

Democracy and Dissent in Australia

A talk to the Melbourne Writer's Festival

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Franz Kafka once wrote that "it is an extremely painful thing to be ruled by laws one does not know".¹ The story in which Kafka made this observation told of an imaginary kingdom ruled by secretive nobles who kept knowledge of the law to themselves. But I cannot help thinking that Australians are increasingly ruled by laws we do not know or understand.

I am thinking particularly of the new anti-terrorism laws passed by federal and state parliaments. Who of us feels confident that we understand the anti-terrorism laws and how they might affect us? I certainly don't understand them, and I follow these things quite closely. I sometimes think that there are things I might do, such as having an outspoken opinion on terrorism or the security services, which could see police with guns come crashing through my door. I could go to the statute books and read the laws, but I don't think that would be much help, because so much in them is undefined and left to the police and security services to interpret as they will, or in response to government direction.

The case of Dr Mohamed Haneef has left many of us feeling disconcerted and worried that the rule of law is under threat. As far as we can tell he did nothing more than give an old SIM card to a relative. He may very well not have known or suspected that the relative knew someone who subsequently committed an act of terrorism. The public has been shown no evidence he has broken any law, despite the Government's attempts to blacken his name with highly selective quotations from some emails, ones that on the face of it lend themselves to perfectly innocent explanation.

The secrecy that has enshrouded the claims against Dr Haneef, and the way in which the case against him was deliberately distorted by the Government and the police in the media, must make us all wonder whether we too at some point could find ourselves locked up for no good reason and without the usual protections.

Anyone who is politically active in Australia, and especially if they are critical of the Federal Government, must live with a low-level anxiety about what might happen to them or their families if some unknown threshold is crossed. And it is not just the politically active: just to know someone who might be could land you in hot water.

Here are some of those indistinct thresholds that come to mind.

¹ Franz Kafka, *The Problem of Our Laws*.

What might happen to me if I send an email to a supporter of the Tamil Tigers? Is that an illegal organisation? Are those who spoke out against the treatment of Dr Haneef now under surveillance? What would happen if I wanted to find out what al-Qaeda really stands for? If I go searching on the internet will an alarm bell ring in a high-tech basement somewhere? Should we hesitate before we use the word 'bomb' when speaking to someone on the telephone? What could happen to my son if he joined a demonstration and some agitators at the front jostled police? Is he going to be dragged out and assaulted by men who refuse to identify themselves - something that has actually happened in the last year?

Recently, a former ASIO agent asked me to consider for publication a paper he had written that was critical of the anti-terrorism laws. My initial reaction was positive, particularly if he could shed new light on how the laws were being misused. But then I found myself hoping that there would be nothing new or controversial in the paper because I would almost certainly have the police and security services barging in to my offices, in the same way that they spent days camped in the offices of Melbourne publisher Black Inc as it prepared to publish Andrew Wilkie's book.

Of course, the tabloid commentators and shock jocks will declare that if you haven't done anything wrong there is nothing to worry about. But the point is that we don't know whether many things we might do are illegal or might make us subject to suspicion. The laws are not transparent and are no longer in alignment with our natural sense of what is right and wrong.

The laws remind us of Walter Benjamin's distinction between "the foreseeable punishment that accompanies the disobedience of the law, and the harsh, unpredictable, and generally violent 'retribution' that comes about for transgressing secret or unwritten rules that are unknown to us".² Benjamin, a Jew persecuted by the Nazis, knew what it was like to live in trepidation of an uncertain fate.

None of us has to study the Crimes Act to know that killing someone is wrong and punishable, but in today's environment, conscience can no longer be our guide. The sort of unpredictable retribution Benjamin spoke of certainly seems to have been the fate of Dr Haneef.

More so than ever before in Australia, the police are now empowered, if not in law then by implicit political fiat, to interrogate, intimidate and even assault people innocent of any crime but suspected of associating with the wrong people. They can admonish and warn off citizens, threatening them with unstated but implicitly dire consequences should they, for example, attend a protest at the APEC meeting or a demonstration against President Bush.

When this happens we are deprived of our rights. In an observation that now has a chilling resonance in our country, the American academic Guillermina Seri wrote:

² Quoted by Guillermina S. Seri "Police Discretion as Unwritten Law: Governing the State of Exception" from Benjamin, Walter. "Critique of Violence". *Selected Writings* Volume 1 1913-1926. (Bullock, Marcus and Michael W. Jennings ed) The Belknap Press of Harvard University Press. 1996.

Citizen encounters with the police open up a territory of unpredictability that blurs the distinction between written and secret laws, normalcy and exception. They are ultimately regulated by unwritten norms that those in charge of policing administer through their discretionary power.³

In his recent *Quarterly Essay*, David Marr tells the disturbing story of the treatment of a number of young men in Sydney who were arrested for events that occurred at the G20 demonstration last year.⁴ Squads of heavily armed police, some from counter-terrorism units, arrived at dawn, in one case kicking the door down. Their houses were turned upside down. One told of how he had previously been snatched off the streets of Melbourne by eight men who did not identify themselves. He claims he was punched and kicked and subsequently charged as one of those who allegedly occupied an office building during the G20 demonstration.

The police warned the demonstrators to stay away from protests and not to go anywhere near APEC. Each of these young people - “middle-class boys” as one observer called them - was severely shaken up. If the intention was to frighten them out of their political engagement then it was very effective; who would blame these young people for desisting?

Although breaking in to offices and throwing things at police are clearly illegal, anyone contemplating going to a protest nowadays must be worried that simply being there may have serious consequences. They know they will be photographed by security agents and they may well have a police file kept on them, merely for exercising their democratic rights. We are in danger of returning to the dark days of the fifties and sixties when ASIO, armed with excessive powers, carried out surveillance of anyone regarded as vaguely left-wing, including peace groups, anti-war activists and women’s groups.

The security organisations were largely unaccountable, at least to any body that might take a critical view of their activities and attempt to rein them in. We have subsequently learned that ASIO had a paranoid culture that made them jump at shadows. Most operatives, including the leadership, had crude political views and their reports on the activities of individuals and groups judged a threat were often laughable, in retrospect at least.

These are the lessons of history, yet who today could have confidence that the current Federal Government and its agencies will implement the anti-terror laws fairly and with due attention to questions of natural justice?

Like many others, for some time I took comfort from the fact that the Commissioner of the Australian Federal Police, Mick Keelty, appeared to be his own man, one committed to the fair and proper application of the laws. But after the Haneef case, it seems to me that the AFP’s reputation for independence and competence has collapsed and the force has become in some respects a political arm of the Government. I no longer have

³ Ibid. Seri teaches at Union College

⁴ David Marr, “His Master’s Voice: The corruption of public debate under Howard”, *Quarterly Essay*, Issue 26, 2007.

confidence in Mr Keelty's independence and that makes me very apprehensive. Parliamentary scrutiny of the security services has gone from minimal to zero with the Government's majority in the Senate and the brow-beating of any potential Coalition dissenters.

If neither the Government, the Parliament, nor the leadership of the security services is able or willing to exercise discipline over the implementation of the laws, and the courts take an increasingly restricted view of their role, what protections remain for Australian citizens?

There is no doubt that we face a real danger of terrorist violence in Australia and heightened security measures are essential for dealing with this situation. But the power and discretion that the anti-terrorism laws give to the Government, the police and the security services have created a climate of fear, and not just among people who might be worried about whether their actions are lawful. Frankly, I am more afraid of being innocently caught up in the new security laws than I am of being harmed by terrorist bombs.

The Howard Government exercises unprecedented power in this country. It is unaffected by many of the checks and balances that have traditionally constrained executive power and has shown itself willing to use its power ruthlessly. We desperately need those checks and balances to be strengthened; otherwise the terrorists really will have won.