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THE PROTECTION OF LAW

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## Introduction: The Protection of Law

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# Introduction: The Protection of Law

L. McNamara

## **Abstract**

Who needs law's protection? Who does law protect? Does law need protection from politicised abuses? Can we restore law to a rightful place in the social? Did it ever have one? These were the provocations of the call for papers for the Australasian Law and Society Conference, on the ambiguous and unsettling theme 'The Protection of Law'. The works featured in this special issue of *Law Text Culture* have their origins in two events held at the University of Wollongong in 2006 and 2007. The first was that conference, hosted by the University's Legal Intersections Research Centre and Faculty of Law in December 2006.

# Introduction: The Protection of Law

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The conference, and the theme, attracted the attention of Friederike Krishnabhakdi-Vasilakis, a PhD candidate in the School of Art and Design in the University's Faculty of Creative Arts, who was preparing to curate an exhibition at the University's Long Gallery in September 2007: *Tactics Against Fear — Creativity as Catharsis*. During the course of early discussions between curator and special issue editor it became clear that the thematic focus of both the conference and the exhibition had been motivated by a similar sense of unease about the contemporary prevalence of fear as a dominating and disturbing influence on the mood and actions not only of governments, but also civil society. We were immediately struck by the desirability of bringing together a collection of scholarly and creative works that, while diverse in their styles and preoccupations, offered much that was complementary.

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And so this special issue of *Law Text Culture*, on the theme of ‘The Protection of Law’, took shape.

My introductory remarks will focus on the eight scholarly essays collected here, confident that the last of these, the article by Friederike Krishnabhakdi-Vasilakis, also serves as an effective ‘epilogue’ to the featured creative works.

The first two scholarly works in this collection, by Amy Maguire and Deirdre Howard-Wagner respectively, address the vexed relationship between law and the interests and concerns of minorities. Maguire’s contribution draws on her unique work comparing the self-determination campaigns of Indigenous peoples in Australia and nationalists in the North of Ireland. Her conclusion regarding the *potential* of law to advance rather than impede collective autonomy contrasts with Howard-Wagner’s account of the manner in which law, underpinned by ‘neo-liberal rationalities’, was deployed by Australia’s (conservative) Liberal-National coalition Government in the decade from 1996–2007 to ‘legislate away’ Indigenous rights.

That the theme of ‘The Protection of Law’ triggers intellectual engagement with a diverse range of policy contexts is well illustrated by Jo Goodie’s examination of conceptions of environmental risk in ‘toxic tort’ litigation. Goodie argues that attempts to turn to the law for protection/recompense against environmental hazards must confront the complexities of the multiple ways in which environmental risk can be conceptualized.

Gary Wickham’s contribution takes us from the applied context of environmental litigation to the endeavour of socio-legal scholarship itself. Wickham is concerned to protect law against a tendency, which he argues is evident in the work of scholars who foreground the law-morality connection in the name of socio-legal studies, without being clear ‘about which “social”, and associated morality, is being employed.’ Provocatively, Wickham suggests that such scholarship ‘threatens the role of the law as a vital cog in modern Western countries.’

While there is no doubt that the theme of ‘The Protection of Law’ – in its different permutations – is an undercurrent that runs

throughout this special issue, the essays by Ian Duncanson, Nicole Rogers and Marcus O'Donnell directly address dimensions of the law-fear-authoritarianism-terrorism tension which originally provoked the themes of both the 2006 conference and the 2007 exhibition in Wollongong. Duncanson's contribution is a typically engaging reflection on the danger of a state that invokes and exercises an imperial sovereignty that is unhinged or severed from 'the community from which its citizens derive their identity'. There are clear echoes of these authoritarian dangers in Nicole Rogers' examination of what she styles as 'legal contests between the state and the accused terrorist'. Viewed through an interrogation and critical application of Agamben's 'state of exception', Rogers concludes that legal performances serve to confer (dubious) legitimacy on authoritarian state action.

While approaching his subject matter from a very different disciplinary and theoretical perspective, Marcus O'Donnell's contribution to this special issue also centres on the trial of a terrorist. Focusing on the case of Jack Thomas – a man who, in 2006, was convicted of criminal association with a terrorist organisation, released from custody when his conviction was overturned on appeal, subjected to a control order and ordered to stand retrial – O'Donnell examines the 'narrative strands' in the Australian media's coverage of the Thomas case, and highlights the manner in which Thomas was placed at the centre of a form of 'terrorvision'.

This special issue of *Law Text Culture* on the theme of 'The Protection of Law' closes with Friederike Krishnabhakdi-Vasilakis' unique essay which blends scholarly analysis of 'the current climate in which we work and live' with insightful reflections on the exhibition, *Tactics Against Fear — Creativity as Catharsis*, and the works from that exhibition that are reproduced in these pages. This is a fitting conclusion. It is fitting not simply for the manner in which it helps to line up the collection's scholarly and creative trajectories. It is fitting also because it serves to acknowledge the critical role that Friederike played in helping to transform the original concept for this special issue into a collection that is in keeping with the fine tradition of *Law Text*

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*Culture* as a unique home for dialogue that crosses both the boundaries between disciplines and the boundaries between academic scholarship and creative practice.

At the launch of *Tactics Against Fear — Creativity as Catharsis* on 11 September 2007 I commented that what I saw and appreciated in the works in the exhibition was the expression of multiple refusals to be passive. In the best traditions of intellectual engagement, I acknowledged artists who had deployed the tactics of creativity to thaw the climate of paralysing fear that had been both cause and effect of the manner in which the Australian government, like many across the globe, had invoked law as ‘protector’ in the ‘war on terror’ during the preceding six years.

While celebrating the engaged work of creative artists I also acknowledged the capacity of law, lawyers and judges to display comparable reflexivity and defiance. Less than three weeks before the exhibition launch, in a case before the Federal Court of Australia, Justice Jeffrey Spender ruled that Australia’s then Immigration Minister, Kevin Andrews had fallen into error in cancelling the visa of Dr Mohamed Haneef, an Indian national employed by a Queensland hospital, on character grounds.

Dr Haneef had been charged under Australian counter-terrorism laws on the basis of allegations that he had played a role in failed bomb attacks in the United Kingdom in June 2007. The charges were later dropped, when it became clear that there was no credible evidence linking Dr Haneef to the terrorist plot. The case became a lightning rod for concerns that Australia’s criminal laws in the context of the ‘war on terror, had ‘gone too far’, both in substance and in the manner of their deployment by governments and law enforcement agencies.

When the decision in *Haneef v Minister for Immigration* was handed down, barrister Greg Barns described Justice Spender’s decision as ‘a reclaiming of turf by the courts in the area of national security, an area where, since 9/11 in particular, governments have become used to doing pretty much as they like’ (*The Australian*, 24 August 2007). Significantly, in the context of this collection, Barns indicated that the

Federal Court's intervention was unremarkable: Justice Spender was 'simply doing his job ... nothing more and nothing less.' I observed at the *Tactics Against Fear* launch that the same could be said of the artists whose works featured in the exhibition. Extending the point, this collection, and all of the intellectual and creative endeavour that it brings together, constitutes evidence of the *capacity* of law and art alike to challenge, provoke and disrupt, but also to restore and protect.

### Case

*Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273  
(21 August 2007)

