

CIVIL LIBERTIES

Lessons for the 'war on terror'? 30 years since Sydney's Hilton Hotel bombing

MICHAEL HEAD considers the abuse of official power in the so-called fight against terrorism

Remarkably, 30 years on, the 1978 Sydney Hilton Hotel bombing is being cited as a reason for the indefinite 'war on terror' declared in 2001. At the official ceremony to mark the 30th anniversary of the bombing, the event was used to justify the erosion of civil liberties in the name of combating terrorism. A memorial plaque was unveiled at the site of the blast in Sydney's George Street and, to mark the occasion, New South Wales Premier Morris Iemma wrote an article for the *Sydney Daily Telegraph* in which he described the Hilton bombing as 'a tragic entrée to an age of terror that remains with us'.¹ He added: 'We have sacrificed a share of our civil liberties so police can thwart the sneaky, insidious methods of the terrorists'.²

Far from being the start of a new era of terrorism, the Hilton experience demonstrates how a single incident can be used to carry through an unprecedented restructuring and strengthening of the powers of the police and intelligence and military agencies at the expense of legal and democratic rights. The mass media proclaimed the bombing as 'our first full taste of Twentieth Century terrorism'³ and supported Australia's first military call-out onto urban streets. Yet, there is no evidence that terrorism was involved following the ignominious collapse of two frame-ups of members of the Ananda Marga religious sect who were wrongly accused of the crime. No genuine inquiry has ever been conducted into the Hilton affair, despite evidence pointing to the possibility that the crime was committed by the security agencies themselves.⁴

The fall-out from the explosion

At 12:40 am on 13 February 1978, a bomb exploded in a garbage bin outside the Hilton Hotel, the venue for the Commonwealth Heads of Government Regional Meeting (CHOGRM), a gathering of government leaders from former British colonies. The blast killed two garbage collectors, Alex Carter and William Favell, and a police officer, Paul Burmistriv, and seriously injured a number of other people including police officer, Terry Griffiths.⁵

Without any clear legal or constitutional authorisation⁶, then Prime Minister Malcolm Fraser and New South Wales Premier Neville Wran authorised the deployment of nearly 2000 heavily-armed troops, some with bayonets fixed, accompanied by armoured personnel carriers and helicopters. Military units took up positions along a major highway on Sydney's outskirts and patrolled the Southern Highlands towns of Bowral and Mittagong, near the site of a scheduled CHOGRM leaders' summit. Local residents were understandably shocked and uneasy.⁷

Over the ensuing 18 months, the Fraser government, with the Labor opposition's basic support, used the

Hilton bombing as the pretext to carry through a far-reaching expansion of the powers and resources of the police and security apparatus. This included legalised surveillance powers for the Australian Security Intelligence Organisation (ASIO), the formation of the Australian Federal Police (AFP), the creation of domestic Special Air Service (SAS) units in the Australian Defence Force (ADF) and the establishment of Crisis Policy Centres with the authority to take control over parts of the country in times of alleged emergency. In coordination with these changes, para-military SWAT-style units were set up in state police forces.

Over the same period, as the result of a police entrapment operation involving Richard Seary, a police Special Branch agent, three members of the Ananda Marga sect, Paul Alister, Ross Dunn and Tim Anderson, were convicted in the New South Wales Supreme Court of conspiracy to murder a National Front leader, Robert Cameron. The media widely depicted their imprisonment for 16 years as punishment for the Hilton blast. In 1983, Alister, Dunn and Anderson unsuccessfully sought special leave to appeal to the High Court against their convictions.⁸ After a seven-year public campaign, Alister, Dunn and Anderson were finally pardoned by the New South Wales government in May 1985, although denied compensation. A judicial inquiry headed by Justice James Wood ruled that Seary had lied on at least 50 occasions, yet made no findings against the police and sanctioned the employment of such dubious undercover agents.⁹

Four years later, in 1989, the New South Wales police mounted another frame-up of Anderson, arresting him for the Hilton blast. In the New South Wales Supreme Court, Anderson was sentenced to 14 years jail on three counts of being an accessory before the fact to murder. Eight months later, however, in June 1991, Anderson was released after the New South Wales Court of Criminal Appeal found obvious flaws in the evidence. The appellate Court concluded that the key police witness, Evan Pederick, had been entirely discredited.¹⁰

Despite the collapse of two police frame-ups, the New South Wales Liberal government and the federal Labor government effectively blocked demands for an official inquiry into the Hilton affair. In October 1991, the Hawke government's Attorney-General Michael Duffy asserted that, because the Hilton bombing involved offences against New South Wales law (when Commonwealth law was also clearly breached), it was up to the state to convene an inquiry.¹¹ Two months later, the New South Wales Parliament passed a resolution, moved by independent MP John Hatton, calling for a joint federal-state inquiry.¹² The motion meant little, however, given the federal government's

REFERENCES

1. Morris Iemma, 'Remembering the Hilton Hotel Bombing', *Daily Telegraph*, 13 February 2008 <www.news.com.au/story/0,23599,23206442-5007146,00.html#> at 31 May 2008. At the ceremony to unveil the plaque, similar remarks were made by Sydney Lord Mayor Clover Moore and NSW Police Commissioner Andrew Scipione. See 'Sydney Remembers Hilton Bombings', *Sydney Morning Herald*, 13 February 2008 <<http://news.smh.com.au/national/sydney-remembers-hilton-bombings-20080213-1s0q.html>> at 31 May 2008.
2. *Ibid.*
3. Editorial, 'Terrorism', *Sydney Morning Herald*, 14 February 1978, 6.
4. See Jenny Hocking, *Terror Laws: ASIO, Counter Terrorism and the Threat to Democracy* (2004) 116–119 and Tom Molomby, *Spies, Bombs and the Path of Bliss* (1986) 409–412.
5. For an account of the events see Hocking, above n 4, 82–85.
6. See Michael Head, 'The Military Call-out Legislation — Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 1, 10–13. See also Anthony Blackshield, 'The Siege of Bowral — The Legal Issues' (1978) 4 *Pacific Defence Reporter* 6 and 'Current Topics: Legal and Constitutional Problems of Protective Security Arrangements in Australia' (1978) 52 *Australian Law Journal* 296.
7. See Hocking, above n 4, 86. See also Damien Cahill and Rowan Cahill, 'Civilian Responses to Peace-time Military Occupation: the 1978 Bowral call-out and its implications for the 'war on terrorism'' (Paper presented at the Australian Society for the Study of Labour History Conference, History Cooperative, Sydney, 30 June–2 July 2005) <www.historycooperative.org/proceedings/asslh/cahill.html> at 31 May 2008.
8. *Alister v The Queen* (1984) 154 CLR 404.
9. Molomby, above n 4, 365–373.
10. *R v Anderson* (1991) 53 A Crim R 421, 444.
11. Commonwealth, *Parliamentary Debates*, House of Representatives, 8 October 1991, 1481 (Michael Duffy, Attorney-General).

insistence on burying the issue. No inquiry was conducted.

Relevance for the 'war on terror'

The measures introduced in 1978–79 helped lay the foundations for the more extensive provisions introduced since 2001 on the pretext of combating terrorism. The September 11 attacks in the United States triggered declarations around the world of an era of terrorism. In Australia, by the end of 2005, more than 40 pieces of federal 'anti-terrorism' legislation had been introduced. The laws had four principal far-reaching features: a wide-ranging definition of terrorism; questioning and detention without trial; executive power to proscribe organisations; and secrecy provisions for terrorist trials.¹³ The measures had basic bipartisan support, and most are mirrored in state and territory legislation. In 2002, the leaders of the state and territory Labor governments agreed to refer their constitutional powers over terrorism to the federal government.

The legislation also gave the federal government the statutory power to call out the troops in civilian areas, as it had done in 1978. The *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006* (Cth) considerably expanded military call-out powers first enacted in 2000. Under these provisions, the ADF can be mobilised simply by a prime ministerial phone call, to deal with 'domestic violence' that threatens 'Commonwealth interests'. Once deployed, military personnel have broad powers, including to search and seize, interrogate, issue directives and use lethal force.¹⁴

The constitutional scope to invoke the military call-out provisions was extended in 2007 when the High Court upheld the constitutional validity of an interim 'control order' imposed on Jack Thomas, sanctioning one of the central features inserted into the *Criminal Code* (Cth) by the *Anti-Terrorism Act 2005* (Cth).¹⁵ In doing so, by a margin of 6 to 1 (Kirby J dissenting alone on this aspect), the Court condoned the extension of the Commonwealth Parliament's defence power under s 51(vi) of the *Constitution* beyond war and external threats.

In effect, the Judges expanded the doctrine of 'judicial notice' to accept the many untested assertions about the 'war on terror' made by the federal and state and territory governments and their security agencies, such as ASIO. Callinan J, for example, declared it was 'blindingly obvious' that 'groups of zealots forming part of, or associated with Al Qa'ida ... planned to undertake violent, literally suicidal attacks upon even the institutions and persons of those communities'.¹⁶ By leaving the government and its agencies broad scope to define for themselves the nature of alleged terrorist threats, the decision eroded the 50-year-old principle adopted by the High Court in the *Communist Party Case* of 1951 that the defence power cannot be expanded unilaterally by the executive government for domestic political purposes.¹⁷

Despite Callinan J's sweeping assertions, there is little to suggest Australia is the subject of any realistic terrorist activity or plans of great magnitude. Only one conviction has been upheld under the counter-terrorism legislation, that of Faheem Lodhi.¹⁸ At

the time of writing, 22 Islamic men are on trial in Melbourne and Sydney, and three alleged supporters of the Sri Lankan separatist group, the Liberation Tigers of Tamil Eelam, are being prosecuted. Every other accused, including Thomas, has either been acquitted by a jury, had the conviction overturned on appeal, or had the charges abandoned.

Significantly, the circumstances of these cases are reminiscent of the police frame-ups witnessed in the Hilton affair. The best known instance is Dr Mohamed Haneef, whose prosecution was withdrawn by the Director of Public Prosecutions after it was established that the police and prosecution had made false allegations against him.¹⁹ The case against Izhar Ul-Haque, a Sydney medical student, was similarly dropped after a judge found that AFP and ASIO officers had unlawfully kidnapped and detained him in a bid to coerce him into becoming an informer.²⁰ Another young man, Zac Mallah was acquitted by a jury on a terrorism charge after a police undercover agent entrapped him into making a video, uttering ludicrous threats to attack government buildings.²¹ Thomas won his Victorian Supreme Court appeal because his conviction was based on an unreliable confession made to the AFP as the result of coercion in Pakistan (although Thomas faces a retrial).²²

The subsequent cover-ups of the circumstances surrounding the Hilton blast also throw into doubt the practice of conducting internal or closed-door inquiries into the Ul-Haque and Haneef cases. The Street Review, commissioned into AFP and ASIO operations in late 2007, has already reported, without proposing any action against the officers involved in the Ul-Haque case or any curtailing of police and ASIO powers.²³ At the time of writing, the Clarke inquiry into the Haneef affair had commenced²⁴ amid controversy over its narrow terms of reference, lack of public hearings and absence of powers to compel witnesses to appear or be cross-examined.²⁵

For many reasons then, the Hilton affair underscores the need to constantly challenge the claims being made by governments about the 'war on terror' and to oppose every erosion of civil liberties and basic legal rights being carried out in its name. Rather than an 'entrée to an age of terror', the Hilton bombing was a highly dubious event. It demands a full independent investigation.

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13. Michael Head, 'Detention and the Anti-Terrorism Legislation' (2005) 9 *University of Western Sydney Law Review* 1; Michael Head, 'Counter Terrorism' Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666 and Michael Head, 'Another Threat to Democratic Rights: ASIO Detentions Cloaked in Secrecy' (2004) 29 *Alternative Law Journal* 127.

14. Michael Head, 'Militarisation by Stealth: Should Domestic Security be a 'Core Business' of the Armed Forces?' (2007) 188 *Overland* 68–73; Michael Head, 'Australia's Expanded Military Call-out Powers: Causes for Concern' (2006) 3 *University of New England Law Journal* 145–150.

15. *Thomas v Mowbray* (2007) 81 ALJR 1414; [2007] HCA 33.

16. *Ibid* at [543]–[553].

17. *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

18. *Lodhi v Regina* [2007] NSWCCA 360.

19. *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 209.

20. *Ul-Haque v The Queen* [2006] NSWCCA 241.

21. *R v Mallah* [2005] NSWSC 317.

22. *R v Thomas* (2006) 163 A Crim R 567.

23. 'The Street Review: A Review of Interoperability Between the AFP and its National Security Partners' (2008) <www.afp.gov.au/_data/assets/pdf_file/71833/The_Street_Review.pdf> at 31 May 2008.

24. See <www.haneefcaseinquiry.gov.au/> at 31 May 2008.

25. For example, David Marr, 'Haneef Inquiry Needs Real Powers', *Sydney Morning Herald*, 19 March 2008 <www.smh.com.au/news/opinion/haneef-inquiry-needs-real-powers/2008/03/18/1205602381764.html> at 31 May 2008.