



## Human rights in an age of counter terrorism\*

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*The dramatic increase and proposed increases in the powers of ASIO and Australian police forces, the vast array of so-called anti-terrorist legislation with its reformulated criminal offences and oppressive procedures, all in the hands of a government not sensitive to individual rights, should make all of us, particularly lawyers, think long and hard about where Australia is heading.*

At the reception the other night one of our number said to me gloomily over his glass, 'I see you are giving a paper on human rights and terrorism. Who will put the view of the Right?' I said, 'I don't care much, because I am speaking last'. The question raised a matter of legitimate concern, because my views about current anti-terrorism legislation have already been given some press exposure in New South Wales, and some may think they lack balance. But I want to narrow the discussion to Australia's anti-terrorism legislation and its effects, and I am not here to defend Australia.

Accepting that all penal laws reflect some attempt to reconcile the interests of individuals and the general community, I cannot accept that Australia's anti-terrorism laws are the product of any fair balance. They go much too far the State's way, to the detriment of the individual.

'Balance' is a word in grave danger of falling into disrepute, because of its constant misuse by politicians. 'Balance' in this context ought to mean the achievement of harmony between opposing forces, or interests. But when a minister of state tells us that a law strikes the right balance, that does not make it so. There may be no real balance in fact. I believe that to be the case in Australia with its anti-terrorism laws. Hence the tenor of this paper.

Those of you who practise to any degree at the criminal bar will have long learned to suspend your disbelief (as John Mortimer once put it). My plea today is that when it comes to listening to governments talk about terrorism and the 'war on terror' and the ever increasing need for more and more repressive legislation to combat the insidious menace, you nurture your disbelief, you keep it alive and well and you feed it on healthy scepticism, particularly because you are lawyers.

In another country, a long time ago, I once appeared for a man called David Combe who was the subject of an inquiry by Royal Commission because of his perceived relationship with a Soviet diplomat in Canberra, suspected of being a KGB operative. It was 1983, to be precise.

It was a strange experience, being my first contact with the Australian Security Intelligence Organisation. Indeed it was one of the very few times

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that ASIO has shown its face publicly, apart from the Petrov Royal Commission in 1954 and the entertaining counter espionage Skripov affair in 1963.

I was obliged to obtain a security clearance, which involved answering questions, one of which was, was there any history of homosexuality or criminality in my family. As to the first, I probably said I had no idea, but didn't think it was any business of ASIO. I had obviously overlooked Lord Devlin's 1959 admonition that 'the suppression of vice is as much the law's business as the suppression of subversive activities'.

As to the question of family criminality, I don't really remember my answer but I imagine I said I knew of none. That answer may or may not have been true. This is something of a confession in present company and I don't know how I can atone, but one of my ancestors accompanied Oliver Cromwell on his trip to Ireland in 1649. After joining in the sack of Drogheda and Galway he was granted land at Castlelyons in County Cork, where he is buried. He may now qualify as an English war criminal. Also, several of my ancestors including two from County Tyrone somewhere north of here, went to Australia quite early in the colony of New South Wales, having received pressing invitations from the Monarch. But I have no way of knowing whether they were properly convicted of the petty crimes for which they were transported.

The point of all this is that the security clearance was the beginning of a suspicion that I was dealing with rather strange people. It has not left me. That suspicion intensified as I listened to evidence from ASIO people, including the then Director-General, a man of the view that criticism of ASIO was criticism of Australia. My views did not receive enthusiastic endorsement from the Royal Commissioner, but it seemed to me the evidence was full of wild imaginings and whimsical contradictions.

For example, the main focus of the inquiry was on a conversation between the diplomat, Valerie Ivanov, and David Combe during dinner at the Ivanov's Canberra house. The house was bugged by ASIO and the conversation recorded. According to the evidence, KGB houses were routinely bugged, and the KGB operatives would be well aware of the fact. Why then, an ASIO agent was asked, did Ivanov choose to have such a conversation in a house he must have known was very likely to be electronically bugged and all conversations recorded? It was March; Canberra was still warm at night; why not have a barbeque outside where they could talk without fear of eavesdropping?

In essence, the ASIO answer was that Russians do not have barbeques, and no conversation could ever be so sensitive as to compel a Soviet spy to entertain dinner guests in the garden. It was not the Russian way.

Another example was this. KGB men, we were told, were devilishly clever, masters of the black arts of deception, disguise and counter surveillance. But ASIO agents always went to Canberra airport to watch new arrivals of KGB men from Moscow. How could they spot such masters of deception? The answer was simple: all the KGB men from the Soviet embassy always went to the airport to greet their KGB friends as they arrived, so it was easy to tell who was a spy and who was not.

There was other such evidence. Perhaps what I found most unsettling was the revelation that ASIO keeps what it called 'passive' files on people and adds 'passive' tit bits of interest which may have precious little to do with national

security. What was more unsettling was the further revelation that I was the subject of such a report by some unidentified ASIO agent assigned to watch me, or Combe, or drinkers generally at Canberra's National Press Club. At all events, it emerged in evidence that a report had been made by an ASIO agent that one night I, along with David Combe and some others, had been seen at the National Press Club drinking beer with a man from the Soviet embassy. To this day I have no idea who he was or why he joined us — he was just there.

I must say, had I been inclined to talk clandestinely to a foreign spy, I would have chosen a venue and time other than happy hour at the National Press Club surrounded by intoxicated and inquisitive journalists. I don't know whether that occurred to my watcher.

By 1983 I had long learned to suspend my disbelief in the course of professional practice, but I have become increasingly less inclined to suspend disbelief in what I am told by successive governments about the great virtues of their intelligence agencies.

The collapse of the Soviet Union had the effect of shooting ASIO's fox. After that, we didn't hear much about ASIO or Australia's other secret intelligence services until 11 September 2001. From then on, while knowing almost nothing of either the intelligence gatherers or the intelligence gathered, Australians have been expected to implicitly trust all the gatherers, because they have the full confidence of the government, and the citizenry should fall into line and trust the judgment of government.

The more things change the more they stay the same. Writing in 1966 in their book *Freedom in Australia*, Enid Campbell and Harry Whitmore said this:

It is apparent that the Act (that is the Australian Security Intelligence Organisation Act of 1956) authorises uncontrollable interferences with the rights of citizens to privacy; reliance has to be placed on the bona fides and integrity of the Attorney-General and the Director General of the Organisation. Whether this reliance is justified must be a matter of opinion; we have little or no knowledge of how the discretions are exercised in practice . . .

The Organisation for the most part operates under a cover of secrecy. Attacks by the opposition as to the nature of the activities of the Organisation have almost invariably been met with a blank refusal to discuss security operations at all in the Parliament, *or with a paean of meaningless praise for the sterling work being performed.*<sup>1</sup>

As it seems to me, the oft repeated paeans of praise we now hear about ASIO and others (whether from government or opposition) are no more meaningful than they were in 1966.

The justification for the great extension of ASIO's powers since September 2001 is equally meaningless, for it consists in essence of no more than that ASIO thinks it should have the powers against the possibility that something might happen, and in this ambience of terror we should trust them and the Attorney-General. Australians have been offered scant logical argument in support of the notion that quite extraordinary and oppressive new powers of interrogation are necessary, nor why the existing criminal law of the Commonwealth and States was inadequate, nor why it was necessary to create

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<sup>1</sup> 1966, Sydney University Press, p 199 (emphasis added).

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new criminal offences which by definition largely absorbed existing criminal offences, with the uncertainty and ambiguity inherent in such definitions as 'terrorism offence', 'terrorist act' and 'terrorist organisation'.

This is my first concern about counter terrorism laws. We are asked to be content to cede unprecedented powers over individual Australians to nameless and unidentified secret agents, and to repose complete trust in assurances:

- (1) that the powers are necessary for our protection; and
- (2) they will never be abused;

and it is not just today's generation of secret agents and today's bureaucrats and ministers of state we are asked to so implicitly trust, but future office holders.

What do we really know about the reasons why Australia's counter terrorism legislation is either desirable or necessary? To go through the legislation in any detail would take far longer than the time available here so I will not even try. It is not easy to keep up with the avalanche of Australian legislation post 11 September 2001. At least 17 Bills created myriad new powers over the citizenry and a multitude of new offences, for example:

- engaging in a terrorist act
- knowingly receiving training for assistance in a terrorist act being reckless as to that fact
- knowingly collecting or making a document likely to facilitate terrorist acts
- providing or collecting funds being reckless as to how the funds will be used<sup>2</sup>

ASIO can apply for a warrant the effect of which would be to detain a person without charge or even suspicion for up to seven days on the ground that the warrant 'will substantially assist the collection of intelligence that is important in relation to a terrorism offence'. A person so detained may be interrogated in increments of eight hours at a time, up to 24 hours, there is no bar to a further warrant for the same purpose against the same person and it is all in secret.<sup>3</sup>

The Act inhibits recourse to lawyers for people so detained. ASIO may object to the choice of lawyer. The first meeting between a detained person and a lawyer must be monitored by ASIO, and the lawyer subsequently is given only the warrant and no other documents.<sup>4</sup>

There is little useful a lawyer can do to help.

The most odious feature of all of course is that a citizen, about whom there is not even suspicion of any inclination to terrorism, may be arrested and interrogated in secret imprisonment for seven days and would thereafter commit a criminal offence if before the end of the period specified in the warrant the citizen told anyone why he or she had disappeared for a week (unless specifically permitted to do so).

If the disclosure is of 'operational information' it would be illegal if made

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2 Criminal Code Act 1995 Pt 5.3.

3 Australian Security Intelligence Organisation Act 1979 Pt III Div 3 ss 34C, 34D, 34F, 34HB, 34HC.

4 Sections 34TA, 34TB, 34U.

within two years from the end of the period of the warrant.<sup>5</sup>

This may be thought to have the potential to create some difficulties between (for example) husband and wife. Assume (again for example) that a wife happens to notice her husband has not been home for a week. That is because he has been arrested for interrogation by ASIO. When he turns up, she may be inclined to seek some explanation. But if he gives a true explanation, he will make himself liable to prosecution. It is a very strange law for a government that holds itself out as concerned to preserve marriages and families.

May I proffer a list of possible explanations which, if the circumstances arise, might be given to the wife who is seeking some credible explanation? I do so in an effort to be helpful and positive:

- (1) Elle McPherson asked me to stay with her and I couldn't resist the invitation;
- (2) Same as (1), substituting Nicole Kidman;
- (3) I was hit by a bus (miraculously all signs of trauma have disappeared);
- (4) I was captured by the CIA and taken to Egypt;
- (5) I was abducted by Martians;
- (6) I have no idea — these things just happen.

Whatever explanation, there would still probably be some tension. In my case it is doubtful if any of my suggested explanations would be believed, particularly the first two. In fact, it is unlikely most wives would believe the true explanation even if proffered. And if the explanation were given in defiance of the statute, even if not believed, the husband would be liable to prosecution and incarceration if word of it reached the ears of ASIO. That of course would create an even greater problem: how would the husband account for an absence of a year or two, if he was unable to give a true account to his wife?

It is truly amazing that his sort of nonsense found its way into serious penal legislation.

The power would undoubtedly extend to journalists and lawyers even though legal professional privilege remains.<sup>6</sup> Journalists will disclose their sources or refuse to answer questions and risk being imprisoned for up to five years, not in the course of a prosecution or a conventionally constituted public inquiry but in the course of a secret inquisition founded upon the assertion of a belief by ASIO that the information sought is important to intelligence in relation to a possible terrorism offence.

Amendments to the Commonwealth Crimes Act now empower police to apply to have the investigation period following arrest, previously four hours, to be, in effect, without limit, so that a person arrested for a terrorist offence may be held for interrogation for so long as a justice specifies the investigation period might be suspended or delayed.

If not suspended or delayed, the period during which an arrested person may be interrogated may now be extended up to 20 hours.<sup>7</sup>

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5 Section 34VAA.

6 Section 34WA.

7 Crimes Act Pt 1C Div 2.

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New South Wales police are empowered to question and search people in relation to 'a threat of a terrorist act occurring in the near future'<sup>8</sup> and the NSW government has now introduced legislation to enable police to seek search warrants in order to secretly search homes of suspected people, including the power to secretly enter adjoining homes to gain access to the target home,<sup>9</sup> and this notwithstanding the States have referred such powers to the Commonwealth under the Constitution para 1(37).<sup>10</sup> The Attorney-General Mr Debus blandly asserts that the powers have been permitted only with the strictest of safeguards.<sup>11</sup> This is self evident nonsense. A law cannot be unreasonably repressive and at the same time save itself by safeguards. It seems to me that New South Wales and the Commonwealth are trying to out do each other in demonstrating toughness on terrorism. In my opinion they take a great deal for granted in assuming that the citizenry is generally in favour.

For the first time since the Communist Party legislation in 1950, the Federal Government has given itself the power to proscribe an organisation by regulation, to make the organisation illegal, and to make it illegal to join or assist such an organisation. A society or organisation — either here or in a foreign country — can be declared a terrorist organisation. Such regulations follow the advice of ASIO to the Attorney-General. The law requires reasonable satisfaction on the Attorney's part but practical remedy is uncertain (to put it mildly) if he acts unreasonably.<sup>12</sup>

Counter terrorism Bills were introduced with this sort of language in the explanatory memoranda:

The amendments will 'enhance the capacity of ASIO to combat terrorism'<sup>13</sup> and 'the legislation is designed to strengthen Australia's counter terrorism capabilities'.<sup>14</sup> The Bill 'enhances the capacity of ASIO to exercise its powers for questioning and detaining persons who have information important to the gathering of intelligence in relation to a terrorism offence'.<sup>15</sup> And in a press release on 21 January 2004 the Attorney-General told us the legislation would ensure 'Australia's counter terrorism arrangements remained responsive to the ever changing global security environment'. The coalition was, he said 'getting on with the job of protecting and securing Australians and their interests'.

We know the legislation is for the purpose of national security, whatever precisely that means. We are not told why it is needed, except that national security requires it, which reflects no more than a desire on the part of ASIO and the Australian Federal Police for more power, and the willingness of government to grant it, regardless of the consequences.

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8 Terrorism (Police Powers) Act 2002 s 5.

9 Terrorism Legislation Amendment (Warrants) Bill 2005.

10 On 8 November 2002, made effective by Terrorism (Commonwealth Powers) Act 2002, commencing 13 December 2002.

11 Second reading speech, *Hansard*, 9 June 2005.

12 Criminal Code Act Pt 5.3 Div 102.

13 Further revised supplementary explanatory memorandum: Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, p 1.

14 *Hansard HR*, 13 March 2002, p 1139.

15 Explanatory Memorandum, ASIO Legislation Amendment Bill 2003.

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We are told it has become necessary to make further profound erosions of privacy by permitting surveillance devices warrants to be issued, so that police and intelligence agencies may more freely eavesdrop, to the extraordinary extent that warrants will be available whenever it is suspected that someone has committed an offence — State (with a federal aspect) or federal — which carries at least three years imprisonment. That covers a lot of offences. Why is it necessary? Well, we are blandly told, the Bill strikes the right balance between the protection of peoples' privacy and the need for law enforcement officers to access technology to do their job effectively.<sup>16</sup> What we are not told, is the extent (if any) that law enforcement officers have been inhibited by existing legislation from effectively discharging their duties. We do not know why these extraordinary powers are needed. Neither are we told why ASIO needs the power to secretly detain people for seven days, in such secrecy that a man detained cannot even tell his wife where he has been. There are a number of safeguards, the Attorney-General said, 'to ensure the new powers are exercised reasonably' but in my view anyway, unreasonable legislation cannot be reasonably administered.

The law relating to detention for questioning was subject to a sunset clause, and ASIO and the government want to renew it. We are not told why the law needs to be renewed, except that it might be needed. Is Australia in the grip of an emergency, or is the real design behind the legislation to keep it more or less forever, that is until the limitless war on terror ends?

It is clear from the Attorney-General's second reading speech of 27 November 2003 that the new laws are driven by the so-called war on terror, which the Americans acknowledge might last several generations. 'The war on terror' the Attorney told parliament, eagerly embracing the new cliché 'presents us with new challenges posed by a new type of enemy'.<sup>17</sup> Since then of course the war on terror appears to include the war in Iraq, something not even in contemplation — at least in Australia — in 2001, and having no relevant connection to the events of 11 September 2001.

On 23 March 2005 the Director-General of ASIO gave an address to the 2005 Lawasia conference in which he advocated a renewal of the anti-terrorism law relating to questioning and detention of suspects. The tenor of his address was that properly considered balanced tough counter terrorism laws were 'an essential component in the fight against terrorism. The notion that such laws constitute a victory for terrorists is a nonsense.'

And he said:

Perhaps those concerned that some terrorism laws go too far in the compromise of individual rights, should have more confidence in the capacity of our own democratic system, with its proper separation of powers, to ensure that any legislative excess, however unintended, can, and will, be corrected.<sup>18</sup>

Well there lies the problem. What is he saying? *Trust us!*

In the absence of adequate information, by what criteria is the ordinary

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<sup>16</sup> AG press release, 21 January 2004.

<sup>17</sup> *Hansard HR*, 27 November 2003, p 23,107.

<sup>18</sup> D Richardson, 'The Law and International Relations', available at <[www.asio.gov.au/Media/Contents/PDF/Address%20to%20LawAsia%20Conference%202005%20-%20Wednesday%2023%20March%202005.pdf](http://www.asio.gov.au/Media/Contents/PDF/Address%20to%20LawAsia%20Conference%202005%20-%20Wednesday%2023%20March%202005.pdf)>, p.9.

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person to judge whether or not his or her right to privacy and freedom should be significantly eroded by government at the urgings of a secret intelligence service?

Another problem of course is that the legislative excesses may distort the very process of justice so that courts may be powerless to assist. For example, the National Security Information (Criminal Proceedings) Act 2004 commenced on 11 January 2005. It was introduced as a response to the failed prosecution of a former intelligence officer who allegedly disclosed classified documents.<sup>19</sup> The documents were protected by public interest immunity and therefore could not be used by the prosecution to prove the accused person's guilt. The legislation seeks to remedy this by allowing prosecutors to use information the disclosure of which would be prejudicial to national security in criminal proceedings while preventing broader disclosure of the information including, in some circumstances, to the defendant.

The legislation could have been confined in its operation to the problem inherent in the prosecution of intelligence officers for alleged breaches of secrecy. However, the government saw fit to extend the legislation to all summary and indictable prosecutions under Commonwealth law, whether in federal or State courts. Predictably, the Bill was said to be necessary also for the prosecution of terrorism offences.

The legislation works to allow national security information otherwise protected from disclosure by the public interest to become available to the advantage of the prosecution. The defendant and his or her legal representative may be excluded from a hearing to determine whether the information should be treated in this way: s 29. If the information is in document form, a copy of the document may by order of the court be admitted in edited or shell form, even to the point of the information in the document being entirely deleted and substituted by a statement as to what the deleted information 'would, or would be likely to, prove': s 31(2)(f). The legislation also enables an order to be made prohibiting the calling of a particular witness if it would be prejudicial to national security: s 31(6). The making of such an order in relation to the author of a document admitted in an edited form would seem all but inevitable. In the result an accused may be left in a situation dealing with evidence based on source documents he has not seen, and with no way of testing whether the information in its altered secondhand form is a faithful rendering of the contents of the original document.

The legislation is repugnant to long accepted notions of fairness and propriety. The idea that information might be used by the prosecution without the accused seeing the information need only be stated for its offensiveness to basic notions of fairness and justice to be apparent. Yet this is a conscious aim of the legislation. Apparently it is now in the public interest that the processes of criminal justice be distorted to prevent an accused from presenting a proper defence.

On 10 May 2005 in a paper<sup>20</sup> the secretary of the Australian Federal Attorney-General's Department, Mr Cornall, defended the counter terrorism

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<sup>19</sup> *R v Lappas and Dowling* [2001] ACTSC 115 (unreported, 26 November 2001, BC200107339).

<sup>20</sup> Delivered at Security In Government Conference.



legislation largely upon the premise that individual human rights need to be rethought in the age of terrorism and more consideration given to community rights (meaning more power to government to control the lives of individuals).

He called in aid of his argument Art 3 of the Universal Declaration of Human Rights, that 'everyone has the right to life, liberty and security of person'. To me, this is a turning on its head of a convention intended to assert the freedom and dignity of the individual in the face of overbearing government. The same argument could be and probably has been used by many governments in the world to justify obnoxious laws passed in the notoriously indeterminate and elusive name of 'National Security'. Maybe Art 29 is closer to his argument but I doubt it.

Mr Cornall asserts there was not much need to think about community rights in Australia in the twentieth century because they were not under any obvious challenge. This, (he said) allowed individual rights to flourish without regard to the broader setting of community rights. But this is not so. One of the reasons we should be resistant to the every-growing power of secret intelligence agencies and police in Australia, one of the reasons we must be thoroughly sceptical of the proposition by Mr Richardson that we can trust our democratic system and all will be well, is the conduct of Australian governments, both present and past, sometimes displaying no regard for individual human rights, many of which, far from flourishing, have been trampled on.

A good contemporary example is the Federal Government's shameful, infamous administration of the Immigration Act, a topic all on its own, which we all know about. I won't spend time on it now. A particularly unhappy feature of it all is that for seven years it was under the direction of a minister who is now the Attorney-General.

But going back a bit in the twentieth century, in both world wars mere regulations in Australia authorised the imprisonment of persons who in the opinion of a minister of the executive government were disloyal or a threat to the security of the country.

The first world war saw the War Precautions Regulations 1915 made pursuant to the War Precautions Act of 1914. They gave the minister for defence the power to order the arrest and imprisonment of anyone the minister thought disaffected or disloyal. Many innocent Australian citizens of German origin were victims of the regulation. In World War II a similar regulation gave the minister the same power, and over 6000 people were arrested and locked up, some for the duration of the war, because they were of German, Italian or Japanese origin, or pacifists, or otherwise opposed to Australia's involvement in the war in Europe.<sup>21</sup>

Perhaps to us in 2005, the most frightening aspect of the regulations was that their validity was upheld by the High Court, and as McHugh J put it in *Al Kateb's* case:

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<sup>21</sup> *Al-Kateb v Godwin* (2004) 208 ALR 124 at 139-40 per McHugh J.

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I see no reason to think that this court would strike down similar regulations if Australia was again at war in circumstances similar to those of 1914–1918 and 1939–1945.<sup>22</sup>

The same abuse of the citizenry occurred in the United States during World War II, when US citizens of Japanese descent were interned for no reason other than they were of Japanese descent and the country was at war with Japan. The imprisonment of innocent and apparently loyal US citizens was accomplished by executive act, with some limited support from Congress. But it is a clear example of the ease with which both legislative and executive power can be misused, even when the motive is to protect national security. And in 1950 Congress passed the Emergency Detention Act which authorised the US Attorney-General, in times of emergency, to detain anyone reasonably thought likely to engage in espionage or sabotage. That was a product of cold war fear, an excess of it by a parliament, which put at risk the liberty of anyone coming to the adverse attention of the FBI.<sup>23</sup>

And consider the *Communist Party* case in Australia. In 1950 the Australian parliament passed the Menzies Government's Communist Party Dissolution Act. In short, the effect of the Act, if valid, was to:

- (1) declare the Australian Communist Party an unlawful association and dissolve it;
- (2) enable the Governor-General to declare that a body of persons was communist and declare the body to be an unlawful association;
- (3) make it a criminal offence to continue or pretend to continue any activity of an outlawed body,

all upon the premise that such persons or bodies were prejudicial to the security and defence of the Commonwealth.

The Act was struck down by the High Court.<sup>24</sup> The issue was put to a referendum and the government's proposed constitutional amendments were rejected by the people. But it was a close run thing and we heard a great deal about national security and the communist menace.

Trust us, the Government said. In the interests of national security we must have the powers.

Another example of the abuse of executive power in Australia was the flagrant misuse of the powers conferred on the NSW Police Special Branch in the 1980s and 1990s. The branch was formed in 1948 to meet the communist threat and to liaise with 'D' Branch, which later became ASIO.

In 1996 and 1997 Wood J examined the activities of the Special Branch and found (amongst other things) they operated under a cloak of secrecy, and they adopted a seemingly indiscriminate approach to gathering information on people such as barristers and public figures, whose activities were no business of Special Branch.

After the Branch was disbanded, the Police Integrity Commission supervised the audit of its records and found that:

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<sup>22</sup> Ibid, at 140.

<sup>23</sup> See, eg, *Hamdi v Rumsfeld* (2004) 159 L Ed 2d 578; 124 S Ct 2633; (unreported, US SC, 28 June 2004, Findlaw) at 6, 40, 41.

<sup>24</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; [1951] ALR 129.

- the Branch's activities bore little resemblance to its charter;
- information gathering on people who posed no threat of politically motivated violence or similar matters was rife;
- Special Branch kept secret dossiers including dirt files which were used for political advantage and which were collected and updated on a diverse range of individuals;
- There were some 26,800 index cards relating to information kept on individuals, *including 6930 cards on people described as terrorists.*<sup>25</sup>

In December 1998 the Protective Security Group was formed in the NSW Police Service to gather and analyse intelligence in relation to people who presented a risk of politically motivated violence or terrorism activity.<sup>26</sup>

The group was subject to stringent statutory restrictions, to overcome the risk of abuse, but in 2003 it was disbanded and replaced by the new Counter Terrorism Co-ordinate Command. A much larger organisation, it is not subject to the oversight under which its predecessor worked. Its members have the clear potential to act in the way Special Branch acted and to abuse their powers in the way Special Branch did.<sup>27</sup>

But throughout, the public has been exhorted to trust the police because they had the confidence of government.

And what of our Federal Government? Why should we put all our trust in its assurances that tough counter terrorism laws are 'balanced' and 'fair' and, above all, necessary? Why should we trust the present or any government to be sensitive about the protection of the rights of individuals in the community, particularly those disliked by the government?

Apart from its treatment of asylum seekers and other unfortunates coming under the notice of immigration officers, you get some measure of the true attitude of the Australian Government to individual rights from its approach to the Guantanamo Bay concentration camp, the incarceration there of two Australians, their proposed prosecution before a military tribunal, the prosecution of one and the release of one. The Guantanamo Bay saga has vividly revealed the great danger to society of unrestricted executive power, justified in the name of national security as a response to terrorism, however well meaning the motives for its use. It has also vividly exposed the enormous benefit to society of a judiciary prepared to stare down the executive.

The prison at Guantanamo Bay is a counter terrorism monster which emerged from the horrors of 11 September 2001. It was established by the US military purportedly pursuant to the powers given the President by Congress on 18 September 2001 when it passed the resolution authorising the President to use all necessary and appropriate military force against those nations, organisations or persons he determines planned, authorised, committed or aided the terrorist attacks, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States

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<sup>25</sup> *Report to Parliament Regarding the Former Special Branch of the New South Wales Police Service*, Police Integrity Commission, June 1998 (emphasis added).

<sup>26</sup> Police Legislation Amendment (Protective Security Group) Bill 1998, second reading speech, 23 June 1998.

<sup>27</sup> Committee on the Office of the Ombudsman and Police Integrity Commission, *Interim Report into the Police Integrity Commission's Jurisdiction to Oversight the Protected Security Group*, Parliament of New South Wales, Report No 8/53, March 2005.

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by such nations, organisations or persons.

The purpose of the establishment at Guantanamo Bay was to imprison people deemed by the military to be enemy combatants. The intention was that they would remain in military custody indefinitely, for the duration of the war on terror if necessary. Guantanamo Bay has been leased by the United States from Cuba since 1903 as a naval base. In 1934 the United States and Cuba entered into a treaty providing that the lease would remain in effect so long as the United States should not abandon the naval station, so it is in effect a lease in perpetuity.

Whether or not Guantanamo Bay is sovereign territory of the United States, about which opinions differ, the US government believed it was beyond the reach of the judiciary and therefore the prisoners could not successfully petition for habeas corpus to challenge the legality of their detention.

Since early 2002 up to over 650 men have been held at Guantanamo Bay as enemy combatants. Many were arrested during the fighting in Afghanistan as supporters of the Taliban. Some, such as the Australian Habib, were seized in Pakistan, some in Gambia, Zambia, Bosnia and Thailand. Some such as Habib have been released; the majority remain.

In considering the legality and morality of all this, there are two distinct problems of definition, made deliberately so by the US executive. In June 2004 the Supreme Court had difficulty with the words 'enemy combatant' observing that the government had never provided any court with the full criteria that it used in classifying individuals as such, but it included people who were part of or supporting forces hostile to the United States or coalition parties in Afghanistan and who were engaged in armed conflict against the United States. The government's position was that a declaration by the President as to the status of the prisoners should be the end of the matter.<sup>28</sup>

It was not until 7 July 2004 that the Defence Department offered the following definition of enemy combatant, when the Deputy Secretary established the Combatant Status Review Tribunals:

An individual who was part of or supporting Taliban or Al Qaeda forces or associated forces that are engaged in hostilities against the US or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.<sup>29</sup>

In her judgment of 31 January 2005 in the District Court of the District of Columbia, Judge Green observed that use of the word 'includes' indicates the government interprets the resolution of Congress to permit the indefinite detention of individuals who never committed a belligerent act or who never directly supported hostilities against the United States or its allies. In fact, counsel for the US government went so far as to argue the executive had authority to detain a little old lady in Switzerland who sent cheques to what she believed was a charity for Afghans in Afghanistan but which was in fact a front for Al Qaeda, and secondly, a person who taught English to the son of an Al Qaeda member, and thirdly, a journalist who knew the location of

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<sup>28</sup> *Hamdi v Rumsfeld*, above n 23, at 6 and *In Re Guantanamo Bay Detainee Cases* (unreported, DC District of Columbia, 31 January 2005) at 4.

<sup>29</sup> *In Re Guantanamo Bay Detainee Cases*, *ibid*, at 10.

Osama Bin Laden but refused to disclose it to protect her source.<sup>30</sup>

So it was this sort of criteria upon which the President relied to authorise the indefinite imprisonment without charge of over 650 men.

The second problem of definition is the now much used expression 'war against terror'. It was coined shortly after 11 September 2001. As a basis for sending a country to war it is so rubbery and flexible, so bereft of boundary or definition as to be without real meaning. In reality to declare war on terror is to declare war on an abstract noun. Yet it was the catalyst for Australia's counter terrorism laws. The US government conceded in the Supreme Court that given its unconventional nature, the current conflict was unlikely to end with a formal cease fire agreement.<sup>31</sup> In the District Court the government was unable to articulate how it could even determine the war had ended, and conceded that the war could last several generations, thereby making it possible that the so called enemy combatants could be imprisoned at Guantanamo Bay for life without charge or trial.<sup>32</sup>

On 28 June 2004 the majority in the US Supreme Court held that the Habeas Corpus Statute confirmed a right to judicial review by the District Court of the District of Columbia of the legality of the executive's detention of aliens at Guantanamo Bay. In a separate judgment the majority made the same finding in respect of a US citizen detained in the United States as an enemy combatant.

Put very briefly, in *Rasul*,<sup>33</sup> the court held:

- (1) the prisoner's presence within the territorial jurisdiction of the District Court was not an invariable prerequisite to the exercise of jurisdiction under the Habeas Corpus Statute;
- (2) the writ does not act upon the prisoner but rather upon the person who holds him;
- (3) the Habeas Corpus Statute would create jurisdiction over an American citizen held at the base, and there was no relevant distinction between American citizens and aliens;
- (4) Federal Courts have jurisdiction to determine the legality of the executive's potential definition of individuals who claim to be wholly innocent of wrongdoing.

The Supreme Court reversed a contrary judgment of the Court of Appeal and sent the matter back to the District Court to consider the merits of the petitioner's claims.

In *Hamdi's* case,<sup>34</sup> the court held:

- the Fourth Circuit Court was wrong in holding that no factual inquiry into the government's assertions was proper;
- the right to imprison indefinitely only arose once it was clear the individual was in fact an enemy combatant, whether the fact was established by concession or by some other process;

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<sup>30</sup> Ibid, at 60-1.

<sup>31</sup> *Hamdi v Rumsfeld*, above n 23, at 7.

<sup>32</sup> *In Re Guantanamo Bay Detainee Cases*, above n 28, at 40.

<sup>33</sup> *Rasul et al v Bush* (2004) 159 L Ed 2d 548; 124 S Ct 2686.

<sup>34</sup> *Hamdi v Rumsfeld*, above n 23.

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- the respective positions of the government and the petitioners highlighted serious concerns — both emphasise the tension that often exists between the autonomy the government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before deprived of a constitutional right;
- the ordinary mechanism for balancing such serious competitive interests and for determining the procedures necessary to ensure that a citizen is not deprived of life, liberty or property without due process of law is a judicious balancing of the respective concerns.

The court said it would turn the country's system of checks and balances on its head to suggest a citizen could not make his way to court with a challenge to the factual basis for his detention by his government simply because the executive opposes making available such a challenge.

They cited a 1967 case *US v Robel*, saying:

It would indeed be ironic if, in the name of national defence, we would sanction the subversion of one of those liberties which makes the defence of the nation worthwhile.

Also:

We have long since made it clear that a state of war is not a blank cheque for the President when it comes to the rights of the nation's citizens.

The majority held that a detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the government's factual asserts before a neutral decision-maker.<sup>35</sup>

The Deputy Secretary of State subsequently issued an order creating the Combatant Status Review Tribunals, being military tribunals set up to give prisoners the opportunity to test their position as alleged enemy combatants. The President then moved in the District Court to dismiss all the applications for habeas corpus.

Judge Green in the District Court dismissed the motion, holding that the new tribunals did not give applicants due process, and their procedures had many failings, for example, they denied the right to counsel, and they denied the right to petitioners to know all the evidence against them.

She further held that there should be a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained under torture, observing that Habib, for example, alleged he had been sent to Egypt for torture including routine beatings, water torture and electric shocks, and the Combatant Status Review Tribunal had found Habib's allegations of torture serious enough to refer the matter to the Criminal Investigation Task Force.

Other prisoners made similar allegations of abuse at Guantanamo Bay.<sup>36</sup>

After languishing in custody for some three years Hicks was formally charged with conspiracy to murder, attempted murder and aiding the enemy, to wit Al Queda and the Taliban. In his report to the Law Council of Australia in August 2004 Mr Lasry QC, who attended the preliminary hearing as an

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<sup>35</sup> Ibid, at 11, 13, 15.

<sup>36</sup> *In Re Guantanamo Bay Detainee Cases*, above n 28, at 55–8.

observer, sets out the facts enumerated in the charge sheet and said to support the charges. It is difficult to see in the facts alleged any real support for either of the first two charges. Mr Lasry, like many other lawyers, is perplexed at the attitude of the Australian Government and says that its expressed satisfaction with the fairness of the process is untenable.

There seems no rational reason why Hicks could not be given, at least, the benefit of trial by a conventional court martial, with its clearly established appellate procedures.

In a paper published by the American Bar Association, cited by Mr Lasry, Michael Ratner writes:

The President and the Pentagon have decided that they will defend the crimes, prosecute people, adjudicate guilt and dispense punishment. This is unchecked rule by the executive branch. It dispenses entirely with our system of checks and balances.

Like many others, Mr Lasry thinks this opinion is indisputable. He does not understand why, with two Australian nationals facing this process (Habib of course no longer) the Australian Government is not troubled. In Lasry's view, shared by many, a fair trial for David Hicks by military tribunal is virtually impossible; and he sets out in detail the reasons why.

Hicks and Habib are both good illustrations of what can happen to the individual at the hands of an executive determined to have its way at all costs in the interests of that marvellously elusive expression national security. It has been said time over that if we permit the rights we enjoy to be eroded or extinguished in the name of national security then we may get to the stage where the nation is scarcely worth saving.

Criticisms of the United States and its treatment of prisoners are legion, coming from such bodies as the Red Cross, The International Commission of Jurists and Amnesty International. In its annual report Amnesty noted that the detention facility at Guantanamo Bay had become the gulag of our times, entrenching the practice of arbitrary and indefinite detention in violation of international law. Trials by military commissions have made a mockery of justice and due process. Amnesty said the United States set the tone for governmental behaviour worldwide. When the most powerful country in the world thumbs its nose at the rule of law and human rights it grants a licence to others to commit abuse with impunity and audacity. From Israel to Uzbekistan to Egypt to Nepal, governments have openly defied human rights and international humanitarian law in the name of national security and counter terrorism.

Amnesty went on to observe that the US Independent Panel to Review Department of Defence Detention operations reported that since the invasion of Afghanistan and Iraq, some 50,000 people had been detained around the world, many secretly, incommunicado. At the same time, Amnesty criticised Australia for not seeking the release of Hicks and Habib and acquiescing in the operations of military tribunals, dismissing allegations of torture and ill-treatment of Habib.

The response of the government of Australia to events at Guantanamo Bay has been, to put it mildly, muted. In spite of protestations by the Attorney-General to the contrary, the government's attitude to Hicks and Habib bespeaks a sustained indifference.

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The former Attorney-General Mr Williams said, in effect, the government did not want Hicks or Habib repatriated because it would be difficult to prosecute them under Australia law. Neither Mr Williams nor the present Attorney-General Mr Ruddock ever protested — at least publicly — about the imprisonment of the two Australians. The present Attorney-General asserts it was the right of the President to designate people as enemy combatants without reference to an independent tribunal, and he could see nothing unfair in the procedures of the proposed military commissions, subject to a few procedural changes.

The Attorney was obviously displeased at the US decision not to try Habib and his public utterances included a threat to proceed against him under the Proceeds of Crime Act if he sold his story to the press. Precisely what the crime might have been, by any standard of proof, has never been revealed. In fact, in November 2002 the AFP advised the Attorney that on the available evidence there were no offences committed by Habib against Australian law.<sup>37</sup>

Neither the fundamentally unfair procedures of the military tribunal, nor the continuing incarceration of Hicks have ever been the subject of serious criticism by the Australian Government. Its inability to find serious fault with the process stands in stark contrast to the British view. On 23 November 2003 Lord Steyn, Lord of Appeal in Ordinary said conditions at Camp Delta were of utter lawlessness. He said President Bush had deprived the detainees of any rights whatsoever. As a lawyer brought up to admire the ideals of American democracy and justice he said 'I would have to say I regard this as a monstrous failure of justice'.<sup>38</sup>

The United Kingdom showed regard for the rights of its citizens by negotiating the release of all British prisoners held at Guantanamo Bay. In the House of Lords on 11 January 2005 Lord Goldsmith made his view plain when he said:

Either the men detained should be tried in accordance with standards we regard as fair and in accordance with international standards, or they should be returned to this country.<sup>39</sup>

They were returned to England.

Remarkably similar criticism was expressed in Strasbourg on 4 April 2005 by the Parliamentary Assembly of the Council of Europe, representing 46 European countries, when it called on the US government to cease torturing and mistreating detainees at Guantanamo Bay and challenged it to either try them fairly or release them in line with international law.<sup>40</sup>

But there has been no criticism from the government of Australia.

My theme remains: In light of repressive laws passed in the name of counter terrorism and the government's adjuration that they are fair balanced and just laws, we should continue to remain in a condition of heightened scepticism and outright cynicism, because we know it is likely there will be more to come in this 'ever changing global security environment' as the Attorney puts it.

It is also relevant to take account of the Australian Government's response

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<sup>37</sup> Senate Legal and Constitutional Committee Estimates, *Hansard*, 15 February 2005, p 11.

<sup>38</sup> BBC Memo, 26 November 2003.

<sup>39</sup> House of Lords, *Hansard*, 11 January 2005.

<sup>40</sup> CCR Guantanamo Global Justice Initiative Legal Update, 5 May 2005.



to allegations of torture by prisoners by the US military, in assessing the extent to which we should repose implicit trust in the government and its agencies to show regard for the rights of individuals.

There is now a large body of evidence which at least points to the proposition that the torture of prisoners of the US military, whether by the US military or by agents of other countries for the US military, is officially sanctioned by high ranking members of the executive government of the United States. There is a constellation of documents, allegations, transcripts, photographs and press reports providing the evidence, many of which are on the Internet and a lot of which are conveniently gathered in a book called *Torture and Truth* by Mark Daner, recently published in England.

Australia knew about the abuses of prisoners in Iraq, because of the now public concerns expressed by the Red Cross in 2003, and the letter in response, drafted by an Australian military lawyer, Major O'Kane, for signing by the US Brigadier General Karpinski. The Australian Government says it does not condone torture but we have not heard any criticism of the United States on the issue, and it was quite by accident that the public came to know of Australia's earlier knowledge of torture in Iraq by US soldiers.

The Attorney-General's position seems to be that the government of Australia could not say that Habib had been in Egyptian custody because the Egyptian Government has never confirmed the fact.<sup>41</sup> But on 15 February 2005 the Director-General of ASIO told the Senate Legal and Constitutional Legislation Committee that ASIO formed the view by late November 2001 that Habib was most likely in Egypt, and in February 2002 ASIO established to its satisfaction that Habib had definitely been in Egypt having been sent there from Pakistan.<sup>42</sup>

Two things are obvious:

- (1) Habib was sent to Egypt by the US military; and
- (2) he was sent there for only one reason — and it was not to look at the pyramids.

But we have heard no criticism from Australia — non whatever — of this horrible violation of the most basic rights of an Australian citizen.

And finally, consider the response of both Federal and NSW governments to the arrest of a man called Ul Haque, charged under the Criminal Code Act, for training in Pakistan with an organisation, now proscribed by regulation, called Laskar Al Tayiba. I declare a personal interest in the case. This man is a young medical student of impeccable character who spent a fortnight in Pakistan during which it is said he underwent military training and religious instruction. He then left and returned to Australia, upon which his diaries and notes were seized by customs. This was early in 2003. He was interrogated by the AFP several times during 2003 and was eventually arrested and charged.

The DPP concedes he is not a threat to security and never was a threat to Australia, any Australian or any Australian asset. Literally dozens of people attested to his character. Yet upon arrest he was put straight into solitary confinement in the most secure maximum security prison in New South Wales, Goulburn Supermax. A compliant magistrate did not see that as a

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41 Senate L & CLC Estimates, *Hansard*, 14 February 2005, p 8.

42 Senate L & CLC Estimates, *Hansard*, 15 February 2005, p 22.

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problem and refused him bail. A Supreme Court judge released him. The Crown was quite unable to articulate any rational reason why he should not be given bail and could not articulate any reason, rational or otherwise, why he was consigned to maximum security solitary confinement. A suspected rapist would have received better treatment. The case however throws light on the views of government about its counter terrorism laws, and those suspected of infringing them. There was Mr Ul Haque, like Mr Toad, 'in the remotest dungeon of the best-guarded keep of the stoutest castle in all the length and breadth of merry England'. Why? So a government could look tough on terrorism.

When a government decides it wants to look tough on terrorism, it usually does not care much about individuals who get trampled as a consequence.

Another measure of the Australian Government's approach to individual liberties can be seen from the stateless person's case last year, *Al Kateb v Godwin*.<sup>43</sup> In the High Court the government contended vigorously, and successfully, that the Immigration Act empowered the minister to detain a stateless alien without charge or trial or accusation for the term of his natural life if the minister so chose. The High Court upheld the power by a 4:3 majority. Many Australians think, quite reasonably, that such decisions by executive governments are unconscionable but the government's attitude has serious implications for Australians in light of the anti-terrorism legislation.

The High Court can only deal with legislation as it finds it, and has no Bill of Rights to guide it. We have no Habeas Corpus Act. What is frightening is that an Australian Government in 2001 would want to cling to the power to keep an uncharged, untried and unaccused person in custody for the whole of his life by order of a minister of state.

The twentieth century was the most turbulent and dangerous in the history of the human race. How can the present crisis be any worse than those we lived through, requiring stronger and more repressive legislation than we have ever had, to guard against the Islamic peril?

As Kirby J put it to the ALR Commission National Security Conference on 12 March 2005:

If a world wide danger supported by a mass movement of convinced ideologies, sustained by one of the world's super powers, armed with nuclear and other weapons, could not destroy our security in the twentieth century we must keep in perspective the powers of those presently ranged against western democracies.

This is not a reason for complacency over national security or indifference to violence and risks of violence. But it is a reason for keeping our feet firmly planted on the Australian ground. We should never forget that, to the extent that we exaggerate the risks to national security we fall into the hands of those who threaten our constitutionalism. To the extent that their threats propel us into demolishing the fundamentals of our liberal democracy we reward the enemies of our form of government with success. To the extent that we overreact, we proffer the terrorists the greatest tribute.<sup>44</sup>

In his paper Kirby emphasised the enormous significance to free communities of the role of their courts, citing cases from South Africa, Israel,

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<sup>43</sup> *Al Kateb v Godwin* (2004) 208 ALR 124.

<sup>44</sup> Available at <[www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_12mar05.html](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_12mar05.html)>.

England, Indonesia and the United States where judges had acted independently to curb what they saw as executive or legislative excesses.

Australians cannot call in aid any constitutional guarantees of freedom from arbitrary detention if authorised by statute, as we saw in the immigration case of *Al Kateb*, where the majority in the High Court saw nothing unconstitutional in the indefinite — perhaps for life — imprisonment without charge of an immigrant who could not find another country to receive him. The approach of the majority in the High Court serves to underscore the deep scepticism, if not cynicism, we should all have about assurances that we are being looked after, that all will be well, that the government is protecting us, it has struck a balance between the protection of national security and individual freedom, etc, etc, etc.

In a paper published in 2003,<sup>45</sup> Professor Williams said:

It is significant that the ASIO Bill goes further than equivalent legislation in the UK, Canada and the USA. Only Australia has sought to legislate to authorise the detention in secret of non suspects . . .

The government's legal response to September 11 is some of the most important legislation ever introduced into the Federal Parliament.

Unfortunately, insufficient regard has been given to the need to balance the rule of law and human rights against our national security concerns. Without a Bill of Rights, Australia is now faced with an ASIO Bill that would not be out of place in former dictatorships such as General Pinochet's Chile. As the bipartisan Parliamentary Joint Committee unanimously found in May 2002 the ASIO Bill would undermine key legal rights and erode the civil liberties that makes Australia a leading democracy.

As to lawyers, if I may quote a part of Kirby J's 2005 paper on the independence of the legal profession, which is in fact a quotation from a paper by Matt Waldman:<sup>46</sup>

The legal profession needs to be on its guard against pressure for judges and lawyers to interpret the law in the government's favour, to secure convictions or to uphold administrative detentions, to refrain from challenging the constitutionality of questionable legislation; to accept evidence obtained in dubious circumstances or where its reliability or provenance is unsound; to adjust the burden of proof against the subject and to accept curtailed abbreviated or expedited judicial procedures.

Kirby J went on to say the challenge for the judiciary and the legal profession is, with constitutionally aided laws, to continue insisting upon the application of the rule of law and the protection of civil liberties, even in circumstances of heightened security concerns.

Our government earnestly exhorts us to be alert but not alarmed. As a prescription for daily life it is an impeccable guide; so obvious that it did not need articulating. But the advice scarcely bespeaks a society so driven by fear of terrorist attack that it is prepared to cede its right to privacy and freedom from arbitrary imprisonment to either a government or its secret intelligence agencies. In my view it is an exceedingly doubtful argument that sweeping

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45 'National Security, Terrorism and Bills of Rights' (2003) 9(1) *AJHR* 263.

46 Law Council of Australia's Conference, 20 March 2005, Gold Coast (quoting M Waldman, 'The Judiciary after September 11' in *Access to justice in a changing world: collection of papers from judicial colloquium*, 6–8 August 2004, Suva, pp 14–15).

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powers are required because they just may be needed; that line of reasoning would justify the most diabolical of repressive laws.

I may be alert to the possibility of criminal behaviour in others. I am thoroughly alarmed at my country's policies in its attempt to make itself look tough on terrorism.