

# THE AUSTRALIAN LAW JOURNAL

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## **ARTICLES**

### **NATIONAL SECURITY AND COUNTERTERRORISM LAWS**

#### **Dr James Renwick CSC SC; Guest Editor of this Special Issue**

The relationship between national security and the law is often under strain. The past 20 years have seen many Commonwealth laws passed in quick response to counterterrorism attacks, and more recently, acts of foreign interference and espionage. This article explains the scope of this special edition while reflecting on the challenges facing each branch of government, and law-reform, in this increasingly important area of the law. .... 744

### **THE CHANGING LEGAL FRAMEWORK OF THE AUSTRALIAN INTELLIGENCE COMMUNITY: FROM HOPE TO RICHARDSON**

#### **The Hon Michael Kirby AC CMG**

Intelligence and security agencies in Australia have been reviewed by judicial inquiries, including two Royal Commissions conducted by Justice RM Hope (1974–1976) and (1983–1985), and later investigations by officials, culminating in the Comprehensive Review (2018–2019) by Mr DJ Richardson. Seeking a balance between civil liberties and suggested security needs, the article traces the two inquiry models. It outlines the dangers presented by the past targeting of communists, homosexuals and political adversaries; the comparative weaknesses of Australia’s constitutional protections for individuals; and the need for regular reviews of such agencies given radical changes in social values, geopolitics, alliances and technology. Reconciling the demands of intelligence and security with democracy and basic rights is never easy and is now increasingly difficult. .... 752

### **SENTENCING TERRORIST OFFENDERS – THE GENERAL PRINCIPLES**

#### **The Hon Mark Weinberg AO QC**

Sentencing is an exercise always fraught with difficulty. Fortunately, there is now a body of sentencing law, derived from both statute and common law, to which judges can turn in carrying out this task. There are well-established general principles which provide guidance while, at the same time, recognising the breadth of the discretion vested in judges in performing this function. The modern phenomenon of global terrorism has led to a number of cases, in this country, which have focused upon this process. This paper explores some of the recent developments in this area, noting the significant departures

from ordinarily accepted principles that the sentencing of convicted terrorists now seems to entail. .... 766

## REFLECTIONS ON OVERSIGHT OF INTELLIGENCE AGENCIES: PROMOTING COMPLIANCE, TRUST AND ACCOUNTABILITY

### **The Hon Margaret Stone AO**

Secrecy is both necessary for the effective operation of Australia's intelligence agencies and inimical to the protection of personal rights and liberties that are fundamental to a liberal democracy such as Australia. This tension poses a challenge for accountability. In meeting this challenge trust, independence and a robust culture of compliance are crucial. The value of administrative review in meeting this challenge is considerable. .... 780

## MECHANISMS FOR REVIEWING AND MONITORING NATIONAL SECURITY LAWS: THE UK AND AUSTRALIA COMPARED

### **Dr Jessie Blackburn**

The United Kingdom and Australia each have a strong mechanism for reviewing the necessity, proportionality and operation of national security laws, although the latter has more explicit statutory basis and powers. After each office escaped abolition, their continuing role now seems clear, indeed the Republic of Ireland recently introduced a Bill for an Independent Examiner of Security Legislation, drawing on elements of each model. .... 786

## THE CONDUCT OF TERRORISM TRIALS IN ENGLAND AND WALES

### **The Rt Hon Sir Charles Haddon-Cave**

The manner in which terrorism trials are conducted is a mark of how civilised a society we are, and a litmus test of our adherence to the Rule of Law. Terrorism trials present unique challenges because of their complexities and subject matter and the heightened public concern surrounding terrorist offences. The role of the courts is to ensure a fair trial within a reasonable timescale. This article seeks to explain the practices and procedures relating to the conduct of terrorism trials in England and Wales. We continue to learn from our colleagues in other jurisdictions in the Common Law world who face similar challenges. .... 798

## WHAT MAKES TERRORISM TRIALS DIFFERENT?

### **The Hon Anthony Whealy QC**

Terrorism trials in Australia have demonstrated, and continue to demonstrate, features which make them markedly different from the general run of criminal trials. This article focuses on the personal experience of a retired Supreme Court judge in relation to several such trials. It highlights the following differences: criminal behaviour based on a religious or ideological persuasion; inherent bias; the impact of national security protection laws and public interest immunity; the complexity of our terrorism legislation and the sentencing principles relevant to persons convicted of a serious terrorist offence. Against this background, the article addresses, from a practical perspective, the sometimes complex nature of the steps necessary to ensure a fair trial in an Australian terrorism trial. .... 806

## NATIONAL SECURITY AND THE LAW – WHAT LIES AHEAD?

### Lord Carlile of Berriew CBE QC

Assessing what lies ahead for national security and the connected law is a complex, multifaceted process. As the world comes to terms with the scale of the impact of the COVID-19 pandemic and grapples with the profound social, economic and political shifts it has inflicted, the most pertinent issues that will affect the relationships between national security and the law are still forming. With the publication of its “Integrated Review”, the United Kingdom has reassessed its place in the world, made choices with serious strategic consequences, and presented a series of plans to deal with the changing situation. An example from the legal context is extensive sentencing reforms, which have created an upward trajectory of imprisonment. By examining how the United Kingdom now perceives its own national security in a global context and has adapted its approach, with particular reference to trends in international terrorism, we can draw some initial conclusions about what lies ahead. .... 819

## NATIONAL SECURITY AND THE LAW – REFLECTIONS OF A FORMER AUSTRALIAN ATTORNEY-GENERAL

### Hon George Brandis QC

Until 2017, the Attorney-General of Australia was also the Minister responsible for domestic security. The Abbott and Turnbull governments implemented the most extensive reforms to Australia’s national security laws in a generation. The peculiar nature of the Attorney’s office – both within politics, and apart from it – encouraged an approach to these reforms, which reflected the importance of seeking bipartisanship in national security policy. This article reflects on that approach and sets out the broad outlines of the several tranches of legislation – including reforms to the Australian intelligence community, counter-terrorism laws, critical infrastructure and foreign interference. .... 828

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