.<sup>10</sup>

The Haneef case provides a good illustration of the point Barker was making. Speaking at his press conference when he announced Dr Haneef's arrest, AFP Commissioner Mick Keelty said that he felt he needed to explain aspects of the case. He went on:

"One is the length of time for the detention of Dr Haneef is something that we had to work our way through. It was a question of balancing human rights, balancing the needs of the community and the needs of the organisation to establish the facts."

Many would now find those words as disturbing. And there is an Orwellian flavour about the notion that people should be arrested and kept in detention without charge while the organisation struggles to "establish the facts".

Writing in a newspaper of the Anti-Terrorism Bill in 2005 Barker, with Robert Toner SC, as his Honour then was, said:

"The proposed anti-terrorism bill creates control and preventive detention orders which will give the Government the ability to control, monitor and jail people who have not committed a crime. These people will not be charged with a crime.

"Fundamental to the concept of the rule of law is that citizens are entitled to due process which necessarily includes a right to know what is alleged against you and the facts that are said to support that allegation and to have the allegation determined by a court of law which stands independent of the executive government.

"Neither the person subject to the control order nor anybody acting on his or her behalf is given documentation other than the order itself which describes the basis upon which the order was made. The information that the Australian Federal Police provides may be inaccurate, maliciously informed, biased or little more than rumour or gossip clad as reliable information.

"Today we are on the edge of a slide into our own 21st-century form of fascism: secret arrest, secret detention, secret interrogation, by secret people. This will be a product of the Anti-Terrorism Bill, itself kept secret until the last minute to avoid scrutiny by those it will put at risk: the Australian public. The premiers and chief ministers are largely compliant in the process, beguiled by secret information derived from the untested assertions of secret intelligence agents....

The strangest aspect of it all is that no one has ventured an explanation of how or why the legislation is likely to have any affect (*sic*) on the probability of a terrorist attack."<sup>11</sup>

The ASIO legislation attracted similar criticism. It is noteworthy that equivalent legislation in the UK, Canada and the United States where, of course, there is statutory protection for individual rights, no provision was made for the detention of non-suspects.<sup>12</sup>

The extent to which these new powers can so easily be abused can be seen in the case of the young Australian medical student, Izhar Ul-Haque, in which Justice Adams in the NSW Supreme Court was severely critical of the questioning of a so-called person of interest carried out by ASIO officers.<sup>13</sup>

In March this year, Hon. Petro Georgiou, the Liberal Federal Member for Kooyong in Victoria, presented a private member's bill for an independent reviewer of terrorism laws, following a unanimous recommendation of a bipartisan parliamentary joint committee. Pointing out that legislation passed by the parliament had created offences and procedures which "depart significantly from traditional principles and

practices of our criminal law” and expressing the frustration and disquiet of many on both sides of politics, Mr Georgiou said:

“The fact is that a democracy’s response to the threat of terrorism cannot simply be more stringent laws, more police and more intelligence personnel”.

He added:

“The point was well made by European Commissioner for Justice, Freedom and Security, Franco Frattini, when he said: “. . . our citizens entrust us with the task of protecting them against crime and terrorist attacks; however, at the same time, they entrust us with safeguarding their fundamental rights . . . [the] necessary steps we take to enforce security must always be accompanied by adequate safeguards to ensure scrutiny . . .” the challenge of protecting security without undermining fundamental rights requires constant vigilance. But the reality is that the machinery of vigilance in Australia is deficient”.<sup>14</sup>

Last month, in a break from the position of its predecessor, the Rudd Government agreed to issue a standing invitation to UN human rights experts to come to Australia, to examine, monitor, advise and publicly report on human rights in this country and in this, the 60<sup>th</sup> year since the Universal Declaration of Human Rights, to show Australia as a leader in international human rights.<sup>15</sup> While the system for mandatory detention of asylum seekers remains intact, the majority of indigenous Australians live in poverty and legislation permitting preventative detention and arbitrary arrest remains on the statute books, there is much work to be done.

With the change of government and the prospect of a change in Washington, too, and with that the prospect of troop withdrawal from Iraq, now is as good a time as any to examine the wisdom of legislation introduced in the wake of the September 11 terrorist attacks and to help the Government get the balance right between protecting our security without sacrificing our civil rights.

I am sure that we can make a constructive contribution to the debate in this area.

Let the conference begin.

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## Notes

<sup>1</sup> Constitution of the NSW Bar Association, clause 3.1

<sup>2</sup> Gareth Evans, “The Global Response to Terrorism”, Wallace Wurth lecture, University of New South Wales, 27 September 2005, available in full from <http://www.crisisgroup.org>

<sup>3</sup> That was the estimated cost 2 years ago according to Brendan Nicholson in *The Age*, 24 November 2006 said to be based on the research conducted by the Australian Strategic Policy Institute, which examined federal government spending, the Homeland Security Research Centre and annual reports.

<sup>4</sup> Professor Gideon Polya, a former associate professor of biochemistry, who has researched what he calls “avoidable global mass mortality”, speaking to Robyn Williams on *Okham’s Razor* on Radio National said 3 years ago that “avoidable deaths” since the invasions of Iraq and Afghanistan have been said to total 1.6 million. Radio National, 28 August 2005.

<sup>5</sup> Including delegated legislation.

<sup>6</sup> Commissioner Mick Keelty, press conference, Saturday 14 July 2007

<sup>7</sup> AFP “Media Statement – Operation Rain”, 29 August 2008

<sup>8</sup> Hansard, House of Representatives, 31 March 2004, p 27658 ff

<sup>9</sup> *Ibid* p 27659

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<sup>10</sup> (2005) 26 ABR 267

<sup>11</sup> *Sydney Morning Herald*, 1 November 2005

<sup>12</sup> See George Williams, “National Security, Terrorism and Bills of Rights” (2003) 9(1) *AJHR* 263

<sup>13</sup> See *R v Ul-Haque* (2007) 177 A Crim R 348

<sup>14</sup> Hansard, House of Representatives, 17 March 2008, p 1952-3

<sup>15</sup> Media release issued by Hon Attorney General, Robert McClelland MP, 7 August 2008