

Chapter Five

Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform

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Introduction: The Balancing Model

Much of the debate post-September 11 (9/11) about expansion of state power to combat terrorism has been framed as striking a balance between security and liberty.¹ The ‘balancing approach’, whereby security is reconciled with respect for fundamental liberal rights and values, has been very influential in counter-terrorism law reform in Australia.² As the former federal Attorney-General Philip Ruddock pointed out:

We don’t live in an ideal world. We live in a world of trade-offs. And now we live in a world where we must accept the costs associated with protecting ourselves from terrorism ... There will always be a trade-off between national security and individual rights. The task of government is to recognise these trade-offs and preserve our security without compromising basic rights and liberties.³

The balancing paradigm has been a touchstone even for critics of the terrorism laws enacted since 2002. The Sheller Committee (the Security Legislation Review Committee), which undertook the five-year review of the first wave of terrorism

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¹ J Waldron, ‘Security and Liberty: The Image of Balance’ (2003) 11(2) *The Journal of Political Philosophy* 191.

² The balancing approach was adopted in the Senate Standing Committee on Constitutional and Legal Affairs, *Report of Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills – Interim Report* (3 May 2002). It is also adopted by G Williams, ‘Australian Values and the War on Terrorism’, *Australian Financial Review* (Melbourne), 7 February 2003, 6-7 (edited version of National Press Club Address, 29 January 2003); G Williams, *The Case For An Australian Bill of Rights: Freedom in the War on Terror* (Sydney: UNSW Press, 2004); G Williams, ‘Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism’ (2006) 8(1) *Journal of Comparative Policy Analysis* 43.

³ P Ruddock, ‘The Commonwealth Response to September 11: The Rule of Law and National Security’ (Speech delivered at the National Forum in the War on Terrorism and the Rule of Law, New South Wales Parliament House, 10 November 2003) [26]-[29].

offences inserted into the *Criminal Code Act 1995* (Cth) ('Criminal Code'), conceived its task in the following terms:

an appropriate balance must be struck between, on the one hand, the need to protect the community from terrorist activity, and on the other hand, the maintenance of fundamental human rights and freedoms.⁴

Likewise, the Australian Law Reform Commission's recent review of sedition approached the process of reform as one of 'balancing anti-terrorism measures with human rights'.⁵ A similar approach also characterises the legal policy environment in the United Kingdom (UK), the United States (US) and elsewhere.

The Critique of Balancing

Although a pervasive feature of public policy in the field of counter-terrorism, the balancing approach has been subject to significant academic criticism. As Jeremy Waldron points out, the concept of balancing must be subjected to careful analytical and empirical scrutiny in the context of counter-terrorism measures.⁶ Notwithstanding the intuitive appeal of balancing, there are many objections to its use to guide terrorism law reform.⁷ For criminal justice scholars, the balancing debate resonates with the pre-9/11 critique of balancing models applied to guide criminal justice reform.⁸

Rather than security versus liberty, the criminal justice debate was framed as striking a balance between crime control and due process, or variants thereof.⁹ In both contexts, several objections may be levelled at balancing.¹⁰ A common objection is that balancing promotes consequentialism in which the 'ends justify

⁴ Security Legislation Review Committee (SLRC), *Report of the Security Legislation Review Committee* (2006) 3. See also p 47 where the SLRC notes '[s]triking this balance is an essential challenge to preserving the cherished traditions of Australian society'.

⁵ Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006) 101, 105.

⁶ Waldron, above n 1.

⁷ For criticism of these balancing models see S Bronitt, 'Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?' (2003) 14 *Public Law Review* 76, 76-80; M Gani, 'Upping the Ante in the "War on Terror"' in P Fawcner (ed), *A Fair Go in an Age of Terror* (Victoria: David Lovell Publishing, 2004) 80-91; and G Carne, 'Brigitte and the French Connection: Security Carte Blanche or A La Carte' (2004) 9(2) *Deakin Law Review* 573, 613-14.

⁸ For an overview of the debate about balancing see L Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32(4) *Journal of Law and Society* 507; S Bronitt and B McSherry, *Principles of Criminal Law* (Sydney: LawBook Co, 2nd ed, 2005) 871-6. In the criminal justice context, see earlier articles by A Ashworth, 'Crime, Community and Creeping Consequentialism' [1996] 43 *Criminal Law Review* 220, 220-30; S Bronitt, 'Electronic Surveillance, Human Rights and Criminal Justice' (1997) 3(2) *Australian Journal of Human Rights* 183.

⁹ In the criminal justice context, the balancing metaphor is a powerful image, linking to the scales of justice and our adversarial system of justice. For a review of the key contributions to this debate by Herbert Packer, Doreen McBarnet and Andrew Ashworth, see Bronitt and McSherry, above n 8, 36ff.

¹⁰ Feminists have also critiqued the bipolar or binary construction of this balancing model, which conceals the significant legitimate interests of victims: see P Eastale, 'Beyond Balancing' in P Eastale (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Sydney: Federation Press, 1998).

the means', a calculus in which individual interests are sacrificed for community gains. The logic of such utilitarian approaches¹¹ has even led some US and Australian scholars to propose that torture, if regulated through judicial supervision, may be justified to avert imminent terrorist attacks.¹² Such preventive measures are justified in terms either of self-defence (a doctrine which extends to defence of others and property) or of necessity. In reality, however, in respect of self-defence, this defensive action is not likely to be directed against the perpetrators of terrorism, but rather against 'soft targets' such as the suspected terrorist's associates or family members. A further point of distinction from the typical self-defence scenario here is that the defensive action is not being performed by a private citizen, but by law enforcement officials or defence personnel, thus invoking what amounts to a broader claim of legal justification based on necessity.

The defence of necessity, which admits that there will be circumstances where a person may legitimately break the law, involves the weighing of lesser evils. There is little case law on the defence, though the courts have held that necessity and duress are unavailable in murder cases — the courts are seemingly hostile to utilitarian calculations in cases that have involved the intentional sacrifice of one person's life to ensure the survival of many.¹³ Recognising necessity in torture cases would similarly deny the autonomy and moral existence of the subject as a human being.¹⁴ Even if the torture is 'regulated' so as to avoid the risk of death, the victim of torture is not only subjected to serious pain but also experiences a form of moral death.¹⁵ Respect for human life and human dignity is a paramount value, and in modern times, the common law has not been willing to entertain legal argument about the relative value of one human life over many.

¹¹ 'Utility', for Jeremy Bentham, meant the greatest happiness (or welfare) of the greatest number with its maximisation being the proper end of humankind. The implications of utilitarianism for law is discussed in S Bottomley and S Bronitt, *Law in Context* (Sydney: Federation Press, 3rd ed, 2006) 45ff.

¹² See A Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002); M Bagaric and J Clarke, 'Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable' (2005) 39(3) *University of San Francisco Law Review* 1. It is not surprising that the father of utilitarian philosophy, Jeremy Bentham wrote an essay on the utility of torture, concluding that its use depended in each case on its 'overall utility': see W Twining and P Twining, 'Bentham on Torture' (1973) 24 *Northern Ireland Law Quarterly* 307; discussed in J Kleinig, 'Ticking Bombs and Torture Warrants' (2005) 10(2) *Deakin Law Review* 614, 614. In the modern law, torture is strictly prohibited, as it is subject to an absolute ban under international human rights law and prohibited under the *Criminal Code Act 1995* (Cth) ('Criminal Code').

¹³ In *R v Dudley and Stephens* (1884) 14 QBD 273, the English common law established the limits of the defence, denying its availability as a defence to murder in a case of survival cannibalism where the crew, consistent with maritime custom of the time, had drawn lots to determine who they would kill in order to ensure their survival. Similar limitations apply to the availability of the defence of duress under common law.

¹⁴ D Manderson, 'Another Modest Proposal' (2005) 10(2) *Deakin Law Review* 640, 651.

¹⁵ As Manderson points out 'our societies have, at least since the Enlightenment, feared pain more than death, believed that human dignity requires absolute protection under all circumstances, and thought torture a more serious act than execution': *ibid* 649.

Another objection relates to the weight attached to these competing values. Jeremy Waldron reposes the question as how these two societal 'goods' in tension (namely security and liberty) should be justly distributed?¹⁶ A recurrent problem with these balancing models is that there is no indication of the relative weight that should be attached to the competing interests. As a leading criminal justice scholar, Lucia Zedner, put it:

Typically, conflicting interests are said to be 'balanced' as if there were a self-evident weighting of or priority among them. Yet rarely are the particular interests spelt out, priorities made explicitly, or the process by which a weight is achieved made clear. Balancing is presented as a zero-sum game in which more of one necessarily means less of the other ... Although beloved of constitutional lawyers and political theorists, the experience of criminal justice is that balancing is a politically dangerous metaphor unless careful regard is given to what is at stake.¹⁷

As Michael Freeman points out, the distributive effects between security and liberty are uneven: security is typically enhanced not through interference with *our* own liberty, but by sacrificing the freedoms of others, typically young Muslim males.¹⁸

Balancing becomes more problematic when we move beyond physical harm to less tangible and direct interests, such as individual or communal security. In this context, security is measured not only by the actual state of being secure, but also the psychological need to feel secure. These feelings will be based in part on a *perception* of the nature of the security threat and what works to address that insecurity — matters which are rarely determined by empirical evidence but dictated by political imperatives and priorities. Promoting the happiness of the majority (whether or not the policies are evidence-based) necessarily tips the balance heavily in favour of the state over the individual.

In the balance between liberty and security, security is invariably viewed as paramount. Security looms larger in this equation for a number of reasons. First, security threats are not confined to national borders or interests, but have a global reach. This aspect of globalisation, which is acute in the context of terrorism law, attaches further weight to the security side of the scales.¹⁹ Second, our capacity to enjoy freedom rests on security. Indeed, Phillip Ruddock, the former federal Attorney-General, justified broader security measures as upholding

¹⁶ Waldron, above n 1.

¹⁷ Zedner, above n 8, 510-11.

¹⁸ M Freeman, 'Order, Rights, and Threats: Terrorism and Global Justice' in R A Wilson (ed), *Human Rights in the 'War on Terror'* (Cambridge: Cambridge University Press, 2005) 48.

¹⁹ A point made by Carne, above n 7: 'The national security aspect in the balance is inevitably given special weighting, producing a structural inequality in that "balance". These considerations suggest a general unsuitability of the balancing paradigm for reconciling national security and democratic interests.'

the right to 'human security', which he views as the paramount human right.²⁰ This 'new' approach, however, distorts the conventional understandings of the right to liberty and to security of person. It also corrupts the new paradigm of human security being advocated by influential human rights and development scholars. Before this recasting by the Attorney-General, the concept of human security had been developed to shift the focus of debate from the security of the state to the security of the people.²¹ However, as previously noted, 'in this new era, fundamental human rights related to liberty and security can acquire radically new meanings'.²² A cursory review of the case law under the 'right to security' in international human rights law would reveal a basic concern with confining the power of the state to coerce its citizens through powers of arrest and detention.²³ Indeed the correct approach, since human rights are not absolute, is to view national security as a competing public interest that may place some necessary and proportionate restriction on the exercise of a particular human right. To be sure, the idea of feeling safe should not be underestimated — there are social, legal and economic dimensions to this, but the promotion of such a feeling can hardly be paramount. Indeed, treating security as paramount can be disastrous, as the International Commission of Jurists noted in the Berlin Declaration:

A pervasive security-oriented discourse promotes the sacrifice of fundamental rights and freedoms in the name of eradicating terrorism. ... [S]afeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the state.²⁴

A further objection to balancing relates to the inverse relationship between liberty and security, namely that more of one thing (liberty) means less of another (security) and vice versa. This underlies the assumption that higher levels of human rights protection or due process *necessarily* will impede the effectiveness of law enforcement. To promote maximum collective security we must sacrifice

²⁰ P Ruddock, 'A New Framework – Counter-Terrorism and the Rule of Law' (2005) 16 *The Sydney Papers*, 113, 116-17.

²¹ Commission on Human Security, *Human Security Now. Protecting and Empowering People* (New York: United Nations Human Security Unit, 2003). The concepts underlying human security are discussed by M Robinson, 'Connecting Human Rights, Development and Human Security' in Wilson above n 18, 313ff.

²² Bottomley and Bronitt, above n 11, 414.

²³ The case law on art 5 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) 213 UNTS 222 (entered into force 3 September 1953) is reviewed in M Macovei, *The Right To Liberty and Security of the Person*, Human Rights Handbooks, No 5 (Strasbourg: Council of Europe, 2002) <http://www.coe.int/T/E/Human_rights/hrhb5.pdf>. The right to liberty and security of person under art 9 of the *International Covenant on Civil and Political Rights* (ICCPR), 999 UNTS 171 (entered into force 23 March 1976) 'guarantees against arbitrariness in relation to arrest and detention', rather than some broader right to safety: see N O'Neill, S Rice and R Douglas, *Retreat from Injustice: Human Rights in Australia* (Sydney: Federation Press, 2nd ed, 2004) 214.

²⁴ *The Berlin Declaration: the International Commission of Jurists Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, adopted 28 August 2004.

our civil liberties: sadly it seems that human rights and due process prove too costly precisely at the moment that they are needed most. However, these assumptions are contestable. Recent procedural reforms to the law governing criminal investigation suggest that some innovations, such as the mandatory recording of interviews and custodial access to lawyers, do not unreasonably fetter law enforcement. The practice of taping, though resisted by police initially, has in fact proved to deliver significant benefits for law enforcement, reducing the number of disputed confessions and providing credible evidence to refute suspect allegations of improper or oppressive treatment during investigation.²⁵

In light of these insights from the field of criminal justice, it is not unrealistic to propose that effective counter-terrorism law can be promoted *with* high levels of human rights and due process. Indeed, it is important to avoid symbolic legislation, and ill-considered knee-jerk responses that prove to have limited impact or, worse still, to have potential counterproductive effects or unintended consequences.

Human rights law is not a straitjacket for effective counter-terrorism measures. As many human rights lawyers and organisations have pointed out, human rights are rarely unqualified or absolute, with permissible limitations in the name of security on rights such as privacy and fair trial provided they are both necessary and proportionate.²⁶ Since the *legal* expression of human rights is rarely unqualified,²⁷ the correct approach to policy development is to promote strict compliance with (rather than wide derogation from) fundamental human rights protected under international law or contained in domestic human rights legislation.²⁸ The problem is that this approach to necessary and proportionate qualification is regularly misunderstood by the courts and legislature. As Laurence Lustgarten has pointed out in the context of British courts addressing the human rights standards in the *European Convention on Human Rights* (ECHR) through the *Human Rights Act 1998* (UK):

It often seems something is lost in the transition (or is it translation?) from Strasbourg to the UK courts, a process in which the ECtHR's [European Court of Human Rights] references to the necessary 'balance' between individual rights

²⁵ See generally, D Dixon, *Law in Policing: Legal Regulation and Police Practices* (Oxford, New York: Clarendon Press, 1997) on the relationship between law and policing, and recognition that due process is not necessarily antagonistic to crime control.

²⁶ This point has been made recently in a submission by the Human Rights and Equal Opportunity Commission to the SLRC, discussed in its Report, above n 4, 39. See also C Gearty, *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2004) ch 2.

²⁷ There are only a few absolute rights, such as torture. Though even in this area, as Gearty notes, the prohibition 'is shown by the jurisprudence of the European Court of Human Rights to have plenty of grey areas around its fringes in which disputes have been able to thrive': Gearty, *ibid* 9.

²⁸ Australia has not yet adopted a bill of rights, though the Australian Capital Territory and Victoria have adopted human rights legislation modelled on the *Human Rights Act 1998* (UK): *Human Rights Act 2004* (ACT), *Charter of Human Rights and Responsibilities Act 2006* (Vic).

and public interest has led — not only in the context of terrorism — to the ‘balancing away’ of defendant’s rights in a manner that arguably fails to comply with convention requirements ... the practical import is that the seductive metaphor of ‘balance’ can readily be used to override convention and other protections when the public clamour is loud enough.²⁹

What this suggests is that both the courts and those responsible for legislative policy in these fields must develop a more sophisticated grasp of human rights law. Furthermore, an understanding of these obligations should inform their decision-making.

As well as fostering legitimacy, strict adherence to human rights law and due process may pay dividends in terms of wider compliance with these laws among the citizenry. There is a strong argument from social psychological research that individual compliance with even unpopular and harsh laws can be promoted by the belief that the processes of enforcement and adjudication are legitimate (that is, procedurally fair and just). As the social psychological research on procedural justice reveals, legal systems with a highly punitive criminal justice system, can deliver high levels of compliance with the law when combined with the processes that are perceived to be fair to accused persons.³⁰

A common claim is that human rights observance is too costly in cases involving terrorism.³¹ But a wider sweep of the history of criminal justice supports the above hypothesis about the importance of procedural justice to compliance. It is important to recall that ‘due process’ rights were not forged in the lower courts in relation to minor misdemeanours, but rather were first articulated in relation to serious security offences, such as treason and sedition. The history of the Star Chamber is often misrepresented by common lawyers as one of inquisitorial oppression and torture, overlooking its critical role in forging many of the key

²⁹ L Lustgarten, ‘National Security, Terrorism and Constitutional Balance’ (2004) 75(1) *The Political Quarterly* 4, 14. Ashworth makes a similar point that ‘balancing’ of interests is used indiscriminately, an approach he believes is simply wrong. He criticises the UK application of the ECHR, arguing that the broad brush approach taken does not take into account the hierarchy of rights that is explicit from the Convention structure (created by art 15), and thus a more precise approach is required to correctly apply the protections provided. Specifically, he suggests that although some rights may be ‘outweighed’ as necessary under a democratic society, others are not to be defeated by public interest, including the right to liberty and security (Art 5) and the right to a fair trial (Art 6): A Ashworth, ‘What Have Human Rights Done for Criminal Justice in the UK?’ (2004) 23 *University of Tasmania Law Review* 151.

³⁰ The key research in this field has been undertaken by T Tyler: *Why People Obey the Law* (New Haven: Yale University Press, 1990). This research is discussed by J Braithwaite, ‘Crime in A Convict Republic’ [2001] 64(1) *Modern Law Review* 11, 21, in the context of his study of convict justice in the eighteenth and nineteenth centuries. The commitment to procedural justice in an otherwise harsh legal system not only constrained abuses of power by officials, but also assisted convicts realign their identities to law abiding citizens. In his view, it was these features of the system, overlooked by many historians, that explains high levels of reintegration and low levels of re-offending, during this period.

³¹ For a recent article making this claim, see G Rose and D Nestorovska, ‘Australian Counter-Terrorism Offences: Necessity and Clarity in Federal Criminal Law Reforms’ (2007) 31 *Criminal Law Journal* 20.

procedural protections that underwrite human rights law today.³² As Geoffrey Robertson has pointed out, the key elements of modern Anglo-American justice (such as the right to counsel and the privilege against self-incrimination) are products of periods of intense political repression. Robertson contends that the more serious and inherently political the crime, the greater the legal quest for legitimacy through procedural safeguards, reminding us that it was in trials of treason that prisoners were first permitted defence counsel. Indeed, Robertson has argued that the seventeenth century trial of Charles I — the first trial of a head of state for tyranny and a precursor to modern war crimes trials — provided common lawyers and judges with the opportunity to fashion many significant legal innovations.³³

Indeed, a similar point about the importance of the ideology of justice was made by Doug Hay in his study of eighteenth century English criminal justice, and the operation of the 'Bloody Code' under which an increasing number of offences were made felonies punishable by death.³⁴ In his view, the approach of the ruling class was to manipulate the ideology of law, to use it as 'an instrument of authority and a breeder of values' in order to maintain the legitimacy of the existing social order. Since fear alone could not establish deference to the law, the structures of the law itself might be used ideologically, to establish deference without force, to legitimate the class structure, and to maintain the domination of the holders of property. Hay emphasises how the elements of majesty, justice and mercy, embodied in the practices of the criminal law, served these ends.³⁵

By looking to legal history, albeit briefly, we see that due process of law (with its symbolic and instrumental aspects) was considered more (not less) important during periods of insecurity and state repression. Why is this so? As foreshadowed above, the answer must be legitimacy — put simply, in cases where the political taint of the crime and the threat to security is manifest, the state must play and be seen to play scrupulously by the rules. This has

³² Geoffrey Robertson highlights the role of the Star Chamber in Jesuitical persecution in the 1600s, which led to its demise during Cromwell's Commonwealth: G Robertson, 'Fair Trials for Terrorists' in Wilson (ed), above n 18, ch 8; G Robertson, *The Tyrannicide Brief* (London: Chatto & Windus, 2005). This is the period in which most of the fundamental due process protections were forged — trial by jury (absent in the Star Chamber), open justice and privilege against self-incrimination. The oppressive features of the Star Chamber can be overstated. As Barnes points out, many of the modern features of due process we associate with the common law were established in the Star Chamber procedure — foremost, the right to counsel (which was denied to the common law courts in relation to felony). Moreover, the Star Chamber placed much value on procedural regularity — namely the rigour of pleadings to define issues — and copious legal argument before judgment. An enduring myth, that the chamber promoted confession by torture was not entirely true either: treason was investigated and torture was used, but never by the judges, rather it was the officers working for the Privy Council who used these methods. See further T Barnes, 'Star Chamber Mythology' (1961) 5(2) *American Journal of Legal History* 1.

³³ Robertson, *The Tyrannicide Brief*, *ibid.*

³⁴ D Hay, 'Property, Authority and the Criminal Law' in D Hay et al, *Albion's Fatal Tree* (London: Allen Lane, 1975) 17; discussed in S Bottomley and S Bronitt, above n 11, 217-19.

³⁵ *Ibid.*

implications for modern terrorism offences. Rather than advocate for terrorism crime to be defined widely and to incorporate strict or absolute liability elements supported by extensive use of reverse onus provisions, legislatures should maintain fidelity to the default standards of criminal justice: namely the burden of proof resting with the prosecution, and offences requiring proof of subjective fault. This would be consistent with the principles of responsibility applied to the Criminal Code and the published federal guidelines on the appropriate use of absolute (no fault) liability.³⁶ Robertson argues that ‘the justice we dispense to alleged terrorists cannot be exquisitely fair, but need not be rough. Above all, it must be justice that conforms with our inherited Anglo-American traditions.’³⁷ Indeed, the quashing of the conviction in the Jack Thomas case in 2006, on the basis that the confession evidence used against him at trial was obtained in coercive circumstances and in derogation of the requirements of Australian law, may be viewed as the judiciary seeking to uphold these values scrupulously in trials for offences that have been widely condemned as exceptional and draconian.³⁸

The Making of Terrorism Law: Uncivil Politics of Law Reform

Drawing from this vein of social psychological research discussed above, I would further argue that legitimacy in law is not simply about how the law is *enforced* by the executive and the judiciary — it is supported by beliefs about the propriety of the process by which the applicable laws are *made* and *reformed*. Harsh laws that divide the community may nevertheless be obeyed where there is a genuine effort to consider the concerns and interests in the legislative process. There is much scepticism, in the current political climate, as to whether the existing scrutiny of terrorism law through parliamentary committees or, indeed, through law reform agencies is effective in addressing these concerns and interests.³⁹

The political imperative to act in order to reassure the electorate proves to be irresistible in the aftermath of a terrorist attack. Prior to the 2002 reforms, the Attorney-General’s Department undertook no systematic review of the reach of

³⁶ The federal government’s first proposals relating to terrorism offences contained in the Security Legislation Amendment (Terrorism) Bill 2002 departed from its own guidelines and were drafted as absolute liability offences: this egregious departure from the presumption of subjective fault in relation to offences of such a serious nature was justified in the Explanatory Memorandum. Whilst these provisions (as proposed) did not pass into law, the terrorism offences have strict liability elements.

³⁷ Robertson, ‘Fair Trials for Terrorists’, above n 32.

³⁸ *R v Joseph Terrence Thomas* [2006] VSCA 165 (18 August 2006). The implications of this case are discussed in J McCulloch, ‘Australia’s Anti-Terrorism Legislation and the Jack Thomas Case’ (2006) 18(2) *Current Issues in Criminal Justice* 357.

³⁹ For an assessment of this trend in the context of sedition, see S Bronitt and J Stellios, ‘Sedition, Security and Human Rights: ‘Unbalanced’ Law Reform in the “War on Terror”’ (2006) 30(3) *Melbourne University Law Review* 923.

existing laws; there was no consideration of whether minor adaptation (with sentence enhancement for crimes with a terrorist motive) could achieve a result more consistent with the existing fabric of our criminal laws.⁴⁰ Despite its immense importance, forging new terror legislation has occurred largely 'on the cheap'. With limited time and resources, government has been encouraged to draw on 'off the shelf' solutions. In the Australian context, the legislature has borrowed heavily from UK models in relation to key definitions, and to new legal measures such as control orders and preventative detention.⁴¹ The core definition of 'terrorist act', which triggers many of the counter-terrorism powers and forms an element of a number of the terrorism offences in the Code, was drawn directly from the *Terrorism Act 2000* (UK). In one respect, not highlighted in the debates in federal Parliament, the UK definition significantly extends the normal jurisdictional reach of the criminal law. The effect of this borrowed definition is that the terrorist act extends to behaviour that has no connection with Australia. Under the Criminal Code the terrorist act must be done, or the threat made, with the intention of (inter alia):

coercing, or influencing by intimidation the government of the Commonwealth or a State, Territory or *foreign country*⁴² [emphasis added].

While this definition of terrorism bears similarity to conventional political crimes such as treason and sedition, the extension to *any* foreign country is a clear manifestation of the globalisation of the concept of security. The recognition that the security of Australia is now dependent upon the security of other states (not just allies) justifies the adoption of expanded offences and powers that promote *global* rather than exclusively *national* security. The extended definition has another effect, potentially criminalising persons who support resistance movements that oppose tyrannical and undemocratic regimes. As the English Court of Appeal has noted in a recent case upholding the conviction of a person engaged in action to overthrow the Libyan dictatorship of Colonel Gaddafi:

the terrorist legislation applies to countries which are governed by tyrants and dictators. There is no exemption from criminal liability for terrorist activities which are motivated or said to be morally justified by the alleged nobility of the terrorist cause.⁴³

⁴⁰ The lack of a proper process to review or assess the current laws was a feature in both Australia and Canada: A Goldsmith, 'The Governance of Terror: Representing Terrorism in Canadian and Australian Counter-Terrorist Law Reform After September 11' (Paper presented at Crime, Community and the State: 18th Annual Conference of the Australian and New Zealand Society of Criminology, Wellington, New Zealand, 9-11 February 2005).

⁴¹ In late 2005, in the wake of the London bombings, the Council of Australian Governments agreed to enact powers to impose preventative detention and control orders on a person without charge, trial or conviction, which were modelled directly on the measures inserted into the *Terrorism Act 2000* (UK). See *Anti-Terrorism Act [No 2] 2005* (Cth).

⁴² Criminal Code s 100.1(1).

⁴³ *R v F* [2007] 2 All ER 193, [32].

These new offences, which apply universal jurisdiction under Category D extended jurisdiction provisions in the Criminal Code, define terrorism in terms of threats to international security (which have no bearing on our own domestic security). With the adoption of such far-reaching definitions (in both senses of the term), there is a further blurring of the traditional distinction between internal and external security, and a significant extension of the mandate of the Australian Federal Police (AFP). Surely such a significant shift in scope for counter-terrorism law and policy deserved greater critical consideration and public debate! This form of covert law reform is simply unacceptable in modern parliamentary democracies.

This pattern of expedited law reform has prevailed over the past five years.⁴⁴ The damage to the integrity of the parliamentary process is most evident in the most recent round of reforms: amendments introducing preventative detention and control orders and reframing the offence of sedition in the *Anti-Terrorism Act (No 2) 2005* (Cth). Despite allowing only one week for public submissions, the Senate Standing Committee on Legal and Constitutional Affairs received submissions from 294 individuals and organisations. At the close of submissions the Senate Committee had only 11 business days to review and make recommendations on the Bill. Not surprisingly, few significant changes were made to the Bill before its enactment.

Federal Parliament is not the only institution compromised by this climate of fear. Another example of how the normal law reform processes are distorted by political exigency is the 2005 Cronulla riots. Following a series of violent confrontations at Cronulla, the New South Wales Parliament introduced and passed on the same day an emergency package of powers for police, allowing them to 'lock down' suburbs.⁴⁵ Without the involvement of any judicial officer or court, senior police can declare an area they define as 'locked down', in which case the following powers apply: police may close licensed premises; declare an emergency alcohol-free zone for up to 48 hours; set up roadblocks and employ stop and search (without warrant) powers to persons, vehicles, and anything in the possession of those persons; and seize and detain any vehicle, mobile phone or similar device. Outside the realm of locked down areas, the amendments also empower any police officer to stop a vehicle if the officer has reasonable grounds for believing there is large-scale public disorder occurring or threatening to occur and that such action is reasonably necessary.⁴⁶ In the immediate aftermath of the violence, charges of riot and violent disorder were laid, though the

⁴⁴ A Lynch, 'Legislating With Urgency – The Enactment Of The *Anti-Terrorism Act [No 1] 2005*' (2006) 30 *Melbourne University Law Review* 747.

⁴⁵ *Law Enforcement Legislation Amendment (Public Safety) Act 2005* (NSW).

⁴⁶ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 87B, 87C, 87D, 87E, 87I, 87J, 87K, 87L, 87M, 87N, inserted by Schedule 1 of *Law Enforcement Legislation Amendment (Public Safety) Act 2005* (NSW).

overwhelming majority related to minor traffic infringements.⁴⁷ Most significantly, in the context of our discussion of terrorism laws, these extraordinary police powers were enacted hastily, without proper review of the adequacy of existing laws or objective analysis of the underlying causes of these disturbances.⁴⁸

With limited time to review such proposals before passage, legislatures are often content to reassure themselves by mandating a review of the law's operation after a specified number of years. This form of post hoc review takes two forms: oversight and periodic review by the Ombudsman; and/or review by independent committees reporting to Parliament. The outcomes of these reviews have thus far not been promising. The first wave of terrorist offences introduced in 2002 has recently been the subject of review by the Sheller Committee; however, confidence in the review process was undermined when the Committee's recommendations were dismissed by the Government.⁴⁹ The legitimacy deficit in relation to both the content of terrorism laws, and the processes by which these laws are made and reviewed, is manifest.

There remains a strong belief that our democratic processes, in particular our system of legislative scrutiny and parliamentary committees, can produce laws in a time of emergency that balance the competing interests of security with liberty.⁵⁰ It is a strength of our system that citizens and organisations can indeed express concern about the breadth and impact of new counter-terrorism laws, and that scrutiny committees can make significant changes to legislation. Indeed, the Senate Committee reviewing the first wave of terrorism offences introduced in 2002 objected strenuously to the overuse of absolute liability, which resulted in significant remodelling of the Bill.

The post-9/11 environment, however, seems to have privileged some stakeholders in that process, particularly those members of the security and law enforcement communities who are viewed as more knowledgeable about the nature and scale of the threats faced, and expert about the range of legal reforms required to neutralise these threats effectively. While the former claim may be true, the latter is certainly contestable. The deference to counter-terrorism specialists over legal and criminal justice experts manifested itself in the way witnesses were 'oriented' before giving evidence to the Australian Capital Territory (ACT) Legislative Assembly Committee on a scheme of preventative detention. The

⁴⁷ A Clennell, 'Labor Soft After Riots: Debnam', *Sydney Morning Herald* (Sydney), 13 January 2006, 1.

⁴⁸ The *Law Enforcement Legislation Amendment (Public Safety) Act 2005* (NSW) was introduced, assented to and commenced on the same day: 15 December 2005.

⁴⁹ SLRC, above n 4.

⁵⁰ Rose and Nestorovska, above n 31, who deride international human rights laws for their 'uncertain applicability in the counter-terrorism context, as fundamental questions arise as to their own universality, immutability, interpretation and application'. They argue instead that the legitimacy of counter-terrorism laws lies 'in their collective approval through a democratic process that enfranchises and effectively reflects the values of the majority of persons who are addressed by those laws': 20-21.

first substantive question (directed to all witnesses) was whether they had been privy to various AFP or Australian Security Intelligence Organisation (ASIO) briefings on the nature of the terrorist threat to Australia. The import of this line of questioning was unsettlingly clear to the witnesses — clearly the proposers of preventative detention (namely the Prime Minister and Premiers who form the Council of Australian Governments) had received such a briefing, and on the basis of this intelligence were prepared to adopt these measures, with only the ACT Chief Minister willing to impose higher standards of due process because of the *Human Rights Act 2004* (ACT). By implication, those who opposed the Bill without such knowledge were simply not qualified to know the seriousness of the threat and what drastic steps are needed to avert devastating terrorist acts.⁵¹ The line of questioning illustrates the power of security culture to sideline critical voices. It is, of course, also disingenuous since the true nature and risk of the terrorist threat is probably unknowable, as the 9/11 Commission itself found to be the case.⁵²

What this discussion supports is the emergence of an uncivil politics of law reform.⁵³ Those committed to high standards of respect for human rights (even those who have experienced the abuse of emergency powers in liberal democracies in Europe) occupy a very narrow ledge of legitimacy. Commentators arguing for wider powers and laws tend to deride human rights law as vague and illegitimate, echoing Bentham's famous jibe against natural law rights as 'nonsense upon stilts'.⁵⁴ On this view, the legitimacy of counter-terrorism laws lies in their democratic origins, and if any critique is entertained, a narrow set of liberal concerns, such as necessity and clarity, are applied to new offences.⁵⁵ The criticism that international human rights law lacks democratic foundations overlooks the fact that these human rights are legal rules, which have been ratified by the Australian Parliament! The claim of inherent vagueness also overlooks the significant detailed body of jurisprudence, which has been built up through the cases, particularly those coming out of the European Court of Human Rights and the United Nations Human Rights Committee. This commonsense approach to counter-terrorism, which purports to distance the critics from any moral or political standpoints, embraces a model of law reform

⁵¹ Apart from the federal police, most witnesses appearing before these Committees had not been privy to those briefings.

⁵² D Luban, 'Eight Fallacies about Liberty and Security' in Wilson (ed), above n 18, 247.

⁵³ This is adapted from the phrase 'uncivil politics of law and order', coined in the pre-9/11 context, to describe the trend in Australia to drive criminal justice reform by reference to 'law and order commonsense' rather than informed expert opinion or available data: R Hogg and D Brown, *Rethinking Law and Order* (Sydney: Pluto Press, 1998) ch 1; see generally, D Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (Sydney: Federation Press, 2004).

⁵⁴ Rose and Nestorovska, above n 31, 20-21. On natural rights see generally J Waldron (ed), *Nonsense upon Stilts', Bentham, Burke and the Rights of Man* (London, New York: Methuen, 1987).

⁵⁵ Rose and Nestorovska, above n 31.

that focuses on prevention, pre-emption and precaution, which are examined in the next section.

Preventative, Pre-emptive and Precautionary Models of Counter-Terrorism Law

Prevention is presented by politicians as the principal driving force behind our new laws. The former Commonwealth Attorney-General, Philip Ruddock, justified the 2005 package of anti-terrorism legislation on the basis that it 'ensures we are in the strongest position possible to prevent new and emerging threats'.⁵⁶ In Jude McCulloch's view, this package is suggestive of a new paradigm based on 'pre-emption' in the sense that it involves 'prevention of the perceived *risk* of terrorism':⁵⁷

Under this model it is legitimate to punish and coerce without evidence and before any terrorist act, even a 'terrorist act' under the legislation that involves no harm or plan to do harm. The *rationale* of prevention takes priority over other considerations including the rights of the accused and the need for reliable and convincing evidence of guilt prior to punishment. Anti-terrorism legislation is 'preemptive' in that it seeks to punish or apply coercive sanctions on the basis of what it is anticipated might happen in the future.⁵⁸

In similar terms, Andrew Goldsmith has argued that the counter-terrorism strategies adopted post-9/11 are part of a wider culture of prevention and risk management in society, and the movement to a 'world risk society' and 'government through fear'. He argues that this cultural change gives rise to pressure towards legal exceptionalism, as fear of the unknown (and unknowable) leads to enhanced powers of proscription — a 'small price to pay for greater security'. He suggests that the precautionary principle may be used by governments to implement draconian measures: 'Extreme caution is justified as prudent in response to profound uncertainty. For some however, it merely provides a convenient cover for adopting conservative or even repressive responses.'⁵⁹

The precautionary principle, which was first developed in the field of environmental regulation, posits that where the risk of a harm (in this case through terrorist attack) is unpredictable and uncertain, and where the damage that would be brought about by that harm is irreversible, any lack of scientific certainty in relation to the nature of the harm or consequences should not justify inaction. This promotes what Cass Sunstein calls the 'Laws of Fear', in which

⁵⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102 (Philip Ruddock, Attorney-General) during the 2nd Reading Speech to the Anti-Terrorism Bill (No 2) 2005 (Cth).

⁵⁷ McCulloch, above n 38, 359 (emphasis in original).

⁵⁸ *Ibid* (emphasis in original).

⁵⁹ Goldsmith, above n 40.

the precautionary principle displaces risk-based or evidence-based approaches to public policy.⁶⁰ Whether this principle should be applied to counter-terrorism policy is highly contentious. Unlike the field of environmental policy, no state has claimed to have embraced the precautionary model for terrorism law.⁶¹ Indeed, much of the language of counter-terrorism policy continues to be expressed in terms of either prevention or pre-emption rather than precaution. Nevertheless, upon closer scrutiny the discourse of public policy has shifted from one based on risk assessment and risk management (where policy-makers claim to weigh the likelihood of attack against the costs and benefits of particular strategies) to one based, in the face of uncertainty, on the need for precautionary action. It is possible to detect new counter-terrorism strategies, particularly those using technologies that permit surveillance of suspect 'places' rather than individual suspect persons, and displace or by-pass traditional protective safeguards.⁶²

Indeed, the recent creation of new powers allowing the military to use lethal force to deal with serious aviation incidents is best understood in terms of moving beyond preventative to precautionary models of legal action. The recent amendments to Part IIIAAA of the *Defence Act 1903* (Cth) create a legislative framework for prospective authorisation of force — including lethal force — by the military in aid of civil power. These amendments give Australian Defence Force (ADF) personnel a range of powers, including the power to destroy an aircraft.⁶³ The Act now provides an expanded legislative basis for military action. Previously, such action would be limited to use of force falling within the ADF's (largely untested) powers to use force within the framework of general defences relating to self-defence (which includes defence of others), necessity, sudden/extraordinary emergency or lawful authority under the Criminal Code. The constitutional legitimacy of using such force would be supported by the defence powers in s 51(vi) of the *Commonwealth Constitution*. However, a review in 2004 noted that the existing powers were too reactive (modelled around a

⁶⁰ C Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005).

⁶¹ Like 'zero tolerance' policing in relation to drug law enforcement, precaution is not an official (that is, legislatively endorsed) principle guiding policy, though particular strategies and approaches conform more closely to a precautionary approach. For a discussion of the concept of zero tolerance policing, see Bronitt and McSherry, above n 8, ch 13.

⁶² On the recent adoption of B Party warrants and powers to access stored data without warrants see S Bronitt and J Stellios, 'Regulating Telecommunications Interception and Access in the Twenty-First Century: Technological Evolution or Legal Revolution?' (2006) 24(4) *Prometheus* 413, 417-21. Also see the new powers in New South Wales (discussed above) and the broad powers to stop and search etc under the *Terrorism (Police Powers) Act 2002* (NSW).

⁶³ See Revised Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006, 2, noting that this Part provides for 'the use of reasonable and necessary force when protecting critical infrastructure designated by the authorising Ministers' and enables a 'call out' of the ADF to respond to incidents or threats to the Commonwealth in the air environment' as well as ensuring that 'powers conferred on the ADF under Part IIIAAA can be accorded to the ADF in the course of dealing with a mobile terrorist incident and a range of threats to Australia's security'.

siege situation) and that there needed to be a more proactive model — hence the 2006 amendments. These include powers to take defensive action to protect critical infrastructure within Australia, and specifically to take action against hijacked aircraft.⁶⁴

In using force or other measures against a vessel or aircraft, or ordering such, the ADF member must conform to the requirements of s 51SE(2) or (3), which require that:

- the order was not manifestly unlawful;
- the member has no reason to believe that circumstances have changed in a material way since the relevant order was given;
- the member has no reason to believe that the order was based on a mistake as to a material fact, and
- taking the measures was reasonable and necessary to give effect to the order.

The purpose of these provisions is to ensure that defence personnel are under strict control, through a chain of command, when they are receiving orders. Subsections 51SE(2) and (3) draw heavily, according to the Explanatory Memorandum, on the principles of the defence of acting under lawful authority (paragraph 37). However, it is probably best described as a hybrid between lawful authority and necessity.

Most contentious, under Division 3B, is the power to use lethal force in order to protect critical infrastructure designated by the authorising Ministers. Section 51T of the *Defence Act 1903* (Cth) provides:

(2B) Despite subsection (1), in exercising powers under subparagraph 51SE(1)(a)(i) or (ii) or Division 3B [action against aircraft], a member of the Defence Force must not, in using force against a person or thing, do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the member believes on reasonable grounds that:

(a) doing that thing is necessary to protect the life of, or to prevent serious injury to, another person (including the member); or

(b) *doing that thing is necessary to protect designated critical infrastructure against a threat of damage or disruption to its operation;* or

(c) doing that thing is necessary and reasonable to give effect to the order under which, or under the authority of which, the member is acting. [emphasis added]

⁶⁴ *Defence Act 1903* (Cth) s 51SE allows ADF members operating under orders given by the Chief of the Defence Force to do certain things in relation to persons, vessels, aircraft or offshore facilities. These include destroying a vessel or aircraft (or ordering it to be destroyed) and preventing, or putting an end to acts of violence. For a review of these powers see M Head, 'Australia's Expanded Military Call-Out Powers: Causes For Concern' (2006) 3 *University of New England Law Journal* 125, and S Bronitt and D Stephens, "'Flying Under the Radar" — The Use of Lethal Force Against Hijacked Aircraft: Recent Australian Developments' (2007) 7(2) *Oxford University Commonwealth Law Journal* 265.

By contrast, the law relating to self-defence in the Criminal Code expressly excludes this level of force to protect property. The purpose of the new provisions in relation to aviation security incidents under the Act is to provide clear legal authority for the military to act. The provisions obviate the need to engage in the deliberative exercise of weighing competing interests as required under the law relating to necessity; to evaluate the imminence of the threat posed as required for self-defence; or to resort to the vagaries of prerogative or executive powers in order to defend the realm. The provisions seek to structure the decision-making process — and also to move beyond the reactive ‘call-out’ model — to designate a set of circumstances where the Chief of Defence is already pre-authorised or prospectively authorised to act (whether in Australia or offshore). In these cases, the military can act without ministerial authorisation or the Governor-General’s order.

While the precautionary rationale is apparent in these powers, there are some further features of the legislation that pull *against* precautionary action. For example, the call-out powers have always raised a concern about excessive or disproportionate force by the military against civilians. To address this, specific measures were included to limit the use of force. Thus, s 51T(3) imposes a duty on defence personnel, where practicable, to first call on someone to surrender before using force likely to cause death or grievous bodily harm. Significantly, the Act seeks to promote more legal certainty for defence personnel by conferring immunity from state and territory criminal law (criminal offences such as murder, causing grievous bodily harm, etc) and ensuring that defence personnel will be dealt with only by reference to offences under the Commonwealth criminal law, and military discipline offences available under the *Defence Force Discipline Act 1982* (Cth).

These new counter-terrorism laws move beyond a conventional preventative to a more precautionary model — under this new legislation, key decision-makers are not weighing up competing harms (choosing the lesser of evils) but rather authorising and taking action (including the intentional use of lethal force) where the level of danger to life or limb is unknown or uncertain. This new legislation permits pre-emptive designation of places as critical infrastructure, which authorises the use of lethal force even though there is no prospect that this action would save a greater number of people, and may even foreseeably involve the killing of a significant number of people on the ground where the plane crashes. It is this particular scenario that presents the most serious challenge for human rights law and the right to human life and dignity, which is protected under international human rights law.⁶⁵

⁶⁵ The right to life is protected by ICCPR, opened for signature 16 December 1966, 999 UNTS 171, art 6 (entered into force 23 March 1976). Following this line of argument, the German Constitutional Court recently held that the *Aviation Security Act* (11 January 2005) authorising the direct use of military force against hijacked aircraft was contradictory to the paramount rights in the federal Constitution:

Conclusion

As governments erode established procedures, the lawlessness of terrorism is being met with the lawlessness of counter-terrorism.⁶⁶

In undertaking research for this chapter, I repeatedly came across statements that we now live in an 'Age of Terror' in both political and scholarly literature. Although some scholars have argued that this best fits the US experience and may not be replicated around the globe,⁶⁷ it seems that many liberal democracies are facing very similar challenges. In the US, Australia and the UK, an uncivil politics of law reform prevails in the field of counter-terrorism. Security culture leaves little space for human rights language and instruments. Under the sway of balancing models and the rationale of promoting preventative or precautionary measures, human rights tend to be traded away as a threshold issue.

The impact of 9/11 on the legitimacy of the law reform process has been highly deleterious: community consultation on draft legislation; the involvement of professional law reform agencies, as well as parliamentary oversight, have been seriously debased (if not sidelined entirely). The question is how long these trends will continue and how best to promote strategies for the civil politics of law reform in which human rights are protected and respected, rather than trumped by security considerations.

The problem in the current and future law reform context will be the likely 'trickle down' effect of this uncivil culture — the normalisation of emergency powers seems inevitable. Indeed, this trend has long been evident in the UK, where exceptional measures (such as the abolition of the right to silence) in Northern Ireland in the 1980s were subsequently brought to the mainland in the 1990s.⁶⁸ In Australia, the trend toward the enactment of preventative powers will continue — in relation both to combating terrorism and to ordinary crimes, which target suspect classes or groups rather than individuals.

This chapter has exposed the subtle but significant shift from preventative to precautionary models in the field of counter-terrorism. Prevention no longer seems the objective or end game. Rather, consistent with the precautionary model, in a security environment characterised by uncertainty, the law

art 2 II 1 GG (which guarantees the right to life), and art 1 I GG (which guarantees the right to human dignity): see O Lepsius 'Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act' (2006) 7(9) *German Law Journal* 761; M Bohlander, 'In Extremis – Hijacked Airplanes, "Collateral Damage" and the Limits of Criminal Law' [2006] *Criminal Law Review* 579; and S Hufnagel, 'German Perspectives on the Right to Life and Human Dignity in the "War on Terror"' (2008) 32 *Criminal Law Journal* 100.

⁶⁶ J Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (Sydney: UNSW Press, 2004) xiii.

⁶⁷ R Falk, 'Human Rights: A Descending Spiral' in Wilson (ed), above n 18, ch 11.

⁶⁸ The normalisation of emergency powers, and the work of Paddy Hillyard, is discussed in Bronitt and McSherry, above n 8, 877.

increasingly favours pre-emptive action, mass surveillance and disruption tactics. The sense of an impending apocalyptic disaster, whether it be environmental or security related, promotes a fatalism in which liberalism and established legal norms are viewed as simply too costly. In truth, there is a serious risk of irreversible harm — not just the harm that terrorism presents to our security, but also the threat that counter-terrorism measures themselves pose to human rights.

As the International Commission of Jurists noted in its Berlin Declaration:

Since September 2001 many states have adopted new counter-terrorism measures that are in breach of their international obligations. In some countries, the post-September 2001 climate of insecurity has been exploited to justify long-standing human rights violations carried out in the name of national security.⁶⁹

One solution might be to invert the precautionary principle so that protection of human rights (like protection of the environment) is the principal value or objective prioritised. In the face of harm being done to human rights by opportunistic governments around the world, we must act to promote higher levels of protection of human rights even though we may lack knowledge that particular measures will be effective in this respect. There remains a broader debate, for example, over whether the adoption of bills of rights or the existing common law presumptions in favour of liberty provide an effective mechanism for upholding these important rights. Precautionary logic might suggest that we should act now to implement such measures, whilst remaining careful to monitor whether such reforms are having the desired impact. In relation to both the making and the enforcement of counter-terrorism laws, a re-modelled precautionary principle serves to uphold rather than to trade away human rights. It would certainly place human rights protection (and its various institutions) at the heart of regulatory design. In light of the arguments above, this attention to human rights would enhance both the legitimacy and effectiveness of our responses to terrorism (objectives that should be viewed as mutually reinforcing rather than antagonistic in the way that the balancing model presumes). The decision to prioritise human rights is ultimately a political rather than a strictly legal choice, especially so in the Australian system, which lacks an entrenched bill of rights. Somewhat pessimistically, my conclusion is that it is unrealistic to expect any significant policy change in the near future — the prevailing uncivil politics of law reform will regrettably continue to marginalise such unorthodox perspectives.

⁶⁹ *The Berlin Declaration*, above n 24.