Att: Julie Bennett * URGENT **

THIS IS A DRAFT ONLY

Was due to be published after editing but in view of Cmttee timeline sent in advance.

THE IMPACT OF THE LAW AND SOCIAL POLICY ON THE COMMUNITY: CURRENT & PROPOSED TERROR LEGISLATION

*Australia's Terrorism Laws: "The only thing we have to fear is fear itself"**

A Joint Discussion Paper of La Trobe Law

And the West Heidelberg Community Legal Service

November, 2005

This Report was authored by La Trobe Law Students, Elise Meredith, Diana Nedelkovska, Vjaalini Ravendran, and Emily Shoales as part of their clinical placement at the West Heidelberg Community Legal Service. It was edited and supervised by Liz Curran, Lecturer in Law and Student Clinical Legal Education Supervising Solicitor. This component of the course was introduced in July 2002 to encourage teamwork and to enhance opportunities for students to engage in the law making process and public policy. Students determine their topics in consultation with the legal service and their lecturer after determining matters of concern arising from their case-work whilst on placement at the legal service or arising from associated problems they identify as relevant to members of the West Heidelberg community and the community more broadly

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Fax: SENATE LEGAL & CONSTITUTIONAL COMMITTEE.

From Liz Curran, LaTrobe Law / West Heidelberg City Legal Service

* Franklin Delano Roosevelt (4th March, 1933)

** Cathy Wilcox, Cartoonist Allan Muir, 'The new face of national security'

Executive Summary

Chapter 1

Chapter 1 provides an overview of the role of the rule of law and human rights in relation to the terrorism legislation. The chapter focuses on the legislation's potential to encroach upon the right to silence/ privilege against self-incrimination, freedom of association, right to a fair trial, right to liberty and security of the person, the right not to be unlawfully detained and the right to freedom of political communication.

Chapter 2

Chapter 2 is divided into two parts. Part A looks at how the questioning & detention powers under Division 3 Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (*'ASIO Act'*) impact upon the core tenets of the Criminal Law which protect fundamental human rights. These fundamental human rights are considered under both the federal criminal law & a comparison is made to the *ASIO Act 1979*. Part B then evaluates the necessity & justification for the introduction of Division 3 Part III of the *ASIO Act* to combat terrorism.

Chapter 3

Chapter 3 centres on the laws of two nations- Britain and Australia. The first section focuses on the history of Britain's experiences with terrorism and the legislative changes it has made to encounter these. The second section focuses on Britain's relationship with the UN, whilst the third section delves into court proceedings, the role of a lawyer and the rights of detainees. The focus then shifts to Australia and its terrorism laws. The final section mentions some proposed laws in both countries. The chapter essentially argues that terrorism needs to be addressed but not through such draconian measures.

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Chapter 4

Chapter 4 is divided into two parts: Part A looks at how the questioning and detention powers given to ASIO under the *Australian Security Intelligence Organisation Act 1979* as amended impinge upon the rights of all citizens in Australia. It provides scenarios of how these laws would work in practice. Part B then discusses the disproportionate impact these laws have on the Muslim community in Australia, and how discrimination against this community is dividing our nation.

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CHAPTER 1
The Rule of Law and Human Rights: What Price Freedom?

Elise Meredith

Methodology

The method undertaken for the purpose of reviewing the terrorism legislation involved, conducting interviews with identified experts within the field and a literature review. A condition of University Ethics Approval for this project was that all interviewee details remain confidential.

Introduction

On September 11th 2001 the western world changed. When the planes hijacked by terrorists crashed into the Twin Towers, people watched in horror and disbelief. Later there were similar atrocities in Bali, Spain and London. The world had changed; and these are tumultuous times. The government rushed a spate of legislation through Parliament, marking the 'biggest changes to Australia's security laws since World War II.'[1] The newly enacted and currently proposed legislation grants ASIO exceptional powers, many of which continue to be the subject of much debate and criticism from both the legal and non-legal arenas. Whilst proponents of the legislation advocate its necessity, many others have denounced the legislation as draconian, arguing it erodes our fundamental human rights and civil liberties, values that lie at the foundation of democracy; the very same values terrorists seek to destroy.

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Terrorism throughout History

Terrorism did not begin on the 11th September 2001, although for many Australians it may have been, or at least marked the beginning of events that resulted in the 'first time that terrorism had in some way affected their lives and the lives of people around them.'[2] It is not a novel twenty-first century concept, nor is it exclusive to the Eastern world. Terrorism has existed since the beginning of time; 'it is as old as the human race.'[3] From the Crusaders in Britain fighting Islam in the Middle Ages, the Spanish Inquisition, the Irish Republican Army and Protestants in Northern Ireland, to the Chechnians fighting for independence. From the struggle for freedom in the Philippines, to the Basques in Spain, the Tamil Tigers in Sri Lanka, the Belgians in the Congo, the Portuguese and Spaniards in Central and South America, the Red Army and the Red Brigades in Germany and Italy; to the African National Congress. This list is not exhaustive and is often highly contentious. Before they became known

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[1] Patrick Walters, 'Why you won't be locked up' *Weekend Inquirer: The Weekend Australian*, 22 October 2005, 19.
[2] Megan Davis, *Hot Topics : Legal Issues in Plain Language 42 Terrorism* (2002), 5.
[3] Malcolm Fraser, "How Democracies Fight Terrorism" Stephen Murray-Smith Memorial Lecture State Library of Victoria, 19 October 2005.

as terrorists many were labelled as freedom fighters, before that, communists or the other way around.[4]

All believed in a cause, whether motivated by religious, political, national or social ideologies. Despite the differences in their agendas, all were fundamentalist in these beliefs. Yet their label depended solely on who was in a position of power to classify them and the political climate at the time.

'Terrorism': A Political Concept

Terrorism is a complex and highly political issue. The ability to classify a group of people as 'terrorists' or label an event as a 'terrorist act' is sometimes derived from a classification made by those in positions of power. Governments perceive terrorists as those whose ideals, whether religious or political, differ from their own. Hilary Charlesworth acknowledges that the word 'terrorism can very easily be used in an omnibus way to mean any activities that we do not approve of, or the activities associated with particular cultures and religions.'[5]

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The Rule of Law

Fundamental to western democratic order, more than two thousand years ago Aristotle proclaimed 'the rule of law is better than that of any individual.'[6] Dicey maintained the rule of law has three main facets; 'that the courts and not the executive determine the legal rights of individual citizens, that the courts protect against the arbitrary exercise of coercive power by the executive and that all persons are equal before the law.'[7] By restraining the exercise of arbitrary power, the rule of law promotes and protects justice and individual liberty; values deeply entrenched and held to be virtuous in democratic societies. However the rule of law is not without its limitations. As Joseph Raz acknowledged, 'the rule of law is not the rule of good law'[8] as it is entirely compatible with 'a non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities and religious persecution.'[9]

Given its political nature, Dyzenhaus acknowledges the appropriate response to terrorism 'is often thought to be a response outside, or largely outside, of the rule of law'[10] and as such, 'the rule of law has no or little purchase when it comes to issues of national security.'[11] Despite this, Justice Kirby has acknowledged that throughout

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[4] Ibid.
[5] Hilary Charlesworth 'Is the War on Terror Compatible with Human Rights? An International Law Perspective' Paper presented at the Castan Centre for Human Rights Law Conference, 4 December 2003.
[6] Mark Cooray, 'The Rule of Law', <www.ourcivilisation.com/cooray/btof/index18.htm> (12/10/05).
[7] Hamish Forsyth and Alison Todd, 'The Rule of Law, Human Rights and the Common Law: Addressing New Challenges' (2003) 9 *Canterbury Law Review* 323.
[8] Joo-Cheong Tham, 'ASIO and the rule of law' (2002) 27(5) *Alternative Law Journal* 217.
[9] Ibid.
[10] David Dyzenhaus, 'Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security' (2003) 28 *Australian Journal of Legal Philosophy* 3.
[11] Ibid.

history the countries that have most effectively combated terrorism 'are those that have kept their cool, retained a sense of proportion, questioned and addressed the causes, and adhered steadfastly to constitutionalism.'[12] In expressing concern at its prospect of becoming merely 'empty rhetoric'[13], Kerr maintains without respect for the rule of law, our civil liberties will be eroded and we 'will be forced to choose between increasingly authoritarian and repressive governments and their radical opponents. Ironically, that is what the terrorists are counting on.'[14]

Commenting on its relationship with the rule of law, Davidson asserts the 'anti-terrorism laws violate the most fundamental tenets of the rule of law ... which are essential characteristics of a free and democratic society.'[15] Justice Kirby emphasises its integral role to the legislation through his assertion 'to preserve liberty, we must preserve the rule of law. That is our justification and our challenge.'[16] Our legal system prides itself upon its development of procedural fairness guarantees, within the realm of the rule of law. The current and proposed terrorism legislation raises valid concerns that government will abandon these well developed processes, and in doing so, relinquish democratic values. As Niemann articulates;

> 'it has taken centuries to develop procedural fairness guarantees; we should be very slow to abandon them, notwithstanding the horrific consequences of terrorism. If we throw them away when under pressure (arguably the most important time for them to be applied), we risk descending to the same level as the terrorists themselves.'[17]

The United Nations

In the aftermath of the atrocities of the Second World War, the leaders of the major states formed the United Nations in an attempt 'to reaffirm faith in fundamental human rights ... [and] maintain international peace and security.'[18] The Universal Declaration of Human Rights was formed in 1948, with subsequent protocols and conventions that followed. *The International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (CESCR), both adopted in 1966 sought to provide greater protection for citizens within a human rights framework. The establishment of the International Criminal Court in 2001 further demonstrates the ongoing development of such protection mechanisms in the Twenty-First Century.

In acknowledging the realities of terrorism, UN Secretary-General Kofi Annan has stated 'terrorism is a threat to all that the UN stands for' and concedes that the threat

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[12] The Hon Justice Michael Kirby, 'Australian Law – After September 11, 2001' Law Council of Australia 32nd Australian Legal Convention Canberra, 11 October 2001, <www.hcourt.gov.au> (10/10/05).
[13] The Hon Duncan Kerr MP, 'Australia's Legislative Response to Terrorism Strengthening Arbitrary Executive Power at the Expense of the Rule of Law' (2004) 29 (3) *Alternative Law Journal* 134.
[14] Ibid.
[15] Kenneth Davidson, 'It's politicians not terrorists who are a clear and present danger' *The Age* 22nd October 2005.
[16] The Hon Justice Michael Kirby, above n 12.
[17] Grant Neimann, 'Terrorism and the Rule of Law' (2002) 24(11) *Bulletin* 18.
[18] *Charter of the United Nations 1945* Article 1.

'has grown more urgent in the last five years.'[19] However, under human rights law, rights and freedoms may be only restricted, by limitation or derogation, in certain conditions.

Article 4(1) of the ICCPR provides that:

> 'in times of public emergency which threatens the life of the nation ... [governments] ... may take measures derogating from their obligations under the ... Covenant to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'[20]

Given that Australia has not experienced a major terrorist attack, many commentators question whether the current threat of terrorism, whether perceived or genuine, constitutes a public emergency threatening the life of the nation.

Apart from derogation under certain conditions; Article 4 of the ICCPR and articles 12, 17, 18 and 22 of the CESCR permit the limitation of some rights by law for legitimate purposes. These include promoting general welfare, public security, order, health or public morality in a democratic society, or to secure the rights and freedoms of others.[21] The abovementioned obligations, fundamental human rights, some quite specific and absolute, which the government is not permitted to limit or derogate from under the Covenants, have been at the centre of the terrorism debate.

Human Rights

Human rights are universally agreed upon and minimum standards accepted by the international community as belonging to all citizens. Considered to be universal and inalienable, they are implemented through UN conventions or covenants. Australia is a party to all six major UN human rights treaties: the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Convention Against Torture and the Convention on the Rights of the Child*.[22] Member states are legally obligated to ensure their domestic laws and practices comply with the standards protected by the treaties, however, it is widely acknowledged that 'Australia's record in implementing these treaties is far from perfect.'[23]

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[19] Kofi Annan, <www.un.org> (15/10/05).
[20] Petro Georgiou MP, "Terrorism and Civil Liberties" Speech to New South Wales Council for Civil Liberties, 21 October 2005
[21] George Williams and Ben Saul, 'Review of Division 3 Part III of the ASIO Act 1979 – Questioning and Detention Powers' (2005) Gilbert and Tobin Centre of Public Law, 2.
[22] Elizabeth Evatt 'Australia's Performance in Human Rights' (2001) 26(1) *Alternative Law Journal* 11
[23] Ibid.

Liberal MP Petro Georgiou maintains that 'terrorist challenges are properly characterised as threats to fundamental human rights and freedoms.'[24] In reference to their validity and necessity, judicial commentary on the legislation demonstrates a deep concern about Australia abrogating from its human rights obligations. Former Chief Justice Sir Gerard Brennan has asserted that 'laws impairing rights and freedoms cannot be justified unless they are shown to be needed to target an identifiable, present danger to the community.'[25] Justice Kirby further strengthens this view through his statement that 'every erosion of liberty must be thoroughly justified.'[26] Elizabeth Evatt, former chief justice of the Australian Family Court and former member of the United Nations Committee on Economic, Social, and Cultural Rights, goes even further to say that 'these laws are striking at the most fundamental freedoms in our democracy in a most draconian way.'[27] Defending the civil liberties of all Australians, former Liberal Prime Minister Malcolm Fraser vehemently maintains 'these are powers whose breadth and arbitrary nature, with lack of judicial oversight, should not exist in any democratic country.'[28]

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Conversely, former chief justice Anthony Mason concedes 'some limitation or suspension of individual rights is necessary in order to meet the threat of terrorism.'[29] However, he acknowledges that 'it is of fundamental importance that any intrusion into traditional rights is proportionate to the threat which is apprehended, does not involve the grant of powers that may be used for other purposes and is subject to effective supervision by the courts.'[30] Furthermore some academics contend civil liberties and human rights are merely political conveniences enjoyed by citizens in times of peace and should not 'constitute yardsticks for government in times of emergency and national danger.'[31] However this argument does not hold much weight in the context of International law and Australia's human rights obligations under the United Nations. Attorney-General Philip Ruddock maintains 'to preserve civil liberties, Australia's response to the threat of terrorism must strive towards the twin goals of security *and* justice. Rather than *balance* one *against* the other it must achieve both goals.'[32] Whilst former ASIO boss Dennis Richardson argues the legislation's necessity lies in the fact that 'we have often been too slow and counter-terrorism is not a game in which it pays to only act when you can see the whites of their eyes.'[33]

Lacking in both political and legal force, the government's capacity to protect human rights in the climate of terrorism has been regarded as 'limited and indeed

[24] Georgiou, above n 20.
[25] Michael Pell, Tony Stephens and Marian Wilkinson, 'Former leaders call for debate' *Sydney Morning Herald*, October 25th 2005.
[26] The Hon Justice Michael Kirby, above n 12.
[27] Pell, Stephens and Wilkinson, above n 25.
[28] Malcolm Fraser, above n 3.
[29] Patrick Walters, above n 24.
[30] Ibid.
[31] Christopher Michaelsen 'Counterterrorism and the Misleading Rhetoric about Balancing Liberty against Security' *Security and Defence Studies Centre Australian National University* 2.
[32] Philip Ruddock 'A New Framework: Counter-Terrorism and the Rule of Law' (2004) 16.2 *The Sydney Papers* 117.
[33] Patrick Walters, above n 1, 24.

insufficient.'[34] An expert interviewed for this discussion paper, attributed the ineffectiveness of human rights in relation to the terrorism legislation to the fact that Australia does not have a Bill of Rights.[35] As Professor George Williams maintains, 'unlike every other democratic nation, Australia must search for answers to fundamental questions about civil liberties and national security without the benefit of a Bill of Rights.'[36] The human rights and common law framework which operate in Australia include concepts such as the right to silence, the privilege against self-incrimination, freedom of association, right to a fair trial, right to liberty and security of the person, the right not to be unlawfully detained and the right to freedom of political communication.

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Right to Silence and the Privilege against self-incrimination

The right to silence is seen as an inherent element of a fair trial and has been recognised as an individual right by the Federal Executive, the High Court and the Victorian Court of Appeal.[37] In *Petty v Maiden* Chief Justice Mason expressed the nature of this right:

> 'a person who believes on reasonable grounds that he or she is expected of having been a party to an offence is entitled to remain silent when questioned or asked simply to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the role which they played.'[38]

Although it has been the subject of much controversy since its inception, the right to silence is regarded as central to our accusatorial system of criminal justice and as such there is much merit in the argument that it 'deserves to be vigorously protected by both the judiciary and the legislature.'[39] The right to silence emerged from the inequality of resources that the State and Police can put against an individual and this has been the reason for this age old protection for individual citizens. With the significant increases in police and State power under current and proposed Terror Laws significant debate around the loss of these protection should occur so that the implications are well understood. Commenting on the powers of the police to revoke a detainees right to silence under the terrorism legislation, Professor Mirko Bagaric from Deakin Law School asserted that 'the Government is right to abolish the right to silence and the privilege against self-incrimination … It is hardly asking too much of people, under threat of imprisonment if they refuse to answer questions, to given an account of their actions.'[40] However, given its inextricable link to the presumption of innocence and the burden of proof, revocation of this right could potentially render the entire notion of due process before the law obsolete

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[34] George Williams, "Balancing National Security and Human Rights: Lessons from Australia" Fullbright Public Lecture Speech, University of Melbourne, 21 June 2005, <www.apo.org.au> (10/10/05).
[35] Interview with expert, 12th October 2005.
[36] George Williams, above n 34.
[37] Simon Matters, 'Anything You Don't Say May be Given In Evidence: Protecting The Interests Of Justice Or Emasculating A Fundamental Right?' (1997/1998) 4 *Deakin Law Review* 50.
[38] *Petty v Maiden* (102) ALR 129, at 130.
[39] Matters, above n 37.
[40] Herald Sun, 15th July 2005.

Freedom of Association

The right to freedom of association is recognised under article 22 of the ICCPR which states, inter alia:

> 'everyone shall have the right to freedom of association with others ... no restrictions may be placed on the exercise of this right other than those which are proscribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.'[41]

However, freedom of association is not an absolute right, it may be limited by proportionate or necessary measures that are prescribed by law and designed to achieve 'the protection of public safety, public order and national security.'[42] It is on these grounds that proponents of the terrorism legislation both justify and qualify its necessity. It remains unclear whether the High Court recognises freedom of association as an implied right. The issue was debated in *Kruger v Commonwealth*[43] where three justices recognised the freedom and three remained unconvinced of its validity.

Right to a Fair Trial

The right to a fair trial is engrained in our legal system. The court examined the notion of a 'fair trial' in *Jago* where Chief Justice Mason held 'it is an entrenched right, which is not only manifested in rules of law and practice, but a right which extended to the whole course of the criminal process.'[44] However, Dawson and McHugh JJ found in *Kruger v Commonwealth* that the Constitution does not guarantee due process of the law, thus whether a constitutional right to a fair trial exists remains unclear.[45]

The concern that the terrorism legislation encroaches upon the right to a fair trial has been addressed by the House of Lords through their statement that 'there is something distasteful about a process which begins by convicting someone and then proceeds to inquire whether there is a case against them.'[46] Such concerns have also been expressed within Australia following the enactment of our terrorism laws. However, as few people have been tried under the new laws, their impact upon a citizen's right to a fair trial is yet to be determined.[47]

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[41] ICCPR, article 22.
[42] Sarah Joseph, 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' (2004) 27(2) *University of New South Wales Law Journal* 437.
[43] 190 CLR 1.
[44] Liz Curran, 'Real Justice or Just Justice? The Retreat From Fundamental Legal Protections' Occasional Paper no 4 (1998) *Catholic Commission for Justice, Development and Peace Melbourne*, 3.
[45] (1997) 71 CLR 991.
[46] Jude McCulloch, 'War At Home National Security Arrangements post 11 September 2001' (2002) 27(2) *Alternative Law Journal* 88.
[47] Interview with expert, 27th October 2005.

Right to Liberty and Security of the Person

Benjamin Franklin once said 'those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.'[48]

The right to liberty and security of the person is affirmed through article 9(1) of the ICCPR. Many commentators have expressed concerns that provisions of the terrorism legislation threaten this right, particularly through preventative detention measures. Central to the debate in relation to this fundamental right, Michaelsen questions 'whether a diminution of liberty actually enhances security or whether we are trading off civil liberties for purely symbolic gains and psychological comfort.'[49]

Right not to be unlawfully detained

Article 9(1) of the ICCPR states 'no one shall be subjected to arbitrary arrest or detention.' This right is further extrapolated by articles 9(2), (3) and (4) which affirm that:

> Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of judgment. And anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Furthermore, article 10(1) of the ICCPR maintains 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' Despite Australia's human rights law obligations towards the right not to be unlawfully detained, Justice McHugh held in the recent *Al Kateb* decision in 2004 that 'it is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to human rights.'[50] As such, inconsistencies exist to the extent that this right should be upheld by the courts.

Right to Freedom of Political Communication

The High Court unanimously introduced an implied freedom of political communication in *Australian Capital Territory v Commonwealth*[51] and *Nationwide News v Wills*[52] in 1992. However it was not until *Lange v Australian Broadcasting*

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[48] Kerr, above n 13, 1.
[49] Michaelsen, above n 31, 17.
[50] 208 ALR 124.
[51] 177 CLR 106.
[52] 177 CLR 1.

Corporation[53] in 1997 that the High Court clarified the nature of its scope, content and limits. In *Lange* the High Court adopted a two-tier test that questioned whether a law burdens political communication and if so, whether that burden is a justifiable limit upon the freedom of political communication.[54] However, in *ACT* Mason CJ stated that 'the concept of freedom of communication is not an absolute. The guarantee does not postulate that the freedom must always and necessarily prevail over competing interests of the public.'[55] Given its lack of clarity, this implied right is utilised in arguments by both advocates and opponents of the terrorism legislation.

Conclusion

At the moment, the simultaneous curtailing of the right to silence, the privilege against self incrimination, freedom of association, the right to a fair trial, the right to security of person, the right not to be unlawfully detained, the right to freedom of political expression undermines the Rule of Law, diminishes human rights and makes it harder for the innocent person to assert their case when faced with the substantially increased powers of the State. In addition to this culmination of the loss of traditional rights, the current and proposed terror laws and National Security of Information legislation adds a shroud of secrecy. (See Chapter Two)

The government's challenge lies in their ability to balance counterterrorism measures with respect for the rule of law and the human rights of all Australians.[56] Whether this is plausible or not remains unknown, only time will tell. However, as one expert interviewed acknowledged, it will take wise leadership, above everything else, to achieve this.[57] In reviewing Australia's current and proposed terrorism legislation, the limitations of this faceless 'war on terror' must be acknowledged. As Professor George William concedes, 'any attempt to 'balance' of national security and human rights is hampered by the fact that we do not possess knowledge of the threat that Australia actually faces.'[58] UN Secretary-General Kofi Annan has stated, 'if we compromise on human rights in seeking to fight terrorism, we hand terrorists a victory they cannot achieve on their own.'[59] In examining the role of the rule of law and human rights in relation to the terrorism legislation, this chapter questioned the extent to which freedom would cost us as a society through asking what price freedom? In the eloquent words of the Honourable Malcolm Fraser, 'if we stand silent in the face of discrimination and in violation of the basic principles of humanity, then we betray our own principles and our way of life.'[60] And that is an enormous price to pay.

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[53] 189 CLR 520.
[54] Ibid.
[55] *Australian Capital Territory v Commonwealth* 177 CLR 106 at 142.
[56] Megan Davis, above n 2, 17.
[57] Interview with expert, 12th October 2005.
[58] George Williams, above n 34.
[59] Sarah Joseph, above n 42, 429.
[60] Malcolm Fraser, above n 3.

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International Covenant on Civil and Political Rights (1966) Article 22

CHAPTER 2:
ASIO's Detention and Questioning Powers –Necessarily Violating Criminal Law Principles?
Diana Nedelkovska

Introduction

In the wake of the attacks in New York and Washington D.C. on September 11, 2001, a new rhetoric prevails: "We live in extraordinary times, which demand extraordinary laws." Following the London bombings in July this year, this view has compounded exponentially, and seems to be dominating our legislatures. But is this really the case? The most significant 'terrorist' attack in Australia was the Sydney Hilton Hotel bombing in 1978. In the absence of such attacks in Australia are such unusual measures, which abridge fundamental human rights and significantly expand the power of the State necessary?[1] Is terrorism so conceptually different to other criminal acts that our criminal law will no longer suffice?

The new counter-terrorism measures are premised upon three platforms:[2]

i) The introduction of a range of 'terrorism' offences into the Commonwealth Criminal Code[3];
ii) The conferral of power upon the Government to ban 'terrorist' organisations[4];
iii) The increase in executive power to compulsorily question and detain persons suspected of having information relating to a 'terrorism' offence.[5]

The ensuing discussion focuses on the third platform. In particular, it will focus on the Australian Security Intelligence Organisation's ('ASIO') detention and questioning powers and how they impact upon traditional criminal law principles and proceedings. The author then goes on to evaluate the necessity and justification of such measures.

Part A: The ASIO Act: Eradicating Fundamental Criminal Law Concepts and Human Rights

Traditional criminal law, that is, the criminal law applicable to non-terrorism offences, has assimilated into it a number of core principles to ensure that the fundamental human rights of suspects are preserved. This is of particular significance in relation to the detention and questioning of suspects, as is the right to liberty.

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[1] Simon Bronitt, 'Australia's Legal Response to Terrorism: Neither Novel Nor Extraordinary?' (Paper presented at the Castan Centre for Human Rights Law Conference "Human Rights 2003: The Year in Review", CUB Malthouse Melbourne, 4 December 2004), p1
[2] Joo-Cheong Tham Submission to Inquiry into the provisions of the Anti-Terrorism Bill 2004 (Cth), 16 April 2004
[3] *Criminal Code Act* 1995 (Cth) (as amended)
[4] *Charter of the United Nations Act 1945* (Cth) and the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth)
[5] *Australian Security Intelligence Organisation Act 1979* (Cth) Division 3, Part III

Division 3, Part III of the *ASIO Act*, which confers upon ASIO special powers relating to terrorism offences, has essentially eroded some of these principles, and thereby violated some of the human rights standards Australia has signed onto in an international arena and the common law rights discussed in Chapter One.

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Detention

Right to Liberty and Security of the Person[6]

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The criminal justice system authorises the detention of a person only if they are reasonably suspected of having committed a crime.[8] Gaudron J in the case of *Michaels*[9] *'...freedom is the fundamental liberty, and therefore will not be taken away without just cause...'* 'Crime' refers to a criminal act, or intention to commit a criminal act advanced by explicit acts of preparation. Detention for the purpose of police interrogation is also permitted, and is typically conducted under strict controls and judicial supervision. In either instance, within a reasonable time the accused must be brought before a court to pass judgment on his/her guilt or innocence in relation to the alleged offence.[10] If convicted, the offender may be imprisoned for a further specified period, after which, she or he is released, having endured their sanction. Therefore, the purpose of detention under the criminal law is ostensibly punitive in nature[11].

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ASIO's power to detain is contained in s34F of the *ASIO Act*. Unlike detention for non-terrorism offences, detention by ASIO need not have the purpose of charging and prosecuting the detainee for a criminal offence, thus person may be detained if they are thought to 'pose a threat to State security', even if she or he is not guilty of any wrongdoing.[12]

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The chief concern in detention by ASIO is therefore to prevent the commission of 'terrorist acts' by persons other than the detainee.[13] This reflects a precautionary rather than punitive objective, which conspicuously infringes the freedom from arbitrary arrest. '...one must assert the primacy of the prosecution and trial process. Punishment occurs at the end of that process not at the start.'[14]

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[6] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 3 January 1976), Art. 9(1); *Universal Declaration of Human Rights 1948*

[7] *Crimes Act 1914* (Cth) ("Crimes Act") s23C and s23D

[8] *Michaels (1995)* 184 CLR 117 –per Gaudron J

[9] *Crimes Act 1914* (Cth) s23C(3)

[10] Administrative Law and Human Rights Section, Law Institute of Victoria Submission on the Review of Division 3 Part III of the *ASIO Act 1979* –Questioning and Detention Powers, 24 March 2005, p6

[11] Ibid, p8

[12] Ibid, p7

[13] Gary Sullivan, 'ASIO and the Justice System 'The sky is falling! The sky is falling!' (Paper Presented at the National Conference of Community Legal Centres, Canberra, 8 October 2005), p7

Questioning

Police questioning under the criminal law is typically based on a reasonable belief that the suspect has committed a criminal offence.[15] The accused must be cautioned as to his/her right to silence prior to questioning,[16] (see Chapter One) and must also be afforded the right to communicate with a friend, relative and with a lawyer,[17] with a deferral of questioning to allow the accused to exercise this right.[18]

By stark contrast, the defining feature of the *ASIO Act* is the unprecedented conferral of power upon ASIO to detain non-suspects, whereby a warrant for questioning is issued if the issuing authority is satisfied on reasonable grounds that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.[19] Once again, this is so notwithstanding the absence of any criminal conduct,[20] which represents an incursion upon yet another fundamental facet of our justice system: that Australians cannot be detained without proper judicial process.[21]

Duration of questioning

For investigations into serious, non-terrorist federal offences, an accused may be questioned for 4 hours[22] (or 2 hours for minors or indigenous persons).[23] This period may be extended only once for up to 8 hours to reach a maximum of 12 hours detention.[24] In determining the length of questioning, investigators must take into consideration a number of factors, including the complexity of the matters under investigation[25] and earlier investigation periods.[26] Moreover, the Commonwealth *Crimes Act* mandates that, having regard to all the circumstances, the investigative period must end at a 'reasonable' time after arrest.[27] This is indicative of the prescribed maximum investigation period operating as an outer limit, on the presumption that questioning will terminate as soon as practicable prior to this time[28] and the prosecution bearing the onus of proving the reasonableness of duration of questioning.[29]

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[15] Administrative Law and Human Rights Section, Law Institute of Victoria, n10 above, p6
[16] *Crimes Act 1914* (Cth) s23F
[17] *Crimes Act 1914* (Cth) s23G(1)
[18] *Crimes Act 1914* (Cth) s23G(2)
[19] *Australian Security Intelligence Organisation Act 1979* (Cth) s34D(1)
[20] Andrew Palmer, 'Investigating and Prosecuting Terrorism: The Counter-Terrorism Legislation and the Law of Evidence' (2004) 27(2) *University of New South Wales Law Journal* 373, 375
[21] Megan Davis, *Hot Topic 42: Terrorism* (2002) *Legal Issues in Plain Language*, p18
[22] *Crimes Act 1914* (Cth) s23C(4)(b)
[23] *Crimes Act 1914* (Cth) s23C(4)(a)
[24] *Crimes Act 1914* (Cth) s23D(5)
[25] *Crimes Act 1914* (Cth) s23C(5)
[26] *Crimes Act 1914* (Cth) s23C(6)
[27] *Crimes Act 1914* (Cth) s23CA(4)
[28] George Williams, Anthony Mason and Ben Saul, 'Review of Division 3 Part III of the ASIO Act 1979 Questioning and Detention Powers' (2005) *Gilbert and Tobin Centre of Public Law*, p6
[29] *Crimes Act 1914* (Cth) s23W

The length of questioning for terrorism offences is the same as that for serious non-terrorist federal offences.[30] The difference lies in the fact that for terrorism offences, the period may be extended 'any number of times' for up to an additional 20 hours to reach a maximum of 24 hours detention[31] (or 48 hours with an interpreter).[32] However, this investigative period may be spread over a period of up to 168 hours (7 full days),[33] which is at odds with the requirement that questioning be conducted properly and without delay.[34] If the proposed changes become law –a person could be detained for *14 days* even though they have done nothing wrong.

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Additionally, notwithstanding that the maximum investigation period operating at an outer limit under the *Crimes Act*,[35] no such presumption is contained within the *ASIO Act*. They may encourage exploitation of the maximum time limit without any regard to reasonableness of the length of interrogation.[36] If a maximum of 24 hours of questioning is presumed to be adequate, why is that ASIO has the power to detain people for an entire week?[37] Police have unofficially stated that the most effective and reliable information is often gained within the first twenty - four hours of questioning.

Presumption of Innocence[38]

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The cherished presumption of innocence has traditionally been protected by placing the evidentiary burden on the prosecution to prove that the accused committed the alleged offence.[39]

The *ASIO Act* reverses this position, and requires that the detainee bear the onus of proving that they do not have the information[40] or the record or thing[41] being sought. If she or he fails to discharge this onus, the consequence is a strict liability penalty of 5 years imprisonment for not providing the information[42] or not producing the thing.[43]

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Nonetheless, the reversal of the evidentiary burden is not what makes these offences unusual. For defences that are not a pure denial of the elements of the relevant offence,

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[30] *Crimes Act 1914* (Cth) s23CA
[31] *Crimes Act 1914* (Cth) s23DA(7)
[32] *Australian Security Intelligence Organisation Act 1979* (Cth) s34HB(11)
[33] *Australian Security Intelligence Organisation Act 1979* (Cth) s34HC
[34] *Australian Security Intelligence Organisation Act 1979* (Cth) s34HB
[35] *Crimes Act 1914* (Cth) s23CA(4)
[36] George Williams, Anthony Mason and Ben Saul, n27 above, p6
[37] Andrew Palmer, n19 above, 377
[38] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 3 January 1976), Art. 14(2), *Universal Declaration of Human Rights 1948, Art. 11*
[39] *Crimes Act 1914* (Cth) s23W
[40] *Australian Security Intelligence Organisation Act 1979* (Cth) s34G(4)
[41] *Australian Security Intelligence Organisation Act 1979* (Cth) s34G(7)
[42] *Australian Security Intelligence Organisation Act 1979* (Cth) s34G(3)
[43] *Australian Security Intelligence Organisation Act 1979* (Cth) s34G(5)

but involve an allegation of additional exculpatory fact, such as self-defence, it is quite normal for the evidentiary burden of proof to rest with the defence. Rather, what instigates the cause for concern is the relatively minimal fault elements required. For example, for an accused under prosecution for murder, only once the prosecution establishes the fact that the accused actually killed the victim does his/her evidential burden in relation to self-defence becomes an issue. If this occurs, the onus shifts onto the defence to lead evidence to show why the killing was not unlawful in the circumstances.[44]

Conversely, when someone detained the *ASIO Act*[45] does not know something, the onus of leading evidence to support a defence emanates from the fact that the accused was asked to provide information and failed to do so. Consequently, there may be nothing in the circumstances to indicate that the accused was ever in possession of the relevant information, thereby eliminating any call for explanation. The accused is essentially denying the core elements of the offence.[46]

In view of the fact that it may be virtually impossible to discharge the onus and the severity of the sanction, the reversal of the onus of proof is ominously unjust. As recently articulated by the Honourable Malcolm Fraser, 'How do you prove you do not have something that you do not know even exists'.[47]

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'You have the right to remain silent'

The right to silence is often raised in a melodramatic fashion in television dramas, but the right to silence is not just a superfluous catchy line uttered on the silver screen – it is a critical component of the justice system, and is duly protected by the *Crimes Act*.[48]

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Nonetheless, it has been accepted that the right to silence is not absolute, but that it may be justifiably abrogated in limited circumstances where another right – the privilege against self-incrimination, which enables a person to be granted immunity in return for providing valuable information, is preserved.[49] (See discussion in Chapter One).

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In addition, whilst s23S protects the right to silence, it also qualifies the right as subject to statutory requirements to answer questions.[50] The right to silence is specifically removed by sections 34D and 34G of the *ASIO Act*. The new laws expressly criminalise the withholding of information[51], and the failure to produce an item.[52] The privilege against self-incrimination is removed in a similar fashion.[53]

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[44] Andrew Palmer, n19 above, 380
[45] *Australian Security Intelligence Organisation Act 1979* (Cth) s34G
[46] Andrew Palmer, n19 above, 380
[47] The Rt. Hon. Malcolm Fraser AC CH, 'How Democracies Fight Terrorism' (Speech delivered at the Stephen Murray-Smith Memorial Lecture, State Library of Victoria, 19 October 2005)
[48] *Crimes Act 1914* (Cth) s23S
[49] George Williams, Anthony Mason and Ben Saul, n27 above, p7
[50] *Crimes Act 1914* (Cth) s23S(b)
[51] *Australian Security Intelligence Organisation Act 1979* (Cth) s34G(3)

Defences to the above offences are available if the detainee can show that she or he did not possess the relevant information[54] or item[55] sought by ASIO, thereby making the detainee rather than the prosecutor (as in normal criminal proceedings) bear the evidentiary burden. One expert interviewee interviewed for this project described this as 'legalised bullying.'[56]

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'Anything you say can and will be used against you in a court of law'

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The legislation is cloaked with secrecy on the premise that it deals with issues of national security. The implications of such secrecy surrounding persons detained for up to 168 hours, and for two years[57] subsequent to their release, are that the person may only disclose their share their experience to their lawyers or certain authorities, and not to their family and friends. It has been argued that such secrecy provisions encourage lawlessness as it results in a significant diminution of public discussion. It also reduces the scrutiny of the investigative process, which 'acts as a primary antidote to subvert illegality.'[58] The media are also affected as it also brings into the process the criminalisation of those who provide information to journalists and the possibility of media being prosecuted for publication of those views.'[59]

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The secrecy associated with ASIO also means that in view of the severity of a particular terrorist threat, a Court may be satisfied with a lower threshold in relation to the disclosure of grounds for believing that a warrant would substantially assist in the collection of intelligence under s34D.[60] However, it also means that subjects will be unable to publicly defend themselves from ASIO's actions,[61] with an abridgment of the right to a public trial by jury based on evidence of some wrongdoing.

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'You have the right to an attorney'

The right to effective legal representation is yet another crucial element of the Australian criminal justice system. The criminal law mandates that prior to the commencement of questioning, the accused must be informed that she or he may communicate with a legal

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[52] *Australian Security Intelligence Organisation Act 1979* (Cth) s34G(6)
[53] *Australian Security Intelligence Organisation Act 1979* (Cth) s34G(8)
[54] *Australian Security Intelligence Organisation Act 1979* (Cth) s34G(4)
[55] *Australian Security Intelligence Organisation Act 1979* (Cth) s34G(7)
[56] Interview with expert, 5th October 2005
[57] *Australian Security Intelligence Organisation Act 1979* (Cth) s34VAA
[58] Joo-Cheong Tham and Stephen Sempill, Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD's review of ASIO's special powers relating to terrorism offences as contained in Division 3 Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth), 23 March 2005, p21
[59] George Williams, Anthony Mason and Ben Saul, n27 above, p9
[60] Claudia Oakeshott and Adelle Neary, 'The *ASIO Legislation Amendment (Terrorism) Act* (Cth) 2003: To what extent does the need for heightened security justify a departure from the Rule of Law?' *University of Adelaide Law School and the Australian Institute of Administrative Law*, p10
[61] Gary Sullivan, n13 above, pp7-8

practitioner of their choice[62] in private,[63] and a 'reasonable time' must be allowed for this to occur.[64] Moreover, provided the lawyer does not unreasonably interfere with the questioning, the accused is also entitled to have his/her lawyer present during questioning, and to obtain advice.[65] This is not so under the *ASIO Act*.

Although not as intrusive as the original *ASIO Bill*, which provided for detention *incommunicado*, thereby allowing no scope for lawyer-client contact, the Act retains intrusions affecting the lawyer's ability to adequately represent their client.[66]

There is no specific mandate that the detainee be permitted to obtain legal advice under the Act. Rather, she or he *may* identify a *single* lawyer of their choice,[67] unless that particular lawyer may alert a person involved in a terrorism offence,[68] or the evidence may be tampered with.[69]

At this stage, security clearance requirements for lawyers[70] may become an issue. This affects the lawyer's ability to adequately represent their client. The security clearance requirements create delays in the administration of justice.[71] It is beyond the scope of this chapter to discuss how this affects court proceedings but this may certainly be an issue.

Questioning of the detainee may occur in the absence of his/her lawyer under s34TB. Further, even when the lawyer is present, notwithstanding the explicit affirmation by s34WA of the right to legal professional privilege, any lawyer-client contact must be monitored under s34U(2). This as a serious restriction on the rights of the detainee, as it leaves an as yet uncharged person with no avenue to obtain advice as to their position and the options available to them.'[72]

In relation to the provision of legal advice, a lawyer may advise his/her client during breaks in the questioning,[73] but the legislation is silent as to the situation *before* questioning begins. If permitted to remain present during questioning, the lawyer may not address the prescribed authority,[74] except to clarify an ambiguous question, and if perceived to be 'unduly disrupting' the questioning, the prescribed authority may require that the lawyer be removed and a new one appointed.[75]

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[62] *Crimes Act 1914* (Cth) s23G(1)(b)
[63] *Crimes Act 1914* (Cth) s23G(3)(a)
[64] *Crimes Act 1914* (Cth) s23G(1)(b) and (2)
[65] *Crimes Act 1914* (Cth) s23G(3)(b)
[66] Claudia Oakeshott and Adelle Neary, n59 above, p8
[67] *Australian Security Intelligence Organisation Act 1979* (Cth) s34D(4)
[68] *Australian Security Intelligence Organisation Act 1979* (Cth) s34TA(2)(a)
[69] *Australian Security Intelligence Organisation Act 1979* (Cth) s34TA(2)(b)
[70] *National Security Information(Criminal Proceedings) Act* 2004 No. 150, 2004 s39
[71] *National Security Information(Criminal Proceedings) Act* 2004 No. 150, 2004 s39(3)
[72] UTS Community Legal Centre, Submission on the Review of ASIO'S Special Powers Relating to Terrorism Offences as contained in Division 3 Part III of the *Australian Security Intelligence Organisation Act* 1979, 23 March 2005, p7
[73] *Australian Security Intelligence Organisation Act 1979* (Cth) s34U(3)
[74] *Australian Security Intelligence Organisation Act 1979* (Cth) s34U(4)
[75] *Australian Security Intelligence Organisation Act 1979* (Cth) s34U(5)

All the matters raised in this Chapter result in a serious curtailing of a lawyer's role to little more than an observer. In essence it is 'representation in name only.'[76] The restrictions on what a lawyer can and cannot do, can and cannot say and the lack of access by them to material against their client makes their role significantly compromised and poses ethical difficulties under their *Professional Conduct and Practice Rules*.[77]

Part B: Evaluation of the new ASIO Powers: Credibly Justified?

By introducing issues of politics, religion, or ideology into the legislative arena, the Government justifies its measures on terrorism on the grounds that normal rules are said not to apply.[78] This is not a good and reasoned basis for law-making. The fact that laws addressing terrorism is a fairly novel phenomenon means that the current debate on these laws in secrecy using national security issues to cloak key issues ensures that it is difficult to properly evaluate the potential impact of the legislation.[79]

Necessity and Justification of the new measures

The introduction of broad criminal offences, sweeping executive powers, a 'detention without trial' regimeshould mean that government has a heavy burden in demonstrating the need for such laws which criminalise conduct previously not unlawful and confer significant powers on the State.[80] Many argue that the measures are draconian and unnecessary.[81] In the authors' view the case that the the new measures are necessary has not been made.[82]

'We must not lose sight of the fact that these terrible deeds are criminal acts'[83].

> 'Robin Hood may steal from the rich to give to the poor the proceeds of the theft, but if he appears before a court charged with stealing, his benevolent motive will be disregarded in determining whether he has committed that crime. If he is convicted his motive may be taken into account in fixing sentences'[84]

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[76] Claudia Oakeshott and Adelle Neary, n59 above, p9

[77] See www.liv.asn.au *Professional Conduct and Practice Rules* 2005 see Rules, 12, 13, 16, 17, 18, 19 and 20.

[78] Interview with expert, 5th October, 2005

[79] Interview with expert, 27th October, 2005

[80] Agnes Chong, et al, 'Laws for Insecurity? A Report on the Federal Government's Proposed Counter-Terrorism Measures' (23 September 2005), pp10-12. Available online at <http://www.amerun.org.au>

[81] Chris Uhlmann, 'Containing the Threat Within" -Parliamentary Review of ASIO's detention powers is asking how far we should go in protecting ourselves from terrorism.' (May 2005) *About The House* 33-34. Available online at: <http://www.aph.gov.au/house/house_news/magazine/ATH_may_05.htm>

[82] George Williams, 'Losing our balance in fortress Australia,' *Financial Review* (Melbourne), 23rd September 2005. Available online at: <http://afr.com/cgi-bin/feedback.pl?name=George+Williamsandheadline=Losing+our+balance+in+fortress+Australia> on 23 September 2005

[83] Interview with expert, 5th October, 2005

[84] Gary Sullivan, n13 above, p6.

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Most 'acts of terrorism' sought to be criminalised under the current and proposed regime already fall under the criminal law.[85] An expert interviewed for this project asserted that 'we have enough laws that cover terrorism and terrorist acts, and therefore enough laws to protect our society. There is a bulk of legislation that is sufficient, including the *Crimes Act, Criminal Code, AFP* legislation, maritime and aviation legislation, and so on.[86]' There is no reason, for example, why someone who commits a terrorist bombing could not be charged with the criminal offence of 'destroying or damaging Commonwealth property.'[87] Lacking is an explanation of exactly what the specific threat is, that warrants these measures.

> 'If those substantive matters were removed from the federal terrorist legislation we are left with matters on the margins. It is arguable that these new activities, which have not been in the criminal law, have no place in the statute books.'[88]

Moreover, it has yet to be seen how these measures actually deter/prevent terrorist threats. How is it, that detaining someone who has done absolutely nothing wrong for an entire week, merely because it is believed that they *might* know some minute detail (which is probably irrelevant) *about someone else* involved in a terrorist act, is a more effective method of dealing with terrorism than other intelligence gathering methods? As suggested by an acknowledged expert, why not watch them for a while, collect enough evidence to charge them, and *then* detain them for questioning.[89]

The National Counter-Terrorism Alert Level in Australia remains at 'medium'. So how can the Government invoke the July London bombings as a reason for these new proposals when some of the measures borrowed from the U.K. were operative in London prior to the blasts? Clearly, those measures failed.[90]

The content of this Chapter has demonstrated that the legislation undermines the virtuous precept that a person shouldn't be subjected to the coercive power of the State unless they are suspected of a crime. It seems these measures are driven by fear and the sense of the need to act so that politicians can be seen to be doing something. Laws made in haste can be bad laws that harm or inadvertently catch innocent people in their operation. The risk of overreaction may well be the very dynamic terrorists rely upon.[91]

Appropriateness

Sullivan has argued,

> 'The new terrorist legislation strays into areas of state responsibility and may be unconstitutional. It diminishes our legal institutions...it ignores the utility of

[85] Interview with expert, 5th October, 2005
[86] Interview with expert, 5th October, 2005
[87] *Crimes Act 1914* (Cth) s29
[88] Gary Sullivan, n13 above, p6
[89] Interview with expert, 25th October, 2005
[90] Interview with expert, 5th October, 2005
[91] George Williams, n80 above

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prosecutions. A prosecution must be transparent, and based on admissible evidence…Transparency is palpably not part of ASIO's mission statement. Security organisations contain analysts operating in a secret world. They make poor collectors of evidence and poor prosecutors.'[92]

ASIO is an intelligence gathering body, not an enforcement body. It operates on intelligence, not on evidence, thus it is inappropriate that ASIO officials have detention and questioning powers. An expert supported the existence of a federal intelligence body as this is required to maintain good relationships with similar bodies overseas. However, it should be restricted to intelligence gathering and should not be operationally active and engage in the detention and questioning of individuals as it is not trained for this. The expert interviewed for this project asserted that this is the domain of state police, and that what is required is an enhanced relationship between ASIO and the police so that if ASIO discovers something, they should adequately convey this information to the police to perform any necessary operational action.[93]

The potential for abuse of power is another issue relevant to the appropriateness of these measures. Another acknowledged expert interviewed for this project explained that although, according to ASIO's Annual Report only three warrants for detention were issued in 2004, which may insinuate that the powers are being used sparingly and responsibly, the reality is that there have been many incidents of detention that have occurred informally.[94] ASIO can make an informal request to a person for questioning, or prior to seeking a warrant. In these circumstances she argues, the chances are that the person may feel intimidated and reluctant to refuse, in fear of a more formal questioning process.[95] The breadth of the powers is simply too wide and cloaked with secrecy.

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Conclusion

As this Chapter has illustrated, both the current and particularly the proposed terrorism legislation violate fundamental criminal law principles which protect cherished rights and freedoms. They do this unnecessarily as the criminal law in the author's view is adequate. The legislation should be repealed effective immediately.

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It is undisputed that there is a need for a federal intelligence body. However, enforcement should be left to States' policing bodies. An effective communication system could be put in place between the two so that any real terrorist threats are dealt with appropriately and with competence and proficiency.

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[92] Gary Sullivan, n13 above, p3
[93] Interview with expert, 5th October, 2005
[94] Interview with expert, 27th October, 2005
[95] Administrative Law and Human Rights Section, Law Institute of Victoria, n10 above, p6

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CHAPTER 3
To Legislate or not to Legislate: A Comparison between Britain and Australia

Visalini Raveendran

Introduction

It is clear worldwide it is now an age marked by terrorist threats and acts. The threat and existence of terrorism is a reality,[1] prompting governments to legislate in order to prevent and manage attacks on the home front. Australia and Britain have enacted specific terror laws which, like almost all terror laws round the world, are subject to controversy and are under scrutiny for being in violation of basic human rights as recognised by the United Nations.[2] Australia and Britain share similar legislative provisions, both set against a backdrop of debate about the trade-offs between democracy and security, and each arising from its own experiences with terrorism. Australia to date has not yet had an attack on its own soil, however Britain has recently suffered twin strikes on its underground train networks and the double decker bus bombings on 7 and 21 July. These events, coupled with earlier attacks on other allied countries, have triggered rapid expansions of current law and the creation of new laws for both Britain and Australia. The controversy centres on the nature of the new laws and their appropriateness to deal with terror. Some criticisms of the laws in both countries are that they are an overreaction and are a threat to the future of liberty.[3] Whilst it is acknowledged terrorism needs to be addressed it is questionable whether the new legislation is actually necessary.

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Britain's History And Formation Of Current Law

Britain is no stranger to terrorism. Its involvement in Northern Ireland over the past three decades has rendered it a target on more than one occasion and it was understood that the "Real IRA and Irish terrorism in general constituted the primary threat to the UK."[4] Post 9/11 Britain's national security risk escalated to the international arena where Al-Qaeda and other extremist Islamic groups became the principal focus of legislative counter-measures.[5]

To respond to such terrorist activity Britain enhanced the powers of its police and intelligence agencies, namely the MI5- purely an intelligence service, SO 12- Metropolitan Police Special Branch and the Anti-Terrorist Branch SO 13.[6] To assist with

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[1] Christopher Michaelsen, 'Derogating from International Human Rights Obligations in the 'War Against Terrorism'? - A British Australian Perspective' (2005) 17 *Terrorism and Political Violence* 131.
[2] Christopher Michaelsen, "Fair go act' needed in an age of terror' (2005) *Online Opinion E-Journal of Social and Political Debate* <http://www.onlineopinion.com.au/view.asp?article=3731> at 3rd August 2005.
[3] Interview with expert, 12th October, 2005.
[4] Bradley W.C Bamford, 'The United Kingdom's "War Against Terrorism"' (2004) 16 (4) *Terrorism and Political Violence* 737.
[5] Ibid, 739.
[6] Ibid, 741.

international liaison, the National Criminal Intelligence Service (NCIS) was created to coordinate with Europol and Interpol. [7]

With the strikes against Britain and the continuing threat of more attacks, legislation was introduced through the Terrorism Act 2000. This Act was "designed to provide a permanent and comprehensive structure for counter-terrorism operations". [8] This new Act replaced two key Acts that had been in force for the last 30 years to deal with the Irish threat' the *Northern Ireland (Emergency Provisions) Act* and the *Prevention of Terrorism (Temporary Provisions) Act*.[9]

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The Terrorism Act 2000 (UK) retained essential parts of the prior Acts, such as "proscribing or outlawing specified terrorist organisations, financial measures, pre-emptive powers of arrest and detention, and port controls."[10] However with 9/11 and the realisation that the UK's immigration and asylum policy hindered the progress of dealing with terrorist activities, the British government decided to introduce the Anti-Terrorism, Crime and Security Act 2001(UK) (ATSCA).[11] By legislative standards, ATSCA was passed quite rapidly, within a month of having been proposed to the legislature.[12] ATSCA consists of 129 sections and 8 schedules and "seeks to cut off terrorist funding, ease the sharing of terrorist information among government agencies and departments, streamline relevant immigration information procedures, ensure the security of nuclear and aviation industries, improve the security of dangerous substances and extend police powers."[13]

Most of the provisions have escaped criticism, except those related to international terrorists. Section 21 (1) of ATSCA allows the Secretary of State to issue a certificate declaring a person's presence in the UK to be a risk to national security and thus declare him or her a terrorist.[14] Section 21 (2) defines a terrorist as "a person who (a) has been concerned in the commission, preparation or instigation of acts of international terrorism, (b) is a member of or belongs to an international terrorist group, or (c) has links with an international terrorist group." [15] The concern here lies in Section 23 (1) which allows a non- British citizen, once certified as an international terrorist, to be detained indefinitely if "either a 'point of law" or a 'practical consideration' prevents his removal from the UK."[16] As such, foreign nationals are subject to indefinite detention without trial on the basis of mere suspicion and "reasonable belief in a risk to national security."[17]

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[7] Ibid, 745.
[8] Colin Warbrick, 'The European Response to Terrorism in an Age of Human Rights' (2004) 15 (5) *The European Journal of International Law* 1007.
[9] Bamford, op cit, 747.
[10] Bamford, op cit, 747.
[11] Bamford, op cit, 747.
[12] Dirk Haubrich, 'September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared' (2003) 38 (1) *Government and Opposition* 8.
[13] Professor Sir David Williams QC DL, 'Terrorism and the Law in the United Kingdom' (2003) 26 (1) *UNSW Law Journal* 182.
[14] Michaelsen, op cit, 133.
[15] Ibid.
[16] Ibid.
[17] Williams, op cit, 183.

UK and the ECHR

The United Kingdom is not only a signatory to the *European Convention of Human Rights* (ECHR) but has formally incorporated this into domestic legislation via the Human Rights Act 1998 (UK)[18] Article 3 of the ECHR states that no one shall be subject to torture or degrading, inhuman treatment.[19] The obstacle the UK is faced with stems from the *Soering* principle which is a code of ECHR jurisprudence requiring Convention States not to deport a person to another state "where that person presents substantial evidence that he would face a real risk of treatment incompatible with Convention standards."[20] The dilemma then for the UK government became a question of how to deal with terrorism effectively without acting contrary to this Convention. The government was in a situation where "non-UK nationals whom it suspected of being involved in activities seriously detrimental to the UK's national security, could not be prosecuted here nor removed to another state, nor could they be detained under the existing law, either as criminal suspects or persons awaiting deportation."[21] Since detaining a suspect for deportation without hope of removal would be contrary to Article 5 (1) of the ECHR where protections for detainees are provided,[22] the government formally derogated from Article 5 (1), which is an option permitted by Article 15 (3) of the ECHR "at times of war or other public emergencies."[23] Having filed notice of derogation, the government was then able to justify the controversial Section 23 and other related provisions of ATSCA.[24]

SIAC, Role of Lawyer and Rights of Detainees

Those detained can appeal to the Special Immigration Appeals Commission (SIAC) under part 4 of ATSCA.[25] Section 35 marks SIAC as a superior court thus allowing appeals from its decisions to the Court of Appeal and House of Lords.[26] "The avenue of challenge to ATSCA decisions is by appeal against certification [...] the only remedy is cancellation of the certificate if either SIAC considers there are no reasonable grounds for the belief or suspicion required under Section 21 (a) or (b) or 'for some other reason' (Section 25 (2))."[27] In previous cases before SIAC, concern has been expressed about the quality of evidence relied upon by the Home Secretary in applying for certification. Some of the intelligence material supplied 'proving' suspicion, has been known to be obtained

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[18] Williams, op cit, 183.
[19] David Goodhart and Roger Smith, 'The Human Rights Act is a welcome constraint on government, but can it threaten our ability to fight terrorism?' (2005) E-magazine *Prospect* <http://www.prospectmagazine.co.uk/article_details.php?id=7026 > at September 2005.
[20] Warbrick, op cit, 1008.
[21] Ibid
[22] ibid, 1009.
[23] Haubrich, op cit, 9.
[24] Michelsen, op cit, 133.
[25] Bamford, op cit, 748.
[26] Warbrick, op cit, 1010.
[27] Haubrich, op cit, 1010.

by torture.[28] SIAC opted for a tolerant view, offering that the Home Secretary was entitled to depend on such evidence, as it went to reliability not admissibility.[29] Further to this, the use of intelligence information in private hearings has "led critics to charge that SIAC proceedings against a person are unfair as they do not allow an individual to see the case against him or her."[30] This negates the well established right of any individual in an adversarial system to have a fair hearing; one that presumes his or her innocence until proven guilty, with the opportunity to refute the case against him or her.[31]

Other causes for concern relate to a reversal of the adversarial process, whereby it is now permissible for entire proceedings to be held ex parte. Suspects and defence counsel (chosen by the Attorney-General) may not have access to all the evidence or be made aware of reasons for judgement.[32] Moreover, the Criminal Justice and Public Order Act 1994 (UK) contains sections which prejudice a defendant's right to silence.[33] Sections 34-37 allow for inferences of guilt to be drawn from a suspect's refusal to answer questions, or to mention facts later depended upon in defence, their failure to account for objects, substances or marks on their person, or a suspect's unexplained presence in a place.[34] The key difference reflected in such provisions is that the "burden of proof has shifted to the defendant."[35]

The role of the lawyer in such instances becomes quite complex. The recent case of eleven Arabs who were sent to Belmarsh, the highest security prison in London, for reasons unknown [36] demonstrates the practical reality of how difficult it is for a lawyer to mount a case in defence of a client. Defence counsels and the public were expelled from the hearing when confidential intelligence information was discussed.[37] A situation such as this exposes the flaws in this new procedure: it lacks "habeas corpus, open justice, the presumption of innocence, independent legal representation and fair trial before judge and jury."[38] One cannot help but be sceptical about the effectiveness of a defence counsel who has been vetted, nominated and paid by the government.[39] Despite SIAC being created as a stand-alone tribunal that is impartial and independent, "serious doubts arise as to whether proceedings before it offer sufficient guarantees of judicial procedure."[40]

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[28] Warbrick, op cit, 1011
[29] Ibid., 1012.
[30] Bamford, op cit, 748.
[31] Ibid
[32] Michaelsen, op cit, 134.
[33] Simon Matters, 'Anything you don't say may be given in evidence: Protecting the interests of justice or emasculating a fundamental right?' (1997/1998) 4 (1) *Deakin Law Review* 66.
[34] Matters, op cit, 66.
[35] Feature, 'Britain: Coming quietly; Freedom and anti-terrorism', (2003) 366 (8313) *The Economist London* 51.
[36] Nick Cohen, 'How British law detains the innocent' (2002) 15 (717) *The New Statesman* 20.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Michaelsen, op cit, 134.

Comparison to Australia

Australia enacted two main Acts to address terrorism; that of the *Security Legislation Amendment (Terrorism) Act* 2002 (SLAT) and the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act* 2002 (ASIO).[41] The Acts increase the powers of relevant authorities and include controversial new provisions which allow non-suspects to be detained for questioning without any prospect of judicial review.[42] Similar to the UK, the right to silence is absent along with the presumption of innocence and the reversal of the burden of proof which now requires the defendant to disprove guilt.[43] Lawyers defending clients face the same challenges as British defence counsels however in Australia it is ASIO, not the government that can veto any lawyer.[44] (*******Gary is this correct??????) Those detained need to ask for a specific lawyer by name and this lawyer is not given any information that is considered a matter of national security.[45] The lawyer's role in assisting the client is severely restricted as he or she is not allowed to interject during questioning and must wait until it has finished. Lawyers cannot communicate information to others. Otherwise they can find themselves committing an offence punishable by imprisonment of up to five years.[46] It is difficult for a lawyer to challenge evidence as inadmissible, if it was obtained by violence or duress. The law now prevents any witnesses who may see someone being forcibly removed by ASIO or the Federal Police, from disclosing that fact to anyone.[47] Of grave concern is ASIO's ability to now "cloak virtually all its operations in secrecy [....] increasing the danger that ASIO's [...] powers will be abused."[48]

In the United Kingdom, unlike Australia, despite ECHR derogation, the existence of the *Human Rights Act 1998* (UK) ensures a "set of civilised values and lays down a process for dealing with conflicts..."[49] Coupled with SIAC and the UK's connection to the EU, judicial review is a safeguard against gross miscarriages of justice. This is in stark contrast to the situation in Australia which lacks legislative support for some UN human rights obligations. Australia is a signatory to key UN conventions like the ECHR and ICCPR but "does not have any legislation giving domestic effect to its obligations under international human rights law."[50] Failure to provide for such measures exposes

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[41] Ibid, 135.
[42] Ibid, 136.
[43] Michalsen, op cit, 137.
[44] Claire Mahon and Karyn Palmer, 'How the ASIO bill ravages your rights', *The Age* (Melbourne) June 23rd 2003.
[45] Ibid.
[46] Mahon and Palmer, op cit.
[47] Dr Michael Head, 'Exploring the myths behind anti-terrorism laws', (2004) E-magazine *Its Time* http://www.whitlam.org/its_time/23/head.html
[48] Ibid.
[49] Goodhart and Smith, op cit.
[50] Christopher Michaelsen, "How the House of Lords has exposed Howard's ASIO Act' (2005) *Online Opinion E-Journal of Social and Political Debate* <http://www.onlineopinion.com.au/view.asp?article=2901>at 5th January 2005.

Australians to unchecked governmental power which may then pave the way for the further curtailing of rights and freedoms.

The extreme laws in place seem disproportionate to the threat of terror in Australia.[51] There is research to suggest that there are many reasons for which Australia would be a poor choice for terrorists to launch an attack. These include Australia's relatively short political history and its lack of involvement in other nations' disputes. Its geographical isolation impedes detection-free entry and exit; and there is an absence of extremist factions, Muslim or otherwise, operating within the country.[52]

It has already been identified that the primary threat to security in Britain is Islamic fundamentalists.[53] There is an unspoken policy of racial profiling which has not only caused Muslims, but anyone of foreign appearance to be targeted by enforcement agencies. The recently introduced 'shoot to kill' law has altered the stakes dramatically "forcing new rules of engagement".[54] Anyone posing an immediate danger can be shot without question. As critics have pointed out the law "raises worrying questions when applied in the much larger and more mixed communities of Britain, and when the suspected terrorists are much more elusive and shadowy."[55]

There is a feeling amongst Muslims and other minority groups that there is dual criminal law system in place. The first one retains rule of law and balance between rights and powers, whilst the other can see one arrested, charged and sentenced without a fair trial.[56] The latter is increasingly being applied to non-whites, not for terrorist-related intelligence gathering purposes, but as an alterative avenue for prosecution of standard criminal and immigration offences.[57] The existence of the new terror laws perpetuates negative stereotypes of foreigners, particularly when casting Muslims as the 'other'. If the aim of the terror laws is to reduce terrorist attacks, it must be recognised that there is a "chasm between Islamists and Islamic terrorists, and understanding the difference is the first task of an intelligent intelligence that wishes to concentrate on real threats."[58]

Given Britain's multicultural make-up and immigration processes, and despite these contentious laws, it can be argued there is a need to directly and decisively address the issue of terrorism, irrespective of the adverse effects it may have on minority groups.[59] Australia is an island with strict border control and a relatively peaceful inter-racial

[51] Daryl Melham, 'Here's the real security threat: laws that steal our freedoms', *The Age* (Melbourne), 15th September 2005.
[52] Christopher Michaelsen, "Australia's terror fear is unfounded' (2005) *Online Opinion E-Journal of Social and Political Debate* <http://www.onlineopinion.com.au/view.asp?article=115>at 12th January 2005.
[53] Bamford, op cit, 739.
[54] Liam Clarke and Tony Geraghty, 'Shoot to kill error echoes Irish dirty war' (2005) E-journal *The Sunday Times*< http://www.timesonline.co.uk/article/0,,2087-1706149,00.html>at 24th July.
[55] Ibid.
[56] Independent Race and Refugee News Network, 'New study highlights discrimination in use of anti-terror laws' (2004) < http://www.irr.org.uk/2004/september/ak000004.html> at 2nd September.
[57] Ibid.
[58] Cohen, op cit.
[59] Goodhart and Smith, op cit.

environment, and has not yet suffered a terrorist attack in the contemporary political climate. It is doubtful whether similar zero-tolerance style laws will have the desired result. They may in fact create more disaffection, resentment and aggrevate communities to feel they are targeted and that they are being treated more unfairly and unjustly than other in the community. This is likely to make them more inclined to rebel and seek the attraction of terrorist involvement.

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Proposed Laws for UK and Australia

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The terror laws are proliferating with a raft of legislation being tabled in Britain and Australian parliaments weekly. Despite the outrage expressed by civil libertarians over current laws, radical new laws continue to be proposed. The most controversial in Australia to date include ongoing search and interception warrants, extensive strip and search powers, and the use of tracking devices.[60]

Experts raise concerns about the control order provision which is issued ex parte. This allows people suspected of involvement with terrorism to be placed under heavy surveillance for a period of 12 months, having the effect of placing them under house arrest. The provision restricts their movements and allows them to be electronically tagged on a permanent basis for 12 months.[61] In the UK by contrast, control orders are confirmed only after a full court hearing.[62]

Both countries' legislatures are in the process of enacting provisions that make it an offence to foment terrorism, which includes condoning, glorifying or encouraging of terrorist acts.[63] The danger of such a law lies in the very broad definition of the offence. It is legally almost impossible to define, the effect of which is to allow greater discretion with more room to convict.[64] Another major concern is the possibility of wide application and enforcement, which could result in dramatic constraints on the freedom of speech. It may criminalise any statement of opposition toward government views.[65] There are clearly benefits in preventative provisions which aim at decreasing the threat of terror before they occur, but care must be exercised when the laws have such a sweeping, wide ranging effect.

Conclusion

Australia and Britain must deal with terrorism. The chance of terrorist acts being committed on national soil is no longer a speculative matter 'on the horizon' and unlikely to eventuate. There is no doubt that governments must legislate in order ensure the safety

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[60] Melham, op cit.
[61] Interview with expert, 12th October 2005.
[62] Michael Gordon, Michelle Grattan and Brendan Nicholson, 'Leaking minister in dog house', *The Age* (Melbourne), 17th October 2005.
[63] Brendon Nicholson, 'Warning on 'dangerous' terror laws', *The Age* (Melbourne), 31st August 2005.
[64] Interview with expert, 12th October 2005.
[65] Williams, op cit, 179.

of its people. However, concerns still exist over the nature and severity of legislation that is created for this purpose. The current and proposed legislative regimes in Australia and Britain need to be scrutinised carefully in order to determine whether these laws belong in a democratic nation, or are draconian restrictions on liberty that are better suited to a tyranny. The "laws and precedents which are the legacy of generations of struggle for liberty have been undermined almost casually, at the stroke of a pen."[66] The nature of terror laws in Britain and Australia have the effect of marginalising minorities the danger of this lies in the proposition that "if you alienate people you can hand the terrorists a long-term support base from which to operate."[67] To detain people on the word of a proscribed authority and without a fair trial causes fear and resentment, all of which have the potential to contribute to fuelling terrorist activity.[68] It cannot be doubted that the laws in place severely restrict long established rights and freedoms in the name of terrorism. Also, by reducing the role and effectiveness of lawyers in the questioning and arrest process, one important barrier between abuse of power and process against citizens is being removed.

It is acknowledged terrorism is a threat to our way of life[69] but it is of the utmost importance that the laws themselves do not have the effect of threatening our own existence. It must be remembered that "terrorism succeeds if it tempts us to abandon the core values of a democratic society."[70]

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[66] Editorial, 'Time to be alarmed', *Sydney Morning Herald* (Sydney), October 21st 2005.
[67] Clarke and Geraghty, op cit.
[68] Interview with expert, 25th October 2005.
[69] Christopher Michaelsen, 'New national security laws make a mockery of 'justice'' (2005) *Online Opinion E-Journal of Social and Political Debate* http://www.onlineopinion.com.au/view.asp?article=2777 at 24th November 2005.
[70] Geoffrey Robertson, 'Fair trials for terrorists?' in Wilson (ed), *Human Rights in the War on Terror* (2005)

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CHAPTER 4
Australian Security Intelligence Organisation's Questioning and Detention Powers: Impinging Upon our Rights and Dividing our Nation

Emily Sheales

Part A: The Erosion of Basic Rights under the Terror Legislation

As the discussion in earlier chapters has noted, in the wake of September 11 the Coalition Government and the Labor Party combined to pass legislation which aimed to target terrorism. The Parliament saw one of the means of preventing terror through the granting of extensive powers of questioning and detention to the Australian Security Intelligence Organisation (ASIO) under the 2002 amendments to the *Australian Security Intelligence Organisation Act 1979 ("ASIO Act")*. As shown in the following scenarios, such provisions have fundamentally altered the criminal justice system and a lawyer's ability to represent his or her client. Furthermore, the act impinges upon basic human rights.

SCENARIO ONE: THE INNOCENT CLEANER

Your name is Sally Jones and you are a happily married 45 year-old with three children. You are employed by a cleaning service that provides their services to offices around the Melbourne suburbia.

At 3am on an early Wednesday morning government agents have broken down your front door, woken up your children, come into you bedroom and taken you to a place where ASIO officers can question you.

You are detained for seven days. You are not allowed to call your family to let them know what is happening. You are not allowed to call your employer to tell them you will not be coming into work. You cannot remember the name of your family lawyer as your husband normally deals with legal matters, such as when you sold your previous house. Of course you can't call your husband to ask him the name of your lawyer because you are not allowed to contact anybody. So you are questioned without a lawyer. You then remember the name of the lawyer, however the ASIO officers tell you "Sorry, that lawyer doesn't have security clearance". Questioning continues.

You don't know what information they want from you. However, ASIO believe that you do have the relevant information, so you will be jailed for five years. You want to dispute this so you go to court. You believe ASIO will have to prove beyond a reasonable doubt that you had this knowledge. To your horror you find out that it is you that has to prove that you don't have the knowledge. How are you expected to prove you don't have information When you don't know what information the believed you have.

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Analysis of the Scenario One in the context of the Terror Legislation:

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The information that ASIO wanted from Sally was in relation to an office she cleaned earlier that week. They believed that she *may* have seen a document which *may* or may not have existed, which *may* have been located in a desk she *may* have cleaned.

Ridiculous, but possible.

Under the *ASIO Act* the above scenario can happen to any citizen in Australia. ASIO can obtain a warrant if they believe on reasonable grounds that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.[1] This is the threshold test. Hence, Sally need not be suspected of terrorism herself, she only needs to be suspected of having some type of relevant information.

A private residence can be broken into at anytime; day or night, in order to take someone like Sally into custody.[2] Force may be used.[3] In a recent case, of Bilal Dave and Fayme Ilali before the New South Wales District Court (the case settled),[4] ASIO had raided the wrong household having mistaken the address. ASIO held the family at gun point and the lady of the household miscarried shortly afterwards having stated in the media that she thought it was caused by the distress. Under the proposed laws, it may in future be impossible for families like this one to expose ASIO's actions and complain due to the penalties for releasing information about raids as have been discussed in Chapter Two.

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Pursuant to s34HC of the *ASIO Act* people like Sally can be detained for up to 168 hours by ASIO officers.[5] Detained people will be able to be questioned for up to 24 hours, in a maximum of eight hour blocks.[6] This questioning can be spread over the seven days.

Those detained under the *ASIO Act* are held incommunicado with no rights to contact anyone outside; not one's husband, family, children, employer or even ones lawyer.[7] When they are released their employers and family will demand an explanation for their disappearance, yet to tell means they will be charged with a criminal penalty and face up to five years imprisonment.[8]

This Act fundamentally subverts some of the essential elements of our criminal justice system. It removes the right to silence and reverses the presumption of innocence. Sally may not know what information ASIO officers are seeking from her, however if ASIO officers believe otherwise she will be charged with an offence under s34G(3) of the Act.

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[1] *Australian Security Intelligence Act 1979* (Cth) s34D(b)
[2] *Australian Security Intelligence Act 1979* (Cth) s34JA
[3] *Australian Security Intelligence Act 1979* (Cth) s34JB
[4] http://www.smh.com.au/news/national/asio-settles-out-of-court-over-botched-raid/2005/11/01/1130823210697.html
[5] *Australian Security Intelligence Act 1979* (Cth) s34HC
[6] *Australian Security Intelligence Act 1979* (Cth) s34HB
[7] *Australian Security Intelligence Act 1979* (Cth) s34F(8)
[8] *Australian Security Intelligence Act 1979* (Cth) s34VAA

Further, she is stripped of her right to silence, as to not answer the questions put to her, she would most certainly be charged with failure to give information.[9] Unlike the procedure in the criminal justice system, Sally will not be presumed innocent until proven guilty, nor will the State have to prove her guilt beyond a reasonable doubt. Instead the defendant in such matters bears the burden of proof.[10] They are guilty unless they can prove to a court otherwise. Yet, doesn't it seem unreasonable for Sally to be asked to prove she didn't know something when ASIO will not tell her what they think she knows?

Sally now has a criminal record.

We can only hope that Sally's detainment does not result in psychological trauma as she would not be able to receive adequate counselling. It would be an offence to tell a health professional about how she sustained this injury.[11]

Sally can be relieved by at least one thing; at least ASIO did not believe she had a "seizable item" in her possession. If they had, she would have been subjected to a strip search.[12]

SCENARIO TWO: TIM UNABLE TO DO HIS JOB PROPERLY

Your name is Tim Laurence and you are a criminal lawyer. You receive a phone call telling you that a previous client now requests your advice. You are told the address, but instructed not to tell anyone else. You are to advise your client who is being interviewed by ASIO. ASIO officers inform you that you have passed their security clearance (however, you are a little confused when they then ask you questions about your sister's husband's previous employer).

When you arrive your client has already been interviewed for three hours. You are not told what has been said in this time. You are informed that you are not to speak except to clarify an unclear question. All contact with your client is monitored and ASIO will not tell you what information they are trying to obtain. Frustrated with this process you disrupt. You demand to know what your client is being held for. You are immediately discharged from the room. Your client is then to be questioned in your absence.

You are furious and mutter under your breath that you will be taking this further. An ASIO officer monitoring the door of the interview room laughs and says, "You can't tell anyone unless you want to end up in jail for 5 years!"

[9] *Australian Security Intelligence Act 1979* (Cth) s34G(3)
[10] *Australian Security Intelligence Act 1979* (Cth) s34G(4)
[11] *Australian Security Intelligence Act 1979* (Cth) s34VAA
[12] *Australian Security Intelligence Act 1979* (Cth) s34I.

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Analysis of the Scenario One in the context of the Terror Legislation:

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Although as Australian citizens we believe that we all have the right to a fair trial and the right to legal representation, the *ASIO Act* only provides a highly circumscribed right to a lawyer. This is seen by lawyers as offensive because it significantly changes the way they can assist their clients.[13]

ASIO has the power to veto any lawyer[14] and questioning may be conducted without the presence of a lawyer.[15] During the questioning a lawyer must not intervene or object to the questions. Further, ASIO will not allow a lawyer to advise their client during the questioning, as a lawyer's role is confined to clarifying ambiguous questions.[16] In effect, legal representation becomes "showcase, pointless window-dressing."[17] As Tim discovered, if ASIO classifies a lawyer's conduct as "disrupting" then they will be excluded from the remainder of questioning and removed from the room.[18]

Lawyers may not communicate any information about their client's detention and questioning to anybody, except the Federal Court. To do so would result in imprisonment for five years.[19] This is because it is illegal to disclose information relating to ASIO's conduct in detaining and questioning persons while a warrant is in force.[20] Further, for two years after the expiry of a warrant it will also be an offence to disclose information which is considered to be "operational information."[21] "Operational information" is broadly defined for the purpose of this Act as information relating to ASIO's knowledge and activities.[22] Therefore the Act does not permit disclosure to lawyers for the purpose of challenging ASIO investigatory activities, nor does it allow Tim's client to complain to a Member of Parliament or the Attorney General as this is considered a criminal offence.[23] This ultimately means that "the legislation casts a pall of silence over the activities of ASIO."[24]

As an intelligence gathering body, ASIO has always worked in secrecy, however these new provisions further immunise ASIO from legal checks and public scrutiny and will have the affect of "implicitly sanctioning lawless behaviour."[25]

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[13] Claire Mahon and Karyn Palmer 'How the ASIO bill ravages your civil rights' *The Age*. 23 June 2003, <http://www.theage.com.au/articles/2003/06/22/1056220477057.html> (12/10/05)
[14] *Australian Security Intelligence Act 1979* (Cth) s34TA
[15] *Australian Security Intelligence Act 1979* (Cth) s34TB
[16] *Australian Security Intelligence Act 1979* (Cth) s34U(4)
[17] Phil Boulten SC 'Lawyers warn of Police State' *Herald Sun*. 31 October 2005, 17
[18] *Australian Security Intelligence Act 1979* (Cth) s34U(5)
[19] *Australian Security Intelligence Act 1979* (Cth) s34VAA
[20] *Australian Security Intelligence Act 1979* (Cth) s34VAA(1)
[21] *Australian Security Intelligence Act 1979* (Cth) s34VAA(2)
[22] *Australian Security Intelligence Act 1979* (Cth) s34VAA(5)
[23] *Australian Security Intelligence Act 1979* (Cth) s34VAA
[24] Brian Walters, *Terrorising our citizens*, Paper presented to the Victoria Legal Aid Conference, 29 July 2005
[25] Joo Cheong Tham and Jude McCulloch, 'Secrecy, Silence and State Terror' (2005) 77 *Arena Magazine* 46, 47

SCENARION THREE: NEWS OF CELEBRITY CURTAILED:

Your name is Jill Carter. You are a journalist for a monthly gossip magazine. You receive a phone call while working late one night. You are informed by this anonymous caller that a high profile celebrity has been questioned by ASIO in relation to a terrorist offence. You are excited; this could be your big break! This combines the two best selling topics; celebrities being arrested and terrorism.

That night you write up your story which you believe will make it to the cover! The following day you quickly check it with the legal department to make sure there is nothing defamatory which you could be sued for. The in-house solicitor looks at you with a troubled look. "Burn this copy and delete all other copies from your computer. You can't publish this". You ask why. "Because this is against the law. You'll go to jail for this!"

Analysis of the Scenario One in the context of the Terror Legislation:

The in-house lawyer is not being over-dramatic, he is correct. If Jill publishes this story she can face a criminal offence and five years jail.[26] This ultimately means that ASIO becomes immune from media scrutiny for their activities, hence diminishes public discussion. "Democracy is only meaningful if the public has information upon which it can make decisions with regard to the appropriateness of government policy and behaviour and the fitness of the various political parties and politicians to govern,"[27] yet we are being deprived of such information under the ASIO Act, with activities being branded with the label of 'national security'. This branding of 'national security' results in ASIO activities being placed above human rights and out of reach of the rule of law and transparency. Consequently, accountability will be the casualty.

It is not just the media who are silenced and whose right to free speech is being impinged upon. As this legislation stops independent monitoring of ASIO detention, it prevents questioning by human rights and civil liberties organisations. Furthermore, "a university

[26] *Australian Security Intelligence Act 1979* (Cth) s34VAA
[27] JC Thom, op.cit. 47

researcher could be subject to these laws if they were foolish enough to have the wrong research interests."[28]

The *ASIO Act* explicitly subverts rights and liberties which we have come to take for granted living in Australia. In the authros' view these laws are simply excessive. An expert in the field has stated that these draconian laws would be expected to be found in a tyrannical dictatorship or a police state, not in a liberal democracy.[29] The *ASIO Act* which "allows faceless authorities to denounce citizens, on a basis never disclosed, and which make it an offence for those people to publicly defend themselves, are the stuff of Kafka-esque nightmare."[30] However, this is no nightmare; this is law enacted by our Commonwealth Parliament.

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Part B: The Discrimination against the Muslim Community and the Division of our Society as a result of the Terror Legislation

The *ASIO Act* sees Australia as not only responding with "draconian attacks on civil rights but also with moves to roll back multiculturalism."[31] Hence, not only does the terror legislation threaten to impinge upon the rights and liberties of all Australians, it has a disproportionate affect on Muslim and Arab communities.

There are just over one quarter of a million Muslims in Australia, but they make up only a small proportion of the Australian population, approximately about 1.5%.[32] However, since September 11, this small community of Australian Muslims have become answerable for the actions of international Muslim fundamentalists. It was President Bush who stated that "you are either with us or against us"[33] and with such a statement has divided the world, including our own Australian communities, into two separate groups: the allies and 'the other'. Unfortunately 'the other' has been created through the following formula:

> Ussama bin Laden + Al Qaeda = Arab Muslim x Arabs + Muslims (1.5 billion)
> = Enemy Terrorists (the other)[34]

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[28] Hilary Charlesworth, Is *the War on terror compatible with human rights?: An International Law Perspective*, Paper presented to the Human Rights Law Conference, 4 December 2003 <www.law.monash.edu.au/castancentre> (27/9/05)

[29] Interview with expert (25 October 2005)

[30] B Walters, op.cit.

[31] Liz Fekete *Anti-Muslim racism and the European security state*, Paper presented at 'Manufacturing Fear: Who's Afraid in the War on Terror' Public Forum, 13 November 2004 <www.international.activism.uts.edu.au/conferences/pdf/Manf_Fear_Booklet.pdf> (5/10/05)

[32] Human Rights and Equal Opportunities Commission, *Isma – Listen: National Consolations on eliminating prejudice against Arab and Muslim Australians* <www.hreoc.gov.au/racial_discrimination/isma> (22/10/05)

[33] Minerva Nasser-Eddine 'The Ragging Beast within us all? Civil Liberties and the War on Terror' (2002) 1 *Borderlands ejournal* 1 <http://www.borderlandsejournal.adelaide.edu.au/vol1no1_2002/nasser_eddine.html> (5/10/05)

[34] Ibid

These laws indirectly racially discriminate against Arabs and Muslims although the rule is applied to all, its affect is harsher on this particular group. Potentially, these laws can be enforced in a discriminatory way against racial and religious minorities who "provide easy targets for random police searches and investigations."[35] The Muslim and Arab communities are already a vulnerable segment of our society and instead of protecting them, the law is victimising them. Many have fled political unrest and persecution in their homelands and have sought refuge in Australia. They arrive and may again be subject to intrusions by virtue of their nationality or appearance. The legislation appears to be directed at groups possibly defined as wide as 'Middle-Eastern' looking,[36] hence invites racial profiling.

The Isma project was launched by the Human Rights and Equal Opportunities Commission to explore the discrimination of Arabs and Muslims in the wake of September 11. Participants reported that they felt more vulnerable to the whims of government, with one Muslim woman stating, "There is a fear in the community that one day you will wake up and your husband will be taken away under the new ASIO laws."[37] The effect of this terror legislation also resulted in a Muslim man reporting that "I feel like I am an Australian a level lower than the other."[38] An expert in the field interviewed for this project fears that these laws are an act of government which is encouraging fear in Australia.[39] It is worrying because fear so easily turns into hate. Hence, as a nation Australia will be increasingly divided by religion and race.[40]

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After 2002 amendments to the *ASIO Act*, the Government launched a national security campaign. This involved booklets entitled *Let's look out for Australia* and television commercials which presented the message 'Be Alert, Not Alarmed'. The booklets were distributed to all Australian homes and the advertisement was played during prime time television; everyone in Australia was exposed to this campaign. Yet, it was a campaign which indirectly discriminated against Muslims and Arabs. A participant of the Isma project reported:

> I know that a lot of people were very offended as they felt like the government tried to not make it with an Arabic or Islamic focus but it did have. They felt like criminals and they hadn't even done anything. The fear about the repercussions of the campaign was prevalent in the community.[41]

No minority should have to feal such fear or discrimination due to the actions of their government. Yet this campaign coupled with the ASIO Act and other terror legislation is doing exactly this.

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[35] Law Institute of Victoria 'LIV condemns counter-terrorism package' *Media Release* 9/9/05 <http://www.liv.asn.au/media/releases/20050909_LCCTP.html> (22/10/05)
[36] Tim Anderson 'Terrorist Laws in NSW: disproportional and discriminatory' (2003) 14 *Current Issues in Criminal Justice* 310, 312
[37] Human Rights and Equal Opportunities Commission, op.cit.
[38] Ibid
[39] Interview with expert (25 October 2005)
[40] Malcolm Fraser 'How Democracies Fight terrorism' Paper presented at the Stephen Murray-Smith Memorial Lecture, 19 October 2005
[41] Human Rights and Equal Opportunities Commission, op cit

The level of ignorance that has been manifested in racism towards Muslims in Australia is particularly frightening. There have been many reports of radically and religiously motivated violence against Muslim and Arab people and their property.[42] Women in hijabs have been spat at and children have had rocks thrown at them. Hijabs have even been pulled off women's heads, an act which is seen by Muslim women as the worst violation.[43] Such racism explicitly present in our society begs the question;

> Has the conditioning of language and the manufacturing of consent moulded public opinion in a way that reflects government policy – thus leaving little room for cultural sensitivity or understanding, let alone real analysis of the turbulent times we are living in?[44]

At the West Heidelberg Legal Centre this issue of discrimination due to ones culture is overtly present due to the large number of Somali clients. The legal centre is situated among large public housing estates which provide residence for many refugees from the Horn of Africa, particularly from Somalia. This group of people are mainly Muslim. The Somali people have come from a country where government uses arbitrary power against its citizens and have escaped civil war. They come to Australia with a fear of authority and government agencies.[45] Efforts undertaken to explain that the community need not have such fears, as they now live in a liberal democracy with transparency in executive government. These statements are now contradicted. In addition, local police who have built up strong and healthy relationships with the community are concerned that the new laws may upset this dynamic. Sources of information which have developed through constructive relationships may dry up due to ill-advised actions by other security agencies and efforst to reduce marginalisation will be hindered. The local police will then have further difficulties in re-building trust in the local communities. The *ASIO Act* ensures secrecy, discrimination and an erosion of civil liberties.

Society's fear is of a terrorist attack on Australian soil. The Muslim community's fear is twofold; fear of a terrorist attack as well as fear of something bad happening to them by other Australian citizens due to their race, culture and religion. Terrorism has hurt Muslim's too. Many Muslim lives have been lost both in September 11, in the London bombings, Madrid and in Iraq as a result of terrist attacks there. The view of the majority of the Muslim community is that terrorism undermines Islam and the killing of innocent people is not only a crime against the teachings of God, but is disgusting violence.[46] Instead of imposing discriminatory laws which divide our nation, working together to

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[42] Ibid
[43] Ibid
[44] M Nasser-Eddine, op.cit.
[45] Jessica Wilkinson 'Access to Justice for Victoria's Somalis – Formal Justice or Reality of Justice?' in former Law Reform project LaTrobe Law/ West Heidelberg Community Legal Centre (2005) *The Impact of the Law and Social Policy on the Newly Arrived Somali Community: Crossing the cultural divide*, 51
[46] Kayser Trad *Speech to The Australian Institute of Police Management*, Paper presented at 'Manufacturing Fear: Who's Afraid in the War on Terror' Public Forum, 13 November 2004 <www.international.uctivism.uts.edu.au/conferences/pdf/Manf_Fear_Booklet.pdf> (5/10/05)

combat terrorism contructively would be a better option. Muslim and Arabic peoples should not be made to feel like second class citizens in their own country.

Conclusion

The Twenty-First Century sees the beginning of a new era in history. It is a period which has been dominated by fear; the fear of terrorism and 'the other'. It was fear which motivated the inclusion of the terror legislation into Australian law. This legislation is unlikely to destroy, but may even assist in escalating a climate for terrorism. These laws impinge on human rights and invite racism into communities. If governments continue on the same path society will no longer be able to recognise its liberal democratic institutions and will lose its identity as a free civil society. The danger of terrorism is that the laws will further marginalise the Muslim community in Australia. Left will be a legal system which erodes civil rights and a society which is divided by culture. This does not sound like a solution; it sounds like a win for terrorists.

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Legislation

Australian Security Intelligence Act 1979 (Cth)

Recommendations

1. The terrorism legislation should be repealed as the current criminal legislation adequately covers both offences and procedure in relation to terrorist acts.

Failing this, we recommend the following:

2. In order to effectively balance the nation's security with the human rights of all Australians, a Bill of Rights should be introduced, bringing Australia into line with every other democratic country.

3. ASIO should remain an intelligence gathering organisation, leaving the Australian Federal Police in charge of questioning, searching and seizing. Greater communication is required between our intelligence gathering agencies and our police in order to effectively combat terrorism.

4. Greater transparency of the processes and procedures of ASIO is required in relation to questioning and detention to prevent abuse of power. This could be achieved by an independent body monitoring the processes.

5. The lawyer's role as to access to their client, presence and participation in an interview should not be restricted in any way. The concern of highly confidential information could be combated through an agreement between ASIO and lawyers as to what information during the interviews and processes constituted issues of national security, provided lawyers are not excluded at any part of the process. Lawyers should not be restricted from complaining about ASIO's processes and procedures.

6. Section 34G (4) and (7) of the *ASIO Act* should be repealed as under our criminal justice system there should not be a reverse onus of proof upon the defendant.

7. Adequate judicial review on both the law and the merits of a case should be strengthened and remain in the context of judicial structures rather than in the precariously described "judges in the personal capacity."