

**ASSESSING THE FIRST YEAR OF THE ACT HUMAN RIGHTS ACT  
CONFERENCE**

**WEDNESDAY 29 JUNE 2005  
LAW THEATRE, LAW FACULTY, FELLOWS ROAD  
AUSTRALIAN NATIONAL UNIVERSITY**

**CHIEF MINISTER AND ATTORNEY-GENERAL - JON STANHOPE**

I wish to acknowledge the traditional owners of the land we are meeting on, the Ngunnawal people. I respect their continuing culture and the unique contribution they make to the life of this region.

Today should be an occasion for celebration.

It ought to be a time for some small degree of permissible self-congratulation.

It should be a day to reflect on this community's first steps towards a greater consciousness of human rights – and to measure the distance travelled over a year of such steps.

It ought to be an occasion for observing that the dire warnings of the anti-bill-of-rights brigade have not manifested themselves. On the contrary, a second Australian jurisdiction is now seriously looking at the prospect of formally recognising its residents' basic rights, and critics of our own journey have been reduced to complaining that the ACT Human Rights Act has *not* clogged the courts, *not* gone to judges' heads and *not* brought civil society down around our ears.

It should be an occasion for celebration. But I cannot celebrate today.

How could celebration be anything but hollow at a time when, around the world, human rights are threatened by what the Secretary-General of Amnesty International Irene Khan has called a "lethal combination of indifference, erosion and impunity"?

In such days as these, she says, human rights are not only a promise unfulfilled, they are a promise betrayed.

Khan points to the efforts of the US to weaken the absolute ban on torture, by limiting the application of the Geneva Convention and redefining torture to justify coercive interrogation techniques. She points to the unacknowledged holding of “ghost” detainees incommunicado and the handing over of prisoners to third countries known to practise torture. She points to arbitrary and indefinite detentions at Guantanamo Bay, in violation of international law, and the military commission that so grimly parodies the ideal of a fair trial.

And as Khan says, the US, the unrivalled political, military and economic hyper-power of our time, sets the tone for governmental behaviour worldwide.

Of course, the US is not only the dominant world power of the era, it is also, paradoxically, the nation that pays the greatest lip service to human rights, reverently according its own bill of rights an almost Biblical force, yet subverting and flouting that same document with a disturbing lack of self-awareness, whenever it suits.

Khan warns that when such a country thumbs its nose at the rule of law and human rights, it grants a licence to others to commit abuse with impunity and audacity.

At the national level, Australia has taken up that licence with gusto.

Our new counter-terrorism laws extend the period for which people can be held, without charge, for ‘terrorism-related’ offences, and further restrict an accused person’s choice of legal representation. More recent laws let the Attorney-General keep secret from an accused person in a federal criminal trial information deemed to have security implications - at the nod of a Magistrate.

The Australian Government continues to acquiesce to the detention of David Hicks, as it did to that of Mamdouh Habib. Not only that, it has repeatedly ignored calls, including ones from my office, for ratification of the torture convention, despite the allegations of ill-treatment by Mr Habib and despite the fact that there is still an

Australian citizen in Guantanamo Bay, from where new and more horrifying allegations of cruelty and indignity are daily emerging.

Despite recent changes, agreed to by the Prime Minister only after he was confronted by the prospect of colleagues crossing the floor, the mandatory detention of asylum seekers continues. These were not concessions born of a change of heart or a new-found sense of compassion from our Prime Minister. They were grudging political compromises and they barely scratch the surface. Daily, new evidence emerges of apparent human-rights violations by the Department of Immigration and Ethnic Affairs—wrongful detentions, wrongful deportations, wrong decisions resulting from wrong-headed policy.

Such revelations are signs of a creeping culture of disregard for human rights. Indeed, I fear they point to a culture of quite deliberate *abrogation* of rights, a culture that would trade half a century of painstaking international advocacy and jurisprudence for a momentary illusion of white-picket-fence suburban security and solidity.

Just over a month ago the Federal Government hosted a major national security conference here in Canberra, showcasing the latest in protective security products and policies for government and the security industry.

One of the speakers at that conference was the Secretary of the federal Attorney-General's Department. He spoke of the need to protect Australia against the threat of terrorism. He said this meant examining notions of individual and community rights. He said it meant reviewing some of our attitudes to crime and punishment.

In the 20th century, he said, Australia had been a safe country, isolated from many conflicts, insulated from political upheaval by its democracy and economic prosperity, protected from civil unrest by a tolerant society that, by and large, accepted differences with a mildly amused shrug of the shoulders.

There had not been much need to think about community rights, in such a society, he said. Individual rights flourished – rights he said were now seen in the comprehensive

protections provided for citizens in their dealings with police and security agencies, and the protections embedded in our criminal trial process.

But, he went on to say, things are different now. We are terrorist targets and we have to take the steps necessary to protect the safety of the community as a whole. This development, he said, was entirely consistent with the Universal Declaration of Human Rights, which accords every person the right to life, liberty and security of person. *Individual* rights, the Secretary said, have to sit comfortably with this overriding human right, to which every one in our community is entitled.

The Secretary cited some of the very same examples of Commonwealth legislation I referred to a moment ago, including the anti-terrorism detention laws. He said he did not see these as an infringement of individual rights, but as a reflection of the extent to which we, as a society, had agreed that individual rights fitted within the overall interests of the Australian community in a more dangerous world.

The Secretary went on to suggest that some of our attitudes to crime and punishment were due for review. He acknowledged that we had highly developed law-enforcement and criminal-prosecution procedures, which had served the community well. But, he said, they had to be capable of change to meet changed circumstances.

Three propositions flow from the Secretary's speech:

- The first is that Australia can no longer afford to be a "tolerant society" that accepts "differences with a mildly amused shrug of the shoulders".

- The second is that we can only afford the luxury of individual human rights in the good times.
- The third is that investigation and prosecution procedures governing all other kinds of crime must suddenly and profoundly change if we are to effectively prosecute those involved in terrorism-related crimes.

I reject absolutely all three propositions.

I do not accept that this is how Australians must behave in order to endure and survive and thrive in this century.

I do not believe that we must suppress, submerge or sacrifice the rights and liberties that were crystallised from the human experience of 20<sup>th</sup> century global warfare, just because the way in which global war is waged in the 21<sup>st</sup> looks as though it might be based on new tactics and new weapons.

The acceptance of difference is no less crucial now than it was in the days of heightened nationalism in the wake of the world wars. Nor is it any easier to achieve.

I draw inspiration from people such as Farid Esack, the South African academic and Commissioner for Gender Equality in the South African Human Rights Commission.

Esack is a self-described South African Muslim male from an impoverished working-class background, reared by a single parent on gang-infested streets where many of his neighbours were Christians and the debt collectors were invariably Jewish.

Tolerance doesn't come easily to someone like Esack. But in the face of significant criticism from within his own Islamic community, he continues to seek a way forward that engages all of humanity. He writes:

*Does an acknowledgment of the complexities of the task of arbitrating between competing and incompatible rationalities and justices mean that one does not have any convictions? Oh no, I certainly do have convictions: I hold them*

*passionately and have suffered for them. However, I can no longer walk over others in the deep-rooted belief that only mine matter. While I can and, indeed, do derive inspiration from my faith and from the Qur'an I can no longer disregard the pluralistic nature of the world wherein we live. I have to find a yardstick to measure the correctness or incorrectness, the justice or injustice of my prejudices and predilections. I can no longer appeal to that which is exclusive to my community. Nor can I appeal exclusively to what is my perception of what my religious heritage is all about. The gap between belief and reality, and between competing realities and beliefs within my own community is too obvious for me to do that.*

While the majority of Australians have been spared the kind of challenges to their instincts for tolerance that must have tested Esack and his countrymen, the threat to our human-rights edifices here in Australia is no less real for being more subtle. For us, as for Esack, the challenge is to keep embracing and learning from diversity, to seek, as he has, a means of monitoring, measuring and talking about our behaviour that doesn't just reflect the values of a particular community or group.

The notion of 'community rights' is superficially appealing. But as Christopher Michaelson pointed out in a recent opinion piece in the *Canberra Times*, in a liberal democracy it is *individuals* who enjoy legal rights and shoulder obligations, not society as a whole. Only individuals are capable of choice, action and the pursuit of interests. The community is not an organism that makes decisions. Of course, individual rights can only be enjoyed so long as they do not violate the rights of others. That is already a reality. The interests of individuals are thus already balanced against the interests of other individuals and against the interests of the community as a whole.

Of course, it is easy to see why governments might *like* to accord communities rights at the expense of individuals. Such a manoeuvre is a convenient strategy for a government that lacks commitment to human rights, or one that even actively seeks to diminish human rights. Communities have no mechanisms to actively articulate or enforce rights. Government itself becomes the self-appointed spokesman on what rights the community wants and needs, day to day. Along the way, the erosion of

human rights is obscured. It gives rise to the kinds of government arguments we have heard in recent times, the use of what the 2005 Amnesty International Report refers to as the ‘security excuse’ – whereby governments curtail and abuse human rights under the cloak of the ‘war on terror’.

Contrary to what the Secretary of the federal Attorney General’s Department claims, Article 3 of the Universal Declaration does *not* provide a basis for intrusive anti-terrorism laws. It is a protective right in an entirely different sense. As Christopher Michaelson points out, the right to liberty and security of the person is widely accepted *not* to relate to some broader right to safety. On the contrary, it seeks to *confine* the power of the state to coerce individuals through such intrusions as arbitrary arrest and detention.

It is extremely cynical for governments to try to persuade people that individual rights are all very well for peacetime, but that they can and ought to be sacrificed during times of war. It is also a shameless re-writing of history. Human rights as we know them, and as they are expressed in our international covenants, were purpose-built for war, arising out of the extraordinary period of moral depravity and ambiguity that was the Second World War. These covenants, and the many national laws that have sprung from them, recognise that it is precisely in times of war that mankind needs the most explicit and unambiguous checklist of the basic rights of individuals. Indeed, it is during times of war or national crisis or uncertainty that we most need to remind ourselves of individual rights, because it is during these times that the temptation to erode rights is greatest.

To characterise individual rights as luxuries that we can afford during the good times but dispense with when it suits us, is to gravely demean the suffering of those whose experiences during the first half of the 20<sup>th</sup> century galvanised the world and gave birth to modern notions of human rights.

There is no doubt that the precise nature of the security challenges societies now face might be rather different than they were in the era of global war, but it is also easy to overstate the security risk when the enemy is diaphanous and wears no uniform. In such circumstances it is relatively easy to persuade people that the enemy could be

anyone – a neighbour, a workmate, anyone who looks, dresses, speaks, thinks or argues a little differently to the way we ourselves look, dress, speak think or argue.

Once such a perception has been encouraged and has become mainstream, it is not difficult to instil the idea that identifying, extracting information from, combating and convicting this new breed of warrior requires weaponry so new and so specific that it might, regrettably, involve a bit of a re-think of basic human rights.

We need a reality check. In his recent address to the National Security Law Conference, the Hon Justice Michael Kirby gave just that, putting recent threats to security in context.

Referring to the period we now know of as the Cold War, Justice Kirby pointed out that in the 20<sup>th</sup> century, our security withstood a world-wide danger, supported by a mass movement of convinced ideologues, sustained by one of the world's superpowers, armed with nuclear and other weapons.

This history lesson was not grounds for complacency over national security, nor for indifference to the risk of violence, he said. But it was a reminder to keep our feet firmly planted on Australian ground.

In his recent submission to a Special Committee of the Canadian Senate reviewing that country's Anti-Terrorism Act, Attorney General Irwin Cotler said it was crucial that counter-terrorism law and policy comport with the rule of law. Minorities must never be singled out for differential and discriminatory treatment, he said. Torture must always and everywhere be prohibited. Counter-terrorism could not be allowed to undermine the very human security it sought to protect.

As Irene Khan puts it, in the 2005 Amnesty Report, human rights must be acknowledged as the *basis for* our common security, not a *barrier* to it.

Irwin Cotler, explaining Canada's anti-terrorism laws to the Special Committee, argued that any limits imposed on the human rights protected under the Canadian Charter must be analysed not in the abstract, but in the factual context that gives rise

to them – the ‘contextual principle’ that exists in various forms in most interpretive jurisprudence on bills of rights.

Similarly, he said, the application of the proportionality principle required that the response to terrorism must be proportional to the threat. There must be a rational basis for the remedy and it should be tailored specifically to the objective. The nature and dimensions of the terrorism threat can be taken into account in interpreting human rights, but they should be taken into account as part of a framework, rather than being given ‘trump card’ status.

Cotler said the challenge was not to balance the protection of national security against the protection of human rights, but to re-conceptualise human rights as *including* national security, and vice-versa. The focus is not on the *surrender* of freedoms, but the *securing* of rights.

Cotler said he believed that in Canada a principled approach to counter terrorism law had been taken that was anchored in a relationship between security and rights, an approach that protected both and did not have to trade off one for the other.

Importantly, Attorney General Cotler said the domestic rule of law did not need to be jettisoned in the handling of offences involving terrorism.

He said that while the domestic criminal-law due-process model, standing alone, might be insufficient, and while it might need to be augmented by international-law concepts, the domestic due process model remained a necessary model and safeguard.

Amnesty’s 2005 Report notes that in many countries, including Australia, new doctrines of security continue to expand the concept of ‘war’ into areas formerly considered law enforcement. This allows governments to argue that human rights should be curtailed when it comes to the detention, interrogation and prosecution of ‘terrorism’ suspects. The laws giving ASIO the power to question and detain an adult for up to seven days if it has reasonable grounds for believing that interrogation will assist in the collection of intelligence relating to terrorism, fall squarely into this category.

There is a disturbing tendency in Australia today to regard human rights as conditional entitlements that are earned or surrendered, depending upon the nature of the allegations faced, or the perception of guilt or innocence.

We have seen this most recently in the allegations against nine Australians accused of drug trafficking in Bali. For what appears to be the first time, Australian law enforcement authorities helped Indonesian Police arrest the nine, who will almost certainly face charges potentially carrying the death penalty. This help was rendered despite Australian's obligations under the International Covenant on Civil and Political Rights and the wording of the *Mutual Assistance in Criminal Matters Act 1987 (Cth.)* The Treaty Between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters that is incorporated by regulation into that Act is clear that a request by a foreign country for assistance must be refused if it relates to offences attracting the death penalty, unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.

The plight of the Bali nine excited some national debate, but regrettably little of it centred on the human rights of the nine men and women themselves. Perhaps anti-human rights sentiment really is firming, at least out there in talkback land.

But Australians are entitled to something better. We are entitled to a degree of rigour in our national policy-making and in the observation of our national legal obligations that you will never find on talkback.

We are entitled, from our federal Attorney-General, to the kind of thoughtful approach taken by Canadian Attorney-General Irwin Cotler, who has given his country counter terrorism law that is rooted in a relationship between security and rights.

There are few voices in Australian speaking up for such an approach. That is why I cannot celebrate today.

I conclude with the words of Justice Kirby:

*National security in a country like Australia ultimately rests not on fear or restrictive laws. It lies in the loyalty of the people, their love of the country and their respect for its institutions, including those that safeguard the rule of law, due process of law and equal justice under the law for all.*