The Law Society of Western Australia
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2015 Sir Ronald Wilson Lecture

"Protecting the Human Rights of Australians through Anti - Terrorism Laws and their Enforcement"

Presented by

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I acknowledge the traditional owners of the land upon which we meet and acknowledge their elders past and present.

I thank the Law Society of Western Australia for the honour it has extended to me by inviting me to deliver this year's Sir Ronald Wilson Lecture.

This Lecture was established in 1989 and has since been delivered by a range of distinguished Western Australian and Australian legal luminaries, in whose company I am most humble to be in.

I acknowledge the presence of Members of the Judiciary, Members of State Parliament, the President of the Law Society of Western Australia Matthew Keogh and Members of the Executive of the Society, the Deans of the Laws Schools of Murdoch University (our sponsor tonight) and the University of Western Australia Dr Jurgen Brohmer and Dr Erika Techera.

I thank Tony Buti for his introduction.

Tony's 2007 biography of Sir Ronald Wilson is the reference point for those seeking to both know and understand more of one of Western Australia's great jurists.

I think Sir Ronald would be pleased if the first two source documents for any study on him were Tony's book and his own "National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families," - the "Bringing them Home" Report.

The Report, prepared on Inquiry by the Human Rights and Equal Opportunity Commission with Ronald Wilson as its President, formed the basis for the Parliamentary Apology to Australia's Indigenous peoples in February 2008, something I remain privileged to have taken part in as the then Member for Perth.

For this year's event, I have prepared a Lecture, not all of which I will read this evening, but which will be made available by the Society. Hopefully it can be a resource for our Year 12 Politics and Law students as part of the Francis Burt Law Education Programme. While there are some references to sources, I have not footnoted the Lecture paper.

This year's Lecture occurs on the 800th Anniversary of the Magna Carta, an event of great significance not just to lawyers, but to nations.

The Society has marked this iconic event throughout the year, including through the subject matter of this evening's Lecture, namely, the protection of the Human Rights of Australians.

Ronald Wilson had a keen interest in the Human Rights of Australians. Some, as Tony points out in his book, believed through critical eyes, that it was an interest acquired only late in life, having started off in the law as a highly forensic and diligent Prosecutor. On 15 June this year, 800 years on to the day, British Prime Minister David Cameron said at Runnymede:

"We talk about the 'law of the land' and this is the very land where that law – and the rights which flow from it – took root. The limits of executive power, guaranteed access to justice, the belief that there should be something called the rule of law, that there shouldn't be imprisonment without trial, Magna Carta introduced the idea that we should write these things down and live by them."

On the same day, the Society's President, Matthew Keogh, published:

"Today, these rights seem so basic and fundamental… it feels inconceivable they would be removed or limited….. An essential part of what makes Australia such a great place to live, work, play and invest is the fact that our society is safe, law abiding and legally stable."

The Society's President then warns of the dangers of complacency and the need to be vigilant about the protection of these rights, along with which, he rightly says, comes responsibilities.

The topic of this evening's Lecture, "Protecting the Human Rights of Australians through Anti -Terrorist Laws and their Enforcement," deals both with rights and responsibilities.

You could be forgiven for thinking that in the 800th year of the Magna Carta, a more predicted topic might have been one which posited the need to ensure that counter terrorism or anti - terrorism measures did not in any way detract from the Human Rights of Australians.

But I come from the viewpoint of International efforts and our own domestic legislative and executive efforts to protect the human rights of Australians from terrorism.

I confess both author's licence in tweaking the general suggestion made to me by the Society, and also that this evening's particular topic comes from the experience of spending the last six years of my time in the Australian Parliament as a Member of the National Security Committee of the Australian Cabinet.

Both David Cameron and Matthew Keogh – and I suspect hundreds of others on the day – referred to "living" by the principles and the rights laid down by the Magna Carta.

One cannot of course enjoy those rights in the modern day if one's life has been taken away by a terrorist act.

My thematic starting point for this evening is the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in December 1948, Article 3: *"Everyone has the right to life, liberty and security of person."*

This is echoed by Article 6 of the International Covenant on Civil and Political Rights (ICCPR) adopted by the General Assembly in December 1966 and coming into force in March 1976, namely:

"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

Without in any way diminishing the importance of any other right contained in the International Covenant, but on the contrary, reinforcing their importance, their quiet enjoyment is rendered otiose by an act of terrorism arbitrarily depriving an individual of the inherent right to life as set out by Article 6 of the Convention.

Australia agreed to be bound by the ICCPR in 1980, and subsequently its two Optional Protocols, including the Second Optional Protocol relating to the elimination of the death penalty.

In the 7th Edition of his text "International Law" Malcolm Shaw (at page 31) says: *"The rise of international terrorism has posited new challenges … as states and international organisations struggle to deal with the phenomenon while retaining respect for the sovereignty of states and respect for human rights."*

While we find earlier references to international terrorism in United Nations General Assembly Resolutions, in particular, the 1994 Declaration on Measures to Eliminate International Terrorism, it is only in the immediate and subsequent aftermath of the terrorist attacks on the World Trade Centre in New York on September 11 2001 that we see, as Evans puts it, an evolving state practice with respect to international terrorism.

This includes Security Council Resolutions 1368 and 1373, both calling on all member states to take necessary steps to prevent the commission of terrorist acts.

Resolution 1373 declares international terrorism to be a threat to peace and security, which Resolution 1368 declares authorises the inherent right of individual and collective self defence, previously generally believed to apply to states or state sponsored actors, not to a threat from or in response to, non-state actors.

We now find, in addition to the 2006 General Assembly Resolution establishing “The United Nations Global Counter Terrorism Strategy,” eighteen United Nations Conventions condemning and dealing with International Terrorism in its various manifestations, such as hostage taking, hijackings and bombings.

The general approach of these Conventions is to identify the terrorist conduct, condemn it and call upon member states to take action against the conduct, including by making it a domestic offence within their own jurisdictions.

The events of September 11 crystallised national security as a global and domestic issue of our time. These events, whether we like it or not, and most of us do not like it, were a fundamental shift, a so called game changer - but where the price of the game was peace and security for nations and the quiet enjoyment of right to life for innocent individual citizens.

The threat is not something which international law and international institutions have been accustomed to focus on – namely one state against another state – but zealous and extreme non state actors, who are quite prepared to die themselves as part of their modus operandi, which as a consequence, requires a different strategic and tactical response from states to protect their citizens.

September 11 caused us then and since to ask ourselves a range of questions: what is the evolving threat that we are trying to deal with, both in our own domestic jurisdiction and offshore with our international partners. What are our international counter terrorism obligations? How are our human rights protected in Australia? What adverse impact can anti-terrorism laws have on human rights and is this impact reasonable, indeed necessary, in the modern era to stare down a greater evil, where the risk is to the inherent right to life? What is the required evolution of our domestic anti-terrorism laws in response to an ever changing threat, particularly in a world of mass digital communications? What principles should guide the development of anti-terrorism laws? What should the oversight and review of Australia’s counter-terrorism laws be? What role does the Parliament and the Judiciary have in this oversight and review? Should there be a Charter or Bill of Human Rights to ensure a proper balance between anti-terrorism efforts and protection of Human Rights, or is this better sustained by more historically familiar Australian Legislative measures? How are Governments held to account for their response to this threat, including their advice to the public about the state of the threat?

This evening it will not be possible to deal exhaustively or in detail with all aspects of these and many other relevant questions, but let me seek to deal with some of them.

Since September 11, the Australian community has been resilient in responding to terrorist attacks, which have occurred and cost Australian lives both here and overseas. We have a challenge to protect and promote our open, democratic, tolerant way of life while tackling this threat to life.

There are those who would sow seeds of distrust and disunity in our communities, but part of our resilience has been to try and find ways to promote and support strong community relations in addressing this threat. These efforts must continually be redoubled and enhanced, as we have seen recently from the New South Wales State Government in the aftermath of the Martin Place tragedy.

We applaud members of the public and leaders in our community who help shape constructive community engagement on these issues. This helps us understand, anticipate and respond to the threat more effectively and, importantly, to understand the impact of Australian approaches and how they can be improved to thwart terrorism, but at the same time, see Australia remain an open and tolerant place to live.

I commend those who do so much to preserve our peace and security : Australian security agencies, civilian and military Defence Force personnel, law enforcement agencies and their personnel, the diplomatic and consular corps, aid officials – countless State and Commonwealth Officials who have played an essential role in responding to the threat of terrorism to Australians both here and overseas.

With their cooperation and support, our national security agencies have been able to thwart a number of potential attacks in Australia and overseas. Their role is vital, and the way in which we want them do it - lawfully, effectively and consistent with our national values and virtues - is also vital. It must continue to be regarded as such by the Australian people.

The global and domestic security environment

Last year, in light of global developments, particularly in Syria and Iraq, and the threat of home grown extremism, lone wolves and returning fighters, the Australian Government raised our national threat level to “high” – namely, an attack is assessed as likely.

The conflict in Syria and Iraq is a new, evolving dimension in the terrorist threat for Australians. More than 120 Australians are reported to be fighting in Syria and Iraq. A number of these individuals have been fighting with jihadist groups such as Jabhat al-Nusra and Daesh. If able to return to Australia, these fighters could bring to Australia new military skills and connections to and with international jihadists.

We are now also seeing a new dimension in active recruitment and radicalisation campaigns targeting Australia, and using social media – the preferred medium of choice of our youth – to do so.

As illustration of this, in 2013, a Sydney man was charged with facilitating the recruitment of Australians to train or fight with terrorist groups in Syria, one of a number of recent arrests for home grown facilitation.

The Minister for Justice, Michael Keenan MP, said at the Lowy Institute in the last month that 160 Australians are actively supporting extremist groups through financing and recruitment. ASIO is currently investigating 400 high profile cases – double that of a year ago. The Government has cancelled 120 passports and refused 16 for those wanting to join terrorist groups overseas. The Foreign Minister has suspended 12 passports under Foreign Fighters legislation introduced last year.

Minister Keenan said at Lowy:
"ISIL has effectively outsourced terrorism by urging its supporters overseas to carry out attacks – attacks which require little more than a camera-phone, a knife and a victim. It emphasises that there is no need to consult with anybody, including ISIL itself, before launching such attacks. Such a prescription makes attacks unpredictable and therefore harder for our security agencies to counter. Terrorist planning is becoming more frequent, warning times are shrinking and the perpetrators are becoming younger."

The Lowy Institute has previously observed that "in the last decade, real progress has been made in diminishing the terrorist threat by reducing the number, connections and lethal skills of the international pool of jihadists that emerged in the period leading to 9/11."
Unfortunately, as the Institute warns, current developments in the Middle East are rapidly refilling that pool. It may end up considerably larger than the one that existed in the decade post September 11. And it is unfortunately a pool that is likely to have a not insignificant number of Australians in it.

What are some of the facts to date about the scale of the threat and the use of legal powers to counter it in Australia?

The Review of Counter Terrorism Machinery released by the Department of Prime Minister and Cabinet in January this year, shows there have been 35 prosecutions and 26 convictions related to terrorism in Australia in the post 2001 period.

The Review reminds us that, thankfully: *"(t)here have been no large scale terrorist attacks on Australian soil in this period….The two terrorist attacks that have occurred domestically – the Martin Place siege in December 2014 and the stabbing of two policemen in Melbourne in*

September 2014 – were carried out by individuals who planned and acted alone. Crimes planned like this are by nature always extremely difficult for police and security agencies to prevent."

According to Australian authorities, half a dozen terrorist plots have been disrupted since 2001.

For example, the plot by Faheen Lodhi who in 2004 was convicted of terrorism offences. He was investigated for plotting to bomb the national electricity grid or defence sites.

In 2005, nine individuals were arrested and convicted on terrorism charges in Sydney for sourcing materials for use in IEDs, possession or attempted purchase of firearms and ammunition and large quantities of extremist material.

In 2005, 13 were arrested in Melbourne and charged with plotting mass casualty attacks, nine were convicted on terrorism charges.

In 2009, five men were charged with conspiracy for preparation of an attack using firearms on Holsworthy Army Barracks in Sydney. Three were convicted. In 2014, we saw entry and search on multiple occasions in Sydney based on intelligence of alleged plots to kill a random member of the public.

The legal, philosophical and practical challenge

In light of all these developments, and the spectre that it will be ongoing for the foreseeable future, in my view Australia's anti-terrorism laws and their enforcement must continue to respond to an evolving and serious threat in a manner which protects Australia and Australians. And do this in a country and with a people whose identity, values and cultural heritage are inextricably interwoven with safeguarding rights and freedoms.

There is an important philosophical, legal and practical tension here that we cannot afford to lose sight of, and which is central to my thematic this evening.

On the one hand, the United Nations Counter Terrorism Strategy reaffirms the respect for human rights and the rule of law as the fundamental basis for the fight against terrorism.
In supporting the Strategy, member states recognised that effective counterterrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.

When linked to the inherent right to life, it is in my view axiomatic that there is an obligation on the part of a state to further the protection of the human rights of its citizens by necessary and effective counter terrorism measures.

But, it is not necessarily easy or straightforward to ensure that these are 'complementary and mutually reinforcing'.

How we develop an effective and evolving counter terrorism framework that is complementary with safeguarding human rights is challenging.

And not least because there are tensions in our efforts to deliver on key human rights as goals in and of themselves. There are tensions between freedom of speech and non-discrimination or incitement to racial hatred, tension between efforts to protect the inherent right to life and individual liberty itself.

Indeed, the Australian Independent National Security Monitor Report of November 2013 commented, that there is a *"perennial challenge"* in seeking to reconcile *"the public interest in the proper administration of justice and the public interest in national security."*

Getting the legal framework right is only part of the practical and political challenge

Getting the counter-terrorism legal framework right here in Australia or indeed elsewhere is only part of the challenge, albeit a critical one.

Getting our laws right in legislative terms then requires them to be implemented and enforced effectively. Authorities across our Federated system and the community must work together to counter violent extremism, and to safeguard and promote our recognised rights and freedoms.

This is a global challenge for the international community, and our domestic efforts must as well align with our international efforts, including an Australian contribution to the development of sound and effective international laws, norms and State practice.
The effort required is resource intensive and our capability must move with the evolving threat.

Government is rightly asked to account for its decisions in this regard. The legislative framework, policies and resource allocation involve an appraisal not just about the threat, but the importance of a proportionate tackling of the threat of terrorism.

There is a debate about the scale of the threat and whether government attention and resourcing is proportionate.

There is a question about whether we accept the ongoing threat as a justification for specially tailored laws and policies and how long these laws should endure with or without sunset clauses.

Some have described the threat of ISIL as an existential one, or as the largest threat since communist and totalitarian regimes of the last century.

Some point out that other conduct may in fact currently involve greater casualties and fatalities here in Australia and suffer from considerably less attention or resourcing – the scourge of domestic violence is one example.

There are no easy answers. As a former member of the National Security Committee, I regard national security as a primary and principle responsibility of government. I also come from a tradition of supporting more equitable social policies and outcomes and tackling adversity, including that caused by gender based violence and discrimination.

Determining whether resourcing is proportionate, whether laws are developed in a measured way, ensuring laws and their enforcement are not allowed to overreach based on claims of extraordinary circumstances, are difficult appraisals to make and ones which needs to be constantly revised and continually assessed.

Security and law enforcement agencies need to be appropriately resourced. In Australia we have seen the budgets for our security agencies grow since 2001. The seriousness of the threat and the need to grow the capability of relevant agencies to respond has meant important decisions to provide more resources.

According to the January 2015 Review of Australia's Counter Terrorism Machinery, from 2001/2 - 2013/14, ASIO's budget increased fivefold. ONA's budget quadrupled. ASIS's budget more than tripled and the AFP's budget more than doubled.

Allocation of these resources and more seek to deliver on one a fundamental responsibility of a national government, namely, to protect and defend the national security interests of the Commonwealth of Australia and the personal security of its citizens. And to do all that consistent with the values and liberties of a free, fair, tolerant and democratic society.

Having said that, there will in my view be one overriding public expectation - the Australian public expects the Government of the day and its various Agencies to protect Australian citizens, including from terrorist attacks.

And if in the terrible circumstances that there is such an attack and loss of life, after the provision of comfort and support to the families of those killed or wounded in such an attack,

there is only one question that will be asked: how could those in authority and responsibility have allowed such an attack to occur.

That is the question which has and will override all others: and the one human right at the forefront of it all will be the inherent right to life of the innocent victims.

Or to put that public expectation at an earlier preventative point in the cycle: when Parliament legislates for anti - terrorism and subsequently provides law enforcement and security agencies with the resources to implement them, I suspect that while there will be a public expectation to be respectful of human rights, their principles and their protection, the preservation of life will be seen as the overriding imperative.

In the wake of Martin Place, we asked ourselves: how did this occur? Could or should it have been prevented? Were there indicators that could have legally been acted upon? Does anyone in authority need to be held to account? And what can we do in future to prevent similar occurrences?

A Review of the Martin Place Siege has just been released, throwing a spotlight on the complexities of that challenge. I will refer to that in more detail later.

Our human rights and how are they protected in Australia? Does counter-terrorism laws impact upon human rights detrimentally or beneficially? Or both?

Since September 11, successive Australian Governments have introduced more than 60 laws related to counter-terrorism.

These include new criminal offences, detention and questioning powers by authorities, anti-terrorist financing, communications and interception powers, the ability to control people's movement and activities by order without criminal conviction, passport cancellation, intelligence gathering and information sharing, the ability to proscribe terrorist organisations, and more.

As outlined above, our security and law enforcement agencies have grown in resourcing and capability to implement these laws.

The Australian Human Rights Commission (AHRC) said in its 2008 *"A human rights guide to Australia's counter terrorism laws"*:

"counter-terrorism laws can have a profound impact on fundamental human rights and freedoms, including: a right to fair trial, the right to freedom from arbitrary detention and arrest, the right not to be subject to torture, the right to privacy, the right to freedom of

association and expression, the right to non-discrimination, the right to an effective remedy for a breach of human rights".

These are rights protected under international Human Rights Treaties including the International Covenant on Civil and Political Rights ('the ICCPR') and the Convention against Torture and Cruel, Inhumane and Degrading Treatment or Punishment (CAT). Australia has ratified both of these Conventions. Some provisions can be limited by domestic law.

The AHRC said: *"Making sure counter-terrorism measures comply with Australia's human rights obligations involves correctly identifying which human rights are non-negotiable and which can legitimately be restricted in certain circumstances. This is because international law allows certain ('derogable') rights to be restricted but only if the restrictive measures is a necessary and proportionate way of achieving a legitimate purpose."*

Article 4(2) of the ICCPR, for example, says the following, inter alia, are 'non-derogable':
-the inherent right to life;
-freedom of thought, conscience and religion;
-freedom from torture or cruel, inhuman or degrading punishment or treatment; and
- elements of the right to fair trial.

Derogable human rights in international law can be limited in certain conditions: a state of public emergency, or if the limitation is a proportionate and necessary response to a threat to national security. In short, a proportionality test applies.

We ask ourselves: why is the action necessary, to what extent does the action impair the right, could the purpose of the action be achieved through less restrictive measures, and do legal safeguards against abuse exist?

Our rights in Australia go beyond Australia's international human rights commitments. There are also common law rights that could be relevant in our broader consideration of anti-terrorism laws.

In a review currently underway, the Australian Law Reform Commission (ALRC) has been asked to identify and examine Commonwealth laws that encroach upon 'traditional' or 'common law' rights, freedoms and privileges.

The ALRC has set out the scope of this Inquiry, and states that laws that encroach upon traditional rights, freedoms and privileges cover over twenty general areas, including laws that interfere with freedom of speech; interfere with freedom of religion; interfere with freedom of association; interfere with freedom of movement; alter criminal law practices

based on the principle of a fair trial; reverse or shift the burden of proof; and, exclude the right to claim the privilege against self-incrimination.

Obviously the results of this ALRC review will in due course be considered as they will go to the heart of our discussion this evening.

What international counter-terrorism law is Australia bound by and what has it ratified?

Since 1963, the international community has developed eighteen instruments that help prevent terrorist acts and help bring to justice those who commit them.

Australia has ratified and implemented into our national law fourteen of the eighteen international counter-terrorism instruments. They are:

- *Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963)*
- *Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970)*
- *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Sabotage) (Montreal, 1971)*
- *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Montreal, 1988)*
- *Convention on the Physical Protection of Nuclear Material (Vienna, 1980)*
- *International Convention against the Taking of Hostages (New York, 1979)*
- *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 1973)*
- *International Convention for the Suppression of Terrorist Bombings (New York, 1997)*
- *International Convention for the Suppression of the Financing of Terrorism (New York, 1999)*
- *International Convention for the Marking of Plastic Explosives for the Purposes of Detection (Montreal, 1991)*
- *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome, 1988)*
- *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Rome, 1988)*
- *International Convention for the Suppression of Acts of Nuclear Terrorism (New York 2005)*
- *2005 Amendment to the Convention on the Physical Protection of Nuclear Material*

Australia has signed and is working towards the ratification of the remaining four instruments.

- *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*
- *Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf*
- *The Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*
- *The Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*

Australia has implemented our international obligations in the following national laws:

- *Crimes (Aviation) Act 1991*
- *Crimes (Ships and Fixed Platforms) Act 1992*
- *Nuclear Non-Proliferation (Safeguards) Act 1987*
- *Crimes (Hostages) Act 1989*
- *Crimes (Internationally Protected Persons) Act 1976*
- *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*

Australia is also bound by a number of key Security Council Resolutions. For example:

- Security Council Resolution 1269 in which the Council urged countries to work together to prevent and supress all terrorist acts;

- Security Council Resolution 1267 and its associated committee which monitors sanctions against the Taliban and subsequently Al Qaeda;

- Security Council Resolution 1373 which established the Counter Terrorism Committee and obliges member states to take measures to prevent terrorist activities and to criminalise various forms of terrorist actions, and well as to promote cooperation in counter terrorism.

- Security Council Resolution 1535 which established the Counter Terrorism Executive Directorate to monitor Member States implementation of 1373 and to provide technical assistance.

- Security Council Resolution 1540 and the associated committee which calls on States to prevent non state actors (including terrorist groups) from accessing weapons of mass destruction.

Member States are still negotiating an additional international treaty, a draft comprehensive convention on international terrorism.

It is said this convention *"would complement the existing framework of international anti-terrorism instruments and would build on key guiding principles already present in recent anti-terrorism conventions: the importance of criminalisation of terrorist offences, making them punishable by law and calling for prosecution or extradition of the perpetrators; the need to eliminate legislation which establishes exceptions to such criminalisation on political, philosophical, ideological, racial, ethnic, religious or similar grounds; a strong call for Members States to take action to prevent terrorist acts; and emphasis on the need for Members States to cooperate, exchange information and provide each other with the greatest measure of assistance in connection with the prevention, investigation and prosecution of terrorist acts."*

Development of our domestic anti-terrorism laws in response to the evolving threat?

Australia's counter-terrorism laws focus on:

- terrorist act offences;
- terrorist organisations;
- prevention of the financing of terrorism;
- urging violence and advocating terrorism offences; and
- foreign incursions and recruitment offences.

Australia first counter-terrorism specific laws were introduced in 2002 and created a range of terrorist offences in Part 5.3 of the Schedule to the Criminal Code Act 1995 (Commonwealth) (Criminal Code), which included engaging in, preparing, planning, or training for, terrorist acts, and offences relating to terrorist organisations.

These have been amended significantly over the years, including to modify or add offences, create powers to investigate offences and to enable authorities to act to help protect the public from a terrorist attack.

For example in 2005, following the London bombing, provisions were introduced to enable police to obtain control orders and preventative detention orders.

Last year, in response to the evolving threat I have outlined above, a number of legislative changes were introduced to strengthen the ability of law enforcement, security and intelligence agencies to prevent and disrupt Australians from travelling to fight with terrorist groups overseas and to address the threat of returning fighters with the will and capacity to conduct attacks upon return, to introduce an offence for 'advocating terrorism' and to enter a declared area without a legitimate purpose, and lowered the threshold for a control order.

States and Territories also have counter-terrorism specific legislation as part of a national framework. States and Territories have preventative detention order legislation which the

Commonwealth could not enact for Constitutional reasons, allowing detention of up to 14 days. The Commonwealth can only detain someone under a preventative detention order for a maximum of 48 hours.

Key enduring principles that should guide the development of anti-terrorism laws? Oversight and review of Australia's counter-terrorism laws

Any domestic law must obviously be Constitutional and consistent with our international obligations.
T
he principles articulated by the COAG Review in 2005 remain relevant today:
In 2005, COAG considered the evolving security environment in the context of the terrorist attacks in London in July 2005 and agreed there was a clear case for strengthening Australia's counter-terrorism laws.

COAG leaders agreed that any new laws must be necessary, effective against terrorism and contain appropriate safeguards.
That is, we need to ask ourselves whether existing and proposed anti-terrorism laws:

- are necessary and proportionate;
- are effective against terrorism—that is, they provide law enforcement, intelligence and security agencies with adequate tools to prevent, detect and respond to acts of terrorism;
- are being exercised in a way that is evidence-based, intelligence-led and proportionate; and
- include safeguards against abuse.

It is essential in my view to review our laws regularly to make sure that these assessments remain current and that powers are not allowed to continue if they are no longer relevant, effective, appropriate or necessary.

Oversight, accountability and redress mechanisms, the importance of setting appropriate sunset clauses on certain legal powers, timely and regular reviews to take account of new developments, incidents and the evolving threat levels, are all important and necessary requirements in this regard.

Australia has some strong oversight and review mechanisms and these should be safeguarded.

Oversight and review mechanisms or authority include:

- the Federal, State and Territory Parliaments;
- Ministerial oversight, including COAG;

- the Parliamentary Joint Committee on Intelligence and Security (PJCIS);
- the Inspector General of Intelligence and Security (IGIS);
- Independent National Security Legislation Monitor (INSLM);
- the Independent Reviewer of adverse security assessments;
- national security agencies inbuilt review mechanisms;
- the role of the judiciary and judicial review, and
- the role of a diverse and free press.

Australia has also subjected itself to important internal and external reviews of our counter-terrorism framework, which have had an important influence on their development and amendment.

Australia has had, for example, the 2005 COAG Review of counter-terrorism legislation; the 2006 UN Special Rapporteur Report; the 2007 Report of the Inquiry into the terrorist organisation listing provisions of the *Criminal Code Act 1995,* the 2008 Report of the Inquiry into the case of Dr Mohamed Haneef; Independent National Security Legislation Monitor Annual Reports since 2011; *and the 2015 Martin Place Joint Commonwealth and NSW Review.*

These Reviews have also played an important role in shaping our debate and making sure we do not lose sight of the complex challenge of safeguarding human rights when tackling threat.

The power of public criticism, review, and amendment in a parliamentary democracy, even in areas of policy bipartisanship

There have been some strong criticisms of Australia's counter-terrorism laws, including in light of the recent introduction of additional laws by the current Government into this Parliament.

The UN Special Rapporteur in 2006 made some criticisms of Australia's laws, pointing to, in its view, inadequate safeguards and redress.

Earlier this year, Kent Roach, Professor of Law at the University of Toronto, was widely reported as describing Australia's "hyper-legislation" as having gone beyond that of Britain, America and Canada.

Some have suggested the extent of Australia's legal framework will impact personal freedoms more than similar laws in countries that may face a more significant terrorist threat than Australia does.

Australia's laws have been subject to Legislative review and Parliamentary amendment.

The previous Federal Government initiated some key changes in this regard.

It established a Parliamentary Joint Standing Committee on Human Rights to examine and make statements of compatibility of new bills with human rights law.

It introduced the Independent National Security Legislation Monitor Act 2010 and appointed Bret Walker SC as the first Monitor. The Monitor has scrutinised and reported on key elements of anti-terrorism laws since its inception. The Monitor continues despite the Parliamentary efforts of some to repeal the Act.

The Human Rights (Parliamentary Scrutiny) Act 2011 came into effect in January 2012.

The Parliamentary Joint Standing Committee reviews new legislation for consistency with Human Rights obligations and requires a statement of compatibility to be prepared in respect of all Bills introduced into the Parliament in relation to commitments arising from the following:

- International Covenant on Civil and Political Rights,
- International Covenant on Economic, Social and Cultural Rights,
- International Convention on the Elimination of All Forms of Racial Discrimination,
- Convention on the Elimination of All Forms of Discrimination Against Women,
- Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment of Punishment,
- Convention on the Rights of the Child, and
- Convention on the Rights of Persons with Disabilities.

This is an important addition to our ability to keep tabs on whether or not we are getting the balance right.

As I mentioned earlier, the current Government has enacted four tranches of legislation to strengthen the ability of intelligence and law enforcement agencies to investigate, monitor, arrest and prosecute home grown extremists and returning foreign fighters.

The development of these laws and their passage through Parliament has been the subject of wide public debate and commentary.

It is essential to note here is that the Government was not given a blank cheque to enact these new pieces of legislation. The legislation was developed through various agencies of Government and subjected to the rigours of policy development. It was then subject to the Parliamentary scrutiny process and debate. There was referral for detailed consideration to

the Parliamentary Committee system, which is open to public and stakeholder submission and involved careful assessments of the key principles I have outlined earlier.

There were a range of proposed amendments by stakeholders and the Opposition to improve oversight provisions, shorten sunset clauses for review and other important elements.

This process goes to the heart of Parliamentary scrutiny, and the check and balance of getting an appropriate and proportionate outcome.

Let me quote from the Second Reading speech of the Hon Mark Dreyfus MP QC, the Shadow Attorney General on the Foreign Fighters Bill 2014: *"Our bipartisan assistance to the government of matters of national security is never a blank cheque. Bipartisanship on national security means that we share the government's assessment of the current threat and that we will support necessary and effective measures to address the threat…that means we conduct our side of the debate and our negotiations with the government in a constructive fashion. …It does not mean that we will support every measure the government proposes. It does not mean that we will not advocate for improvements to those measures that we support, to ensure that they will be effective".*

Mr Dreyfus said that the Opposition had worked hard to achieve Parliamentary Committee support for 36 substantial recommendations for improvements to this Bill, some of which originated with suggestions arising from the COAG Review and the Independent National Security Legislation Monitor, particularly in relation to improving human rights protection.

Martin Place Siege – Joint Commonwealth and NSW Review

It would be inappropriate to have a discussion of the application of Australia's counter terrorism laws and human rights without reflecting on the recent important Review of what occurred at Martin Place and what lessons this can provide in thinking about our laws and their effectiveness.

What is noticeable very clearly in reading the Review is that the questions of proportionality and effectiveness, and the consideration of Australia's democratic rights and freedoms, are central to its examination. This is as it should be.

The Review found that the judgments made by government agencies were reasonable and that the information that should have been available to decision-makers was available.

It said that any further controls would be based on judgments as to whether increases in policing, surveillance and controls and the related extra burden on the taxpayer and intrusions into Australians' lives would make us appreciably safer.

It concluded that the Review's recommendations would maintain broadly the current balance in our existing regulatory and legislative framework. It said the Review's decision to not propose steps beyond this was based on the view that introducing substantial further controls involves a larger choice about the sort of society we wish to live in and is properly the province of the public and our elected representatives.

The review does throw a spotlight on a long debate about the appropriateness and efficacy of the control orders and preventative detention orders in Australia.

Let me reflect on this for a moment because it is in my view important.

The Review found that while Monis was consistently on the radar of law enforcement and intelligence agencies from the time he arrived in Australia, based on information available, at no point prior to the siege could he have been successfully charged with a terrorism offence under the law. The Review also found that control orders and preventative detention orders are extraordinary and Monis's actions never reached the threshold for these powers to be used prior to the siege. However, law enforcement agencies pursued his criminal behaviour, so while the Joint Counter Terrorism Team investigating Monis did not charge him for a terrorism related offence between 2007 and 2009, it did pursue criminal charges against him for his use of a postal service to send offensive letters to the families of Australian soldiers killed in Afghanistan. Ultimately Monis was convicted of these offences.

The Review found no evidence that counter-terrorism legislative powers could have been better used by law enforcement agencies. It did however have some suggestions including in relation to bail arrangements and visa arrangements, which the NSW State and Federal Governments have started to consider and act upon.

When the Review examined the question of Australia's control and preventative detention orders, the Review found that:

"The regime contains thresholds and safeguards to ensure the powers are proportionate and only used where appropriate. A key threshold is an identified risk to public safety and, in the case of preventative detention orders, an imminent terrorist threat. Whilst recent amendments have strengthened the control order and preventative detention order regimes, they have not departed from this fundamental principle…. and while not triggered for Monis, this regime has been used before. To date, four control orders have been issued under

Commonwealth legislation, and three preventative detention orders have been issued under New South Wales legislation. "

The Review noted that:

"control orders and preventative detention orders were vital tools in assisting in the prevention of terrorist incidents. Although the INSLM and PJCIS will review the provisions by September 2017 and March 2018 respectively, it is critical that the efficacy of these tools is constantly monitored in light of the evolving nature of the terrorist threat and operational experience."

The Review as well recommended that the Australian and New Zealand Counter Terrorism Committee (ANZCTC) should monitor the operation of control orders, as well as preventative detention orders, to ensure they meet evolving operational needs.

It is important to note that the Review emphasised that the operational effectiveness of these tools needed to remain the priority. Of course for each, ensuring adequate protections is also a requirement, but if they are to evolve to meet the changing threat environment, we must be nimble in how we ensure that operational effectiveness.

Countering Violent Extremism

I am conscious that I have not touched in detail on the question of countering violent extremism and how to do this effectively. This is a live debate in Australia now as we consider how young people in their mid to early teens can be so quickly radicalised and attracted to the messages of Daesh.

There is of course consensus around the notion that prevention is better than cure. A lot of consideration and effort is going in to developing community engagement programs. However, counter radicalisation is notoriously complicated and global examples of effective programs are few and far between. Much of the discussion at present is around the conditions and motivations for radicalisation, and there is no simple answer. The reasons are likely to be as multifaceted as the actions required to counter it. One thing is certain, though, we cannot shy away from having the discussion in our community, acknowledging the issue and coming together to deal with it.

Conclusion

The terrorist threat is evolving and presenting new challenges to nations, including Australia. Anti-terrorism laws must strengthen, where necessary and appropriate, our ability to respond to an evolving and serious threat at home and abroad, in a manner which protects Australia

and Australians, a country and a people whose identity, values and cultural heritage are inextricably interwoven with safeguarding rights and freedoms.

There is an important philosophical, legal and practical tension here that we cannot afford to lose sight of.

The recent Martin Place Review shines a spotlight on the effectiveness of some elements of our legal framework and also underlines the importance of ongoing review and oversight, the importance of testing the cost, effectiveness, and balance of what we are doing to respond to this evolving threat.

As a society, we need ongoing flexibility to ensure operational effectiveness against the threat. The threat is evolving and we have a tough job to stay ahead of it.

Our framework must be nimble but in the process, human rights protection must be required.

And I believe there can be confidence that the system of oversight works well to ensure adequate safeguards.

In the face of such threats, the reality is we need to be pragmatic and in particular circumstances see some rights as less important than others. But balance cannot be lost. That is the responsibility of Government, for which it must be both accountable and subject to scrutiny, given particularly that it is government which has access to knowledge of and assessment of the threat.

The formation of successful, prosperous and safe communities, where the pursuit of individual rights and liberties is possible or a given, does require the sacrifice of some level of individual freedom, even if we define freedom only as the right to do as one pleases without reference to others.

The Magna Carta recognised that in the way it both set forth comprehensive rights and responsibilities at all levels of society to ensure that while the previous unchecked power of the King was subject to limitations, it still provided for the administration of the common good and a well regulated society, dependant, for example, on some level of taxation and a functional legal system.

Since the Magna Carta, society has always been prepared to surrender some liberty for order and common protection.

At its core, the Magna Carta was a blow against the concept that one person – indeed any one person - could treat others as less than themselves, as less than equal before the law, as less than human.

This is where the trade-off between the rights and responsibilities developed since 1215 come into play. It is a primary duty of the State to protect its citizens from harm. This duty must be balanced against the right of citizens to go about their activities with quiet enjoyment.

It is in my view actually easier to see that where innocent victims are deprived of their inherent right to life – a core human value.

In protecting our citizens, we must inevitably encroach on their "rights". It has ever been thus. Magna Carta was perhaps the first major attempt to codify and limit this process by acknowledging the need for a system of law.

And, finally what would Ronald Wilson's view have been of all this?

Perhaps it is the case that the combination of a highly committed forensic Crown Prosecutor, criticised by some for being too zealous in that role and the irrepressible human rights advocate he was later in life, might just have helped to provide the right balance to find in Australia's anti - terrorism laws and their enforcement, as against a terrorist threat to the inherent right to life and therefore human rights generally.

Thank you for listening to me this evening and I again thank the Society for the honour of inviting me to deliver this year's Lecture.