

# Keeping our balance

in troubled times:

## Legal measures, freedoms and terrorist challenges

**Robert Cornall**

Once attended an address by one of Australia's most well-known historians, Professor Geoffrey Blainey, entitled "Looking backwards, looking forwards". His major message was that our present circumstances at any one time do not exist in a vacuum. They are part of an incomplete continuum that started some time in the past. If we can analyse and understand the progression that brought us to where we are now, we will have an idea where we could be going in future.

Since the terrorist attacks in New York and Washington DC three and a half years ago we have responded with a broad range of measures to protect our nation against terrorism. If we look at these measures in broad outline we see that our responses, and our national acceptance of them, have changed over time.

Our initial responses were understandably immediate, direct and reactive. They included increasing resources for frontline agencies such as the Australian Federal Police (AFP) and the intelligence and security agencies; strengthening border protection and aviation security (including the introduction of Air Security Officers on domestic flights); and introducing new laws to specifically outlaw terrorist acts and proscribe certain terrorist organisations.

Next there were more detailed efforts to disrupt and prevent attacks – pushing back the immediate response boundaries. These measures included the establishment of the National Threat Assessment Centre within the Australian Security Intelligence Organisation (ASIO) to provide a central point where all of our intelligence and security agencies share incoming information and intelligence; engaging regional support by negotiating agreements to co-operate in the fight against terrorism with 11 South East Asian countries; and participation in the offensive international response to September 11 including the conflicts in Afghanistan and Iraq.

When that work was well underway, we pushed past immediate disruption and prevention measures, tackling more complex initiatives to create a more permanent secure environment. Following the Bali Ministerial Forum in February 2004, Australia leads a Legal Issues Working Group which is developing standard counter-terrorism and related laws throughout South East Asia. We also agreed

to assist troubled states in our region through the Regional Assistance Mission to the Solomon Islands and the Enhanced Cooperation Program with Papua New Guinea, partly as good neighbours and partly because it will reduce real or potential security problems for Australia.

### Some reflections

In reflecting on these initiatives a few observations stand out. First, our responses have been like the rings on an archery target. If the initial reaction to September 11 was the bullseye, then our responses have become broader and more encompassing as they have expanded over time. Second, the broader the response to terrorism, the more people and organisations it encompassed.

Our actions obviously include the intelligence, protective security, law enforcement, defence and emergency management agencies. This is a large group in itself – cutting across previous bureaucratic demarcations and the constitutional divisions of power between the Commonwealth, States and Territories.

But, depending on the nature of the threat, our responses can also include health or agriculture departments, public utilities supplying water and electricity and the private sector owners of significant buildings, installations, public venues and critical national infrastructure like pipelines, communication systems and computer networks. In addition, individuals have to take some personal responsibility for their own security by, for example, paying close attention to the Government's overseas travel advisories.

A third reflection on experience to date is that because the threat of terrorism is not limited to one country or one region, the same observations apply in varying degrees to the governments of other countries. The threat of terrorism has drawn many countries into much closer and more productive relationships than existed before, or has at least provided the catalyst for this to begin.

What all this means is that there is no way we can contain the problem of effective security in one bureaucratic box. Security does not have a precise definition or limited application. It is more like a theme or a characteristic of the way we go about our business in the future, whatever that business may be.

## Facing asymmetric threats

Such reflections naturally draw us to the question of what should we do next? First, however, we need to also look at how our terrorist enemies have reacted and responded over the same period.

One view of Al Qa'eda, for example, is that since 11 September 2001 it has been the unwitting victim of its own success. The callous viciousness and stunning impact of the attacks in New York and Washington DC unleashed a massive international retaliation which has greatly damaged Al Qa'eda and, as far as we can tell, its subsequent plans have largely been disrupted or come to nothing.

Al Qa'eda lost its base in Afghanistan and many of its leaders have been captured or killed. While it is still dangerous, it is no longer the threat it once was. But it has inspired other groups like Jemaah Islamiyah, which have stepped in and, in effect, taken its place. Al Qa'eda has provided a perverted philosophy and an illustration of action to redress a perceived range of grievances which has unfortunately linked diverse and fragmented groups around the world.

One indicator of the accuracy of this assessment is the fact that no one thinks the current threat of terrorism would fall away if Osama Bin Laden was captured or killed. Another is the fact that, by June 2005, the Australian Government has proscribed eighteen terrorist organisations under our new counter-terrorism legislation.

The bomb attacks against Australians and Australian interests in Bali and Jakarta tragically underline this conclusion. Furthermore, security and police investigations involving people like Willy Brigitte, and the successful prosecution of Jack Roche on terrorism charges, reinforce the concern that the threat of a terrorist attack on Australian soil is still very real.

Three key questions remain. How quickly are new, local or regional networks overtaking or replacing the Al Qa'eda threat? How will we counter them, given that they are linked only loosely by a common but misplaced umbrella discontent about Muslim disadvantage and a corrupted misappropriation of the Islamic faith? How will we recognise them, if the underlying causes which spark their militancy are different in different countries or regions?

As the concentric rings of our response spread out even further, there are a few strategic areas that I think deserve special consideration as we plan ahead for the next few years. I want to briefly touch on five of them:

- developments in technology;
- individual and community rights;
- community attitudes to crime and punishment;
- means of stopping terrorism at its source; and
- preserving our resolve and keeping our view of events in perspective.

## New technologies

The first of these strategic areas involves the challenges posed by developing and new technologies. Telstra's short message service statistics, for example, provide an

extraordinary illustration of how quickly technology is evolving around us. A few years ago – say 1995 – no one in the general Australian community would have known what an SMS text message was. Yet more than 1.4 billion SMS messages were sent over Telstra's network in 2002–03. An even more surprising statistic is that the 82,000 people who went to the final of the Rugby World Cup in Sydney in 2003 sent 225,000 SMS messages during the two hours the match was being played. That was more than the total number of SMS messages sent over the network in the whole month of July 2002.

So keeping up with, or preferably ahead of, the way modern technology could be used by terrorist and criminals is a major strategic challenge. One response to this advance in mobile telephony is the legislation passed in 2000 enabling telephone interception warrants to operate against a person – irrespective of which phone or SIM card he or she uses – rather than a nominated telephone. Another is the review currently underway to reassess the conceptual basis of our existing legislation authorising telephone interception. In broad terms, the underlying principle of our current legislation is that lawful interception can only occur while a communication is crossing the communication network. This idea was underpinned by the available technology of the 1980s, that is, basically poles and wire strung along the street, rather than the far more sophisticated systems which carry our communications today.

Obviously keeping up with technology is not just a defensive measure. The investigation into the Bali bombings provides a great illustration of the importance of this technology in the fight against terrorism. The bombings took place on 12 October 2002 and one of the principal terrorists – Amrozi – was arrested within four weeks in November. His trial was concluded with a guilty verdict and a death sentence in September 2003 – less than one year later. Others have been charged and convicted as well.

The key to this outstanding result in a country of more than 200 million people is to be found in the analysis of call charge records and telephone interception. The combined investigation by the AFP and Indonesian police revealed that one of the bombs was detonated by a mobile phone call. Pieces of the phone and its SIM card were found in the rubble.

In order to identify the call that activated the bomb and to meet the requirements of the principles of corroboration, the AFP obtained seismological charts to determine the precise time of the first wave of the bomb blast. This evidence pinpointed the phone that made the call and set off a chain of inquiries to map the key players in the terrorist attack through an analysis of call charge records. The mapping exercise involved tracking all calls to and from a large number of phones over a period specified by the AFP. Investigators processed millions and millions of call charge records. That analysis led to targeted telephone interceptions which in turn provided the trigger for the arrest, prosecution and conviction of Amrozi and his co-terrorists. There is no way these outcomes could have been obtained without the telephone intercepts and the technology capable of undertaking such a huge mapping task of call charge records.

Looking forward, a lot of the technology that will be of particular interest over the next couple of years will centre on secure and accurate identification. We can already see examples in the technology supporting the introduction of electronic passports and the Australian Customs Service trial of the *Smartgate* system which electronically identifies Qantas crews as they clock in for an international flight.

Another illustration is the project being led by the Attorney-General's Department over the next 18 months to improve the integrity of some of the most important documents and processes which we use to establish our identity on an everyday basis. This project should produce great benefits for intelligence, security and law enforcement agencies. In due course, it will also help many private-sector enterprises that have a pressing need to identify their customers accurately, in order to protect both their clients and themselves against identity fraud and other crimes based on the use of a false identity.

Another key aspect about the importance of technology – and therefore its consequent exposure or susceptibility to security risks – is our largely unquestioning dependence on the Internet. This is a worldwide network of computers joined by cables, satellite and other links with relatively few key nodes controlling the connections to a vast number of others. Another way of describing it is that it is basically a comparatively makeshift collection of unregulated, interconnected computer and communications systems designed originally to facilitate academic research, not carry the world economy.

This structure makes the Internet robust against random attacks but vulnerable to physical or hacker attacks targeted on the key nodes. Can you imagine the global economic cost if the Internet was disrupted or crashed for an hour, a day, a week or a month at some time in the next ten years, when we are even more dependent on it than we are today?

A one hour disruption of several major nodes could cause economic loss comparable to a major bushfire. If it went on for a day, the economic loss and social dislocation could be more on the scale of a cyclone or earthquake hitting a major city. One week could equal economic loss on the scale of a regional financial crisis, including severe social and political dislocation and collapse of some infrastructures and communications vital to the food supply. A crash that lasted a month – which would be possible if no back-up system was available – could cause economic collapse throughout the world on the scale of a global depression and the collapse of most of our infrastructure, the public health system and the food supply. These predictions are, of course, only estimates, but they do make you stop and think about the trust we are placing in this sprawling, ungoverned and at least potentially unstable network.

They also reinforce the urgent need for the further development of the Australian Government's program to protect the nation's critical information infrastructure through the Trusted Information Sharing Network, led by the Attorney-General's Department and supported by many

government agencies, utilities and private sector owners and operators.

## Individual and community rights

The second area requiring attention over the next couple of years is an examination of our understanding of individual and community rights in the 21st Century. This requirement starts from the premise that in the 20th Century, Australia was a very safe country. It was isolated by distance from many of the conflicts in other parts of the world; insulated from political upheaval by its democracy and economic prosperity; and protected from civil unrest by a tolerant society that by and large accepted differences with a mildly amused shrug of the shoulders.

There was not much of a frequent need to think about community rights in the 20th Century because they were not under any obvious challenge. This allowed individual rights to flourish without regard to the broader setting of community rights. In areas relevant to countering terrorism, many of those individual rights can be seen in the comprehensive protections we provide for our citizens in their dealings with police and security agencies, and the protections we have embedded in our criminal trial process. Those protections and processes reflect our history of comparative community safety.

But things are a bit different now. Australia and Australians have been nominated as terrorist targets. We have to ensure that we take all the steps necessary to protect the safety of our community as a whole and, in the process, to protect the rights of individuals within our society.

This aim is totally consistent with the Universal Declaration of Human Rights, which states in Article 3, that "Every person has the right to life, liberty and security of person". Our individual rights and responsibilities have to sit comfortably with this overriding human right to which every one in our community is entitled.

The Australian Parliament has already addressed some of these issues. Examples can be found in legislation giving ASIO questioning and detention powers; allowing police access to stored emails under a search warrant; and establishing a means for classified information to be tendered as evidence in criminal trials provided strict conditions are met (including requiring the lawyers involved to obtain security clearances).

In the context of the checks and balances involved, and the threat from terrorism, these moves are not an infringement of individual rights. They reflect the extent to which we, as a society, agree that our individual rights fit within the overall interests of the Australian community as a whole in a more dangerous world.

This point has been made very eloquently by the Canadian Attorney-General, Irwin Cotler, previously a leading civil rights lawyer who acted for, among others, Nelson Mandela. In addition to that endorsement, Canada is very similar to

Australia in many ways and their views on how to respond to terrorism are often very instructive for us.

Cotler has noted: “Indeed, as the United Nations put it, terrorism constitutes a fundamental assault on human rights – a threat to international peace and security – while counter-terrorism law involves the protection of the most fundamental of rights – the right to life, liberty and the security of the person – and the collective right to peace”.

## Attitudes to crime and punishment

This leads us to the need to review, at least, some of our attitudes to crime and punishment. In Australia we have highly developed law enforcement and criminal prosecution procedures. They have been developed over many years and have served the community well. However, they have to be capable of change to meet changing circumstances.

This is the sort of choice we will have to make. Do we, as a society, want to require lawyers to obtain a security clearance so classified information can be put in evidence and an alleged terrorist can be properly tried in accordance with all of the protections that our criminal justice system offers? Or would we prefer that charges not be brought at all – and the alleged terrorists go free – because we have no way to protect classified information in the court room?

I personally have no difficulty in accepting the security clearance requirement. In coming to that opinion, I am once again encouraged by Irwin Cotler, who has gone so far as to argue that “the domestic criminal law/due process model – standing alone – is inadequate, if not inappropriate” to deal with some terrorism offences. I don’t want to discuss the details of the possible changes to criminal process which Mr Cotler had in mind. I simply want to record his view that this is an area where he believes we need to think outside the box.

This will not be an easy debate but it will help if people can approach it with intellectual consistency, which has not always been evident so far. Consider this example. We have heard a lot of public criticism about the fact that a military commission in Guantanamo Bay can consider hearsay evidence if it has probative value. As an aside, I note this is the same standard which is applied in international war crimes tribunals like the International Criminal Tribunal for the Former Yugoslavia.

As far as I am aware, none of these critics of a military commission has, for example, said a word against the Government’s efforts to assist Mr John Ford to give what was clearly hearsay evidence in Ms Schapelle Corby’s defence during her drug trial in Indonesia.

In my view, one of our major challenges is to analyse and act on the consequences of the clear fact that the criminal law and potential punishment will not deter a suicide bomber. While our criminal justice system is based on the premise that detection and punishment act as a deterrent to the commission of crimes, this is not true for terrorists who aim

for the deliberate mass murder of civilians in public places and are prepared to lose their own lives in doing so.

Hopefully, most terrorism prosecutions will involve allegations of being a member of a terrorist organisation, training or preparing to commit a terrorist act or funding a terrorist organisation rather than having actually committed a terrorist act. But our courts will be asked to impose penalties for those preliminary actions which reflect the extreme seriousness of the activity, even though it was not brought to fruition.

One case which gave rise to a concern in this area is the prosecution of former Defence Intelligence Organisation employee Simon Lappas. Mr Lappas was found guilty in what I understand was the first successful espionage prosecution in Australian history, but his sentence was wholly suspended and he was placed on a good behaviour bond. The Director of Public Prosecutions appealed against the light penalty and the appeal resulted in Mr Lappas being re-sentenced and imprisoned for six months which was, in my view, a more appropriate outcome.

## Stopping terrorism at its source

Our fight against terrorism means we need to find ways to stop terrorism at its source. This is an extremely difficult and complex task. We have begun to tackle it in a number of our diplomacy, operational support and international assistance programs over the last few years (including our speedy and heartfelt assistance to Indonesia after the 2004 tsunami disaster).

In *The Muslim World after 9/11*, the Rand Corporation argues that the condition that has shaped the political environment of the Muslim world, more than any other, is the widespread failure of national post-independence political and economic models. The report asserts that “Muslim anger has deep roots in the political and social structures of some Muslim countries and that opposition to certain US policies merely provides the content and opportunity for the expression of this anger”.

The accuracy of this judgment may be debated, but it is consistent with a number of other indicators which suggest that our present problems with terrorism have been developing for some years even though they have only become widely apparent since 11 September 2001.

A couple of years ago, Major General Michael Dunleavy, formerly the commander of Joint Task Force 170 which set up the US detention camp at Guantanamo Bay, addressed a conference in Australia. He noted that one of the things that struck him most forcefully was that a number of the 9/11 terrorists had lived in New York for some time not many miles from his own home.

Another indicator is that many of the people who have committed acts of terrorism over the last three years have no criminal record and have generally been regarded as ordinary, law-abiding members of their communities. This fact (among others) has led one of our allies to express the view that there

is no point in trying to profile and identify likely terrorists as a way of attempting to stop a future terrorist attack.

The Rand Corporation has suggested a number of strategies to address this situation. They include promoting networks of liberal and moderate Muslims; fostering reforms of radical madrassa and mosques; expanding economic opportunities; and providing support to Muslim civil society groups that advocate moderation and modernity. The issue was summarised very succinctly by a senior Asian official I spoke to on a recent trip overseas. He said that, while most of their people do not support violence and do not accept extremist views of radical Islam, those groups are winning the war of propaganda.

The dimension of this task – to remove or otherwise deal with the root causes of terrorism – is daunting. It must, however, form a significant part of our future counter-terrorism strategies if we are to continue to move effectively from reaction and disruption to long-term prevention.

## Preserving our resolve and sense of perspective

In all of this, we need to keep our chins up and keep things in perspective. Given the complexity of its causes, the current threat of trans-national terrorism is likely to be with us for a considerable time, just as the Cold War was. While we have to take prudent steps to protect ourselves and carefully manage the risks we face, we cannot let the threat of terrorism overtake our lives or prevent us enjoying all the benefits of living in a prosperous democracy.

In this regard, we can take a lead from the Spanish attitude after the Madrid train bombings on 11 March 2004 which killed 191 people and resulted in 2062 people needing operations or medical treatment. Madrid has well established and practiced emergency response plans backed up by a strong emphasis on co-ordination between the various responding authorities and maximising the use of available resources.

These plans result in a large part from the fact that Spain has been on constant alert for a long while due to fears

about Basque separatists and the threat from the Basque terrorist group, ETA. But irrespective of the reasons, look at the way they responded to this attack. From the first call to the emergency line, just seconds after the first explosion at 7.30 AM, emergency recovery teams swung into action. Combined, they activated 5300 emergency service people, 3500 police officers, 250 ambulances, 385 other emergency or support vehicles, 38 hospitals and medical centres and 317 psychological support staff in a city of a bit over five million people.

And how did they perform? All of the injured were off the scene within an hour and a half. One hundred and twenty significant operations were performed that day, that is, within 13 hours of the bomb blasts. Railway traffic was completely restored – including the line where the four trains were bombed – by 6.30 PM the same day – that is, within 11 hours. In summary, despite the huge scale of this attack, the city of Madrid had returned to normal operation and the citizens of the city who were not directly affected were getting on with their lives in less than 24 hours.

## Looking forward

We are extremely fortunate that Australia is a safe, prosperous, pluralist, liberal society with great traditions of respect for individual rights, acceptance of difference and tolerance of diversity. The strategic aim of all of our initiatives for the foreseeable future should be to protect and maintain that society while preserving those traditional values. ♦

*Robert Cornall has been Secretary of the Commonwealth Attorney-General's Department since 2000. Before joining the department Mr Cornall held key roles in public legal administration, as Managing Director of Victoria Legal Aid 1995-2000 and as Executive Director of the Law Institute of Victoria 1987-95. Mr Cornall also has extensive experience in private legal practice, having been a partner in a large Melbourne law firm for fifteen years. This article is based in part on his address to the Australian Government's 'Security in Government' conference in May 2005.*



# Slouch Hat Publications

PUBLISHERS OF AUSTRALIAN MILITARY HISTORY SINCE 1989

(Ron & Sue Austin)

email. slouchat@surf.net.au

(03) 5986 6437

**NEW!**  
Out in Oct 2005!

**Gallipoli Encyclopedia: Australians in the Dardanelles campaign, 1915 (R Austin). \$55.00**

Members of Australian Defence Association receive books less 10%, post free within Australia.

[www.slouch-hat.com.au](http://www.slouch-hat.com.au)

