

Australia's legislative response to terrorism

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'A new, breathtakingly vague and broad definition of terrorism'

In the aftermath of September 11 the United States Congress passed the USA Patriot Act in a matter of weeks with only one dissenting vote in the Senate and sixty-six in the House of Representatives.

In doing so the Congress implicitly accepted the logic that a threat to national security justified the suspension of ordinary civil rights and measures 'that are not consistent with [United States] established laws and values and would have been unthinkable before'ⁱ

Writing in the *New York Review of Books*, Ronald Dworkin states that the Act 'sets out a new, breathtakingly vague and broad definition of terrorism...:someone may be guilty of aiding terrorism, for example if he collects money for or even contributes to a charity which supports the general aims of any organization abroad—the IRA, for example, or foreign anti-abortion groups, or in the days of apartheid, the African National Congress...' He went on to claim that the statute permitted the attorney general to detain aliens on suspicion with no charge noting:

the Justice Department has now detained several hundred aliens, some of them in solitary confinement for twenty-three hours a day. None of them has been convicted of anything at all, and many of them have been charged with only minor immigration offences that would not by themselves remotely justify detention....So our country now jails large numbers of people secretly, not for what they have done, nor even with case by case evidence that it would be dangerous to leave them at liberty, but only because they fall within a vaguely defined class, of which some members might pose danger'ⁱⁱ

That of course is a dramatic repudiation of the foundational principle of the US republic. That foundational principle (albeit applied neither to women nor slaves), steeled by resolve that it was right to rebel against an unjust state, was that each citizen possessed inalienable human rights, not to be 'balanced', against any other consideration, life itself included.

Should we give up liberty to gain safety?

Benjamin Franklin posed this question and then answered it clearly in a phrase later inscribed on a plaque in the stairwell of the Statue of Liberty: *‘Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety’*ⁱⁱⁱ,

Like the United States of America, Australia has seen laws proposed, and some passed, that involve the lessening of our traditional concern for civil liberties.

I will return to the detail of those laws but I want first to ask you to think about whether our civil rights are conditional and circumstantial or transcendent and inalienable, as Benjamin Franklin believed them to be.

Is the balancing theory sound?

The ‘balancing’ theory worked well when Australia faced modest threats, because all that was ever demanded on the other side of the equation was modest concessions.

I freely admit that when I was Attorney General and/or Minister for Justice I often claimed that my object, and the proper object of all parliamentarians, was to find an appropriate balance between law enforcement and civil liberties.

But when we face very grave threats does that really justify very large lessening of our rights. If as lawyers, upholding the rule of law, think not, we have to work out and explain a justification for civil rights that goes beyond ‘balance’.

Applied in circumstances of grave threat, such as terrorism, a ‘balancing’ theory of rights can lead to Dershowitz’s logical conclusion that arbitrary detention and even torture may be ok^{iv}.

And bear in mind that the ‘war on terror’ is not something that will have a discernable end. If it is a war it is a war only in the sense that the ‘war on drugs’ is a war. The ‘war on terror’ may, and, sadly, probably will, be with us for decades^v. Are our rights and freedoms also going to be corroded and sacrificed for those decades?

I put that threshold question for you to consider because these new circumstances and my role as a parliamentarian have forced me to think about it myself.

The legislative response

What then has been the Australian legislative response so far to our heightened fear of terrorism?

The most obvious aspects of the response to date have been the passage of changes to the criminal code (creating the offence of terrorism) and amendments to the ASIO Act allowing detention without charge for the purpose of allowing questioning of them in regard to actual or suspected acts of terrorism.

In both instances the bills introduced by the government were initially draconian. They were crude examples of legislative over-reach.

In shades of the Communist Party Dissolution Act the bill intended to create the offence of terrorism would have allowed a minister, the Attorney General, to proscribe organisations thus making membership of any such organisation a criminal offence. It would also have defined terrorism in vague and broad terms akin to the USA Patriot Act.

In the case of the ASIO legislation, the bill would have allowed ‘adults and even children, to be detained and strip searched, and to be held by ASIO for rolling two day periods that could be extended indefinitely^{vi}’. Detainees would have been denied access to legal advice and held without judicial supervision. It would have established ‘part of the apparatus of a police state^{vii}’.

Fortunately, unlike the US Congress, the parliament of Australia took a slightly more robust role. Both bills were substantially amended and the worst elements of each removed.

The definition of the crime of terrorism was substantially narrowed and the necessity for a criminal intent to be shown included. The power of the attorney general to proscribe political parties was replaced by a regime that required the United Nations Security Council, or a court; to determine that a group is a terrorist organisation before membership of such a group can be criminalized^{viii}.

In the case of the ASIO legislation, the bill subjected the new powers to a credible supervisory regime, removed the power to detain young children and, subject to limited exceptions, allowed detainees access to a lawyer of choice. It also imposed a three-year sunset clause so that these new laws lapse unless explicitly renewed. Despite these improvements many commentators have expressed continuing concerns.

The issue of further warrants was the one I still find difficult. Under the ordinary criminal law, if a person is suspected of a crime, the police can interview them. They can be interviewed initially for a period of four hours; once that has been brought to a close, it requires the warrant of a magistrate to extend that period, and it can be extended only for a further eight hours. It is a once only period. For all serious crimes committed in this country, that has been shown to be sufficient. Since a fixed period of questioning was introduced, together with videotaping of records of interview, there has been no case put that any extension is required in the interests of law enforcement.

By contrast, the new ASIO regime provides for a period of detention of up to seven days; with periods of questioning within that—albeit with breaks—of up to eight hours and in circumstances where a person is locked up, not permitted to go home and not allowed to communicate with their family.

People who have not experienced the pressures that go with detention talk about it a little glibly, as if it is just a nuisance. I have been both a prosecutor and a defence lawyer. I have acted as a lawyer for clients during interrogations and interviews. I

have done that in two countries. I know the kind of hurt, anger, resentment and fear that comes with their being taken into custody and questioned and I know how it impacts on their families.

The possibility (after a person has been locked away in secret for seven days) of allowing a further warrant to be issued authorising another period of detention of the same person so that ASIO can further investigate the same set of matters that were the subject of the first period of detention is, in my opinion, one bridge too far. It is also the view of the Law Council of Australia. In a letter to the Prime Minister dated 25 June 2003, the Law Council recommended that the ASIO Bill not be passed in its current form. Noting that the Bill applies to the questioning and consequent detention of a person not suspected of criminal behaviour the letter stated:

“At the very minimum, the Law Council would submit that approvals and a warrant authorising the questioning of a person already subject to questioning under the regime...should not be permitted on subsequent occasions unless in addition to the existing tests...”

The Law Council then put five further tests forward. The tests had the following requirements:

- new information, not previously in the possession of security or police agencies at the time of the initial approval for questioning, must be brought before the approving and authorising authorities;
- it must be explained why the information was not reasonably available at the time when the initial period of questioning was approved and authorised;
- the information must raise an issue of a substantially different kind from that previously relied upon for the grant of approval and authority to question the person;
- the information must not have been derived from answers provided by the person as a result of the previous questioning undertaken under the regime established by the Bill; and
- the subject matter must not have been substantively canvassed during the questioning which has previously taken place under the previous warrant.

The President of the Law Council of Australia concluded:

“the purpose of these requirements is to ensure that the time limits prescribed in the Bill have meaning. Further questioning on information given during questioning, if not limited, is paramount to endless interrogation.

I think the Law Council made one small mistake: they meant ‘tantamount’ not ‘paramount’. Nonetheless, the points are well made. The Law Council argued that the parliament should not pass the legislation without adding these further protections.

In the event the Parliament passed the legislation without these further changes. They will subject some of our fellow citizens to both interrogation and administrative detention for long and repeated periods. This has never before been permitted under the laws of this country.

For that reason the ASIO legislation ought to be seen as so exceptional that, when the Parliament reconsiders these laws in three years (under the sunset clause), it should remove them from the statute book unless a proper case for their continuation can still be made out. This is not the sort of legislation, which, once introduced, should be allowed to become just another part of our political and legal landscape.

The only constitutional foundation for such laws is the defence power (or, very doubtfully, the inherent power of nationhood) which requires there be an immediate and substantial threat to national security to permit a government to make such invasions into civil liberties. In the absence of such a continuing threat these new ASIO laws would be likely to fail in the High Court^{ix}.

Just the tip of the iceberg

But these two bills are only the tip of the iceberg. I use that analogy because most of an iceberg is invisible, unseen. So too much of the government's legislative response to terrorism has drawn little or no comment even from those organisations, like your bar association, that are the key to harnessing opposition to the corrosion of civil liberties.

Consider for example the abolition of the National Crime Authority and its replacement with the Australian Crime Commission. This subjects a formerly independent organisation akin to a standing royal commission to the directions of the heads of Australia's police forces and ASIO. Done in the name of security.

Consider the proposed amendments to the Australian Protective Services Act that will allow APS staff to demand the names and addresses of anyone they suspect *may* commit an offence. This is a power the Commonwealth Parliament has never before granted, even to the police.

Consider the proposed changes to the Communications Act, which will allow ASIO to ask that Telstra and other carriers withdraw telephone and Internet services from those they suspect of being security risks.

Consider the proposed changes to the Migration Act that will introduce a 'biometric' identification system for aliens and intrusive security systems far more draconian than ever put forward the proponents of the Australia Card.

Consider the attorney general's press release of the 3 April 2003 in which he indicates that 'a range of new measures have been designed for trials involving classified material including:

- Enabling closed hearings on the use of such materials
- Enabling the court to allow summaries as to the facts to be substituted, and

- Requiring legal representatives who require access to the information to be security cleared ‘at the appropriate level’.

I am told that the Commonwealth attorney general has already ensured that no grant of legal aid will be provided to a lawyer in a matter involving national security unless that lawyer is security cleared^x.

The Australian Law Reform Commission has also been asked to report on other measures to protect security during trials.

A practical example: the new ASIO powers^{xi}

I will conclude this paper with a practical thought experiment for you to reflect upon.

I ask you to imagine you are a lawyer who is asked to help a client whose daughter has become under suspicion of involvement in terrorism. Your client is a professional man who was active in the anti-Vietnam war moratorium movement in his own youth.

Like your client, his daughter is a bit of a romantic. After finishing University she has been traveling overseas. She has kept in touch with her father and told him about her involvement with some other young people intent on changing the world. She is deeply involved with the group and has told her father a lot about her new friends.

The group’s objects are challenging US hegemony and what his daughter calls ‘the new world order’. Your client has retained some sympathy for youthful radicalism and has been sending his daughter money to fund her travel and to fund her participation in the group’s leadership training facility.

Now ASIO wants to ask your client some questions!

How should you advise your client if they have been summonsed to appear?

Suppose your client visits you after having been summonsed by warrant pursuant to the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (the ASIO Act) to appear for questioning before a prescribed authority.

You will need to advise your client about how he should answer questions. Under the Act, there is no right to silence. A subject who refuses to answer questions commits an offence carrying a possible maximum penalty of five years imprisonment (34G(3)).

You will need to advise your client of the fact that this offence has been created so that he can make a decision about whether or not to cooperate with the questioning. He will need to be told about the consequences he could face if he chooses not to cooperate.

You will also need to make your client aware of the way in which any information he reveals in the course of questioning can be used. The Act provides for personal immunity which means your client will be protected against statements he provides being used directly against him in further criminal proceedings.

However, any information gathered by ASIO during questioning can be used against any third party, including your client's daughter.

Information given by your client during questioning can also be used to source other evidence. There is no derivative use immunity. Thus, for example, testimony from a person being questioned that he or she had hidden a gun in a cupboard could not be used against them as an admission, but if a gun is found, the fact of its existence, and any fingerprints on it could be put in evidence in proceedings against that person. To advise your client properly you would need to make him aware that his answers can be used in that way.

If there are no, or few, issues of concern regarding derivative use evidence, and the client understands the consequences for his daughter, the client may be best advised to provide a full and complete account of all he knows. In that way he not only provides the answers ASIO seeks, he maximizes his immunity.

If your client is detained - under what authority can ASIO detain him?

The ASIO Act gives power to the Director General of ASIO to seek approval from the attorney general to apply to an 'issuing authority' (a federal magistrate or judge) for a warrant requiring an individual to appear before a 'prescribed authority' (a former judge, appointed to the post by the attorney general) for questioning by ASIO, or providing for that person to be taken into custody, brought before a prescribed authority and detained.

Non-compliance with the conditions of a warrant is an offence as is failing to give any information requested in accordance with the warrant. Both offences carry penalties of five years imprisonment (S34G(1) & (3))^{xii}. The attorney general may only give his/her approval, and the issuing authority may only issue the warrant if satisfied there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence important in relation to a 'terrorism offence'. The attorney must also be satisfied that relying on other methods of collecting that intelligence would be ineffective.

When and how will you find out that your client has been detained?

The ASIO Act does not guarantee confidential access to a lawyer of the detainee's choice.

If a police officer takes a person into custody under a warrant the officer must make arrangements for the person immediately to be brought before a prescribed authority (34DA). Until this has occurred your client will not be permitted to contact a lawyer.

If your client is to be allowed to contact you, either the warrant under which he is detained needs to permit contact with you, (34F(9)(a)), or once brought before the prescribed authority, he can ask to contact you.

The prescribed authority will allow the suspect to contact a lawyer only after the suspect has identified their lawyer by name^{xiii} in the presence of ASIO. ASIO then can

then agree to allow you to assist your client or ask that the prescribed authority direct that the person be prevented from contacting you (34D (4A)).

The prescribed authority can prevent your client from contacting you if satisfied that if he is permitted to contact you, a person involved in a terrorism offence may be alerted that the offence is being investigated, or a record or thing requested under the warrant may be destroyed, damaged or altered (34TA(2)).

If your client is permitted to contact you, the contact must be made in a way that can be monitored by a person exercising authority under the warrant (that is, a member of ASIO) (34U(2)). You will not have confidential access to your client. You will have to bear that in mind as you seek instructions and provide advice.

What rights does your client have while in detention?

On 11 August this year, the Government tabled a protocol governing the behavior of ASIO officers and police when questioning people under the Act. ASIO and the police must comply with the provisions of the protocol.

The protocol states that the taking into custody and subsequent detention of suspects under the Act must be effected under arrangements made by a police officer, and must be consistent with applicable police practices and procedures in relation to custody of persons (unless the relevant practices are inconsistent with the terms of the Act or the protocol.) A police officer (Australian Federal Police) is to supervise all detention under a warrant. The protocol provides that a police officer may use only the minimum force reasonably necessary in the circumstances. Physical restraint is not to be applied as a punishment, and may only be applied by a police officer and must not be applied for a longer time than is necessary.

The protocol requires that a person taken into custody and detained shall be permitted to contact a person specified in the warrant, or a person falling within a class of persons so specified. It further provides that unless directed otherwise by the prescribed authority, contact with such specified persons shall only be permitted within the presence of officers present for the purposes of executing the warrant (i.e. in the presence ASIO officers).

The protocol establishes guidelines on the method of questioning which ASIO officers under the Act should employ. It includes provisions that the subject shall have access to fresh drinking water and toilet and sanitary facilities at all times and be provided with three meals a day. A subject must not be questioned continuously for more than 4 hours without being offered a break – such a break being, at a minimum, 30 minutes. A subject may however, elect to continue questioning without taking a break, or after taking a break of less than 30 minutes duration, provided the prescribed authority is satisfied that this is entirely voluntary.

The protocol also mandates that a subject shall be provided with a separate bed, and a separate room or cell in which to sleep. A subject is to be provided with sufficient clean bedding and unless otherwise directed by the prescribed authority, must be

allowed the opportunity for a minimum of 8 hours undisturbed sleep for each 24 hours of detention.

How will your client be questioned and what involvement can you have?

If your client has not been prevented from contacting you under section 34TA, his questioning may have already begun before you arrive or are even contacted. Section 34D(3) provides that the period for questioning begins as soon as a suspect is brought before a prescribed authority^{xiv}.

Before he has been questioned for a total period of 8 hours (not including breaks), ASIO must request permission from the prescribed authority if they want to continue his questioning beyond that 8-hour period. A similar request for an 8-hour extension may be made before your client has been questioned for a period of 16 hours. The maximum total period your client may be questioned for under a single warrant is 24 hours (34HB(1), (2) & (6)). The prescribed authority may allow questioning to continue to that maximum period expires if satisfied that it will substantially assist the collection of intelligence in relation to a terrorism offence, and that ASIO conducted the questioning of the person properly and without delay in the first 8 or 16 hour period (34HB(4)).

Requests for permission to continue questioning beyond 8 or 16 hours may be made by ASIO in the absence of the suspect, their lawyer, parent or guardian (34HB(3)(a)-(f)), and there is no explicit provision for a suspect or their lawyer to apply to the prescribed authority for questioning to cease, or not to continue beyond 8 or 16 hours^{xv}.

As the subject's legal representative, you do not have few rights to intervene or object to ASIO's methods of questioning. Section 34U(4) of the Act states that a legal adviser may not intervene in questioning of the subject or address the prescribed authority in any way, except to request clarification of an ambiguous question.

If the prescribed authority considers you are unduly disrupting the questioning, the authority may direct that you be removed from the questioning (34U(5)). Your client would then have the opportunity to contact a new legal adviser (34U(6)), but you would almost certainly be denied any further contact with your client during his detention were these events to occur.

The giving of a direction that a person be released after the expiry of the maximum period of questioning does not prevent an issuing authority from granting a further warrant for the detention of that person (34F(7))^{xvi}.

There is no explicit provision in the Act allowing a person or their lawyer to argue against that person's further detention.

What can you do if you observe unlawful conduct while your client is in detention?

A lawyer representing a detained client can object to methods of questioning or treatment that directly contravene the protocol, and can complain to the Inspector-General of Intelligence and Security or the Commonwealth Ombudsman, on behalf of their client. This is because law does not authorise such conduct and that would make the conduct, and arguably the detention, unlawful and take it outside of the Act's provisions compelling you not to intervene^{xvii}. However there is no express provision providing for lawyers to intervene in this way either under the Act or the protocol.

When can your client apply to a federal court in relation to his treatment?

Section 34E of the Act provides that the prescribed authority must explain the nature of the warrant to your client as soon as he comes before the authority. Included in this section is an obligation placed on the prescribed authority to alert the subject to the fact that they '*may seek from a federal court a remedy relating to the warrant*' or their treatment under the warrant (34E(1)(f)). The prescribed authority is also obliged to remind the detainee of this right once in every 24-hour period of their detention (34E(3)).

The question for practitioners is – on what grounds could you advise your client that they may benefit from applying to a federal court?

There are three possible circumstances:

1. *The warrant under which your client was summonsed or detained may be faulty in that the provisions of section 34C were not satisfied.*

Section 34C(3) provides that the Minister may consent to the issuing of a warrant only if s/he is satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence and that relying on other methods of collecting that intelligence would be ineffective (34C(3)(a) & (b)).

Further, the section provides that if the warrant is to authorize taking the suspect into immediate custody, the Minister must be satisfied that, if the person is not immediately taken into custody and detained, they may alert a person involved in a terrorism offence that the offence is being investigated, may not appear before the prescribed authority (i.e. may be a flight risk) or may destroy, damage or alter a record or thing which may be requested in the warrant.

It may be possible to show that these elements were not made out in the detention of your client. You may be able to argue that there was no need to detain him at that time, and doing so was premature. You may be able to argue that there were alternative ways to obtain the information required under the warrant – and that ASIO could have undertaken questioning under their usual questioning powers rather than resorting to the very serious provisions of this Act. If the preconditions to the issue of a lawful warrant were not you could submit that the warrant is void and of no legal effect and the detention under it

is unlawful.

2. *You may be able to show that ASIO did not comply with the provisions of Subdivision C of the Act.*

Subdivision C deals with issues such as the humane treatment of people detained under warrant (34J), specifies reasonable times and ways an officer may enter a premises in order to detain a suspect (34JA), the reasonable use of force to be used while taking a person into custody (34JB), the requirement to video-record procedures (34K) and the power to conduct ordinary and strip searches (34L). If the requirements of these sections are not complied with, you may be able to argue that your client was illegally detained.

3. *You may be able to challenge the issue of subsequent warrants for the detention and questioning of your client when they have already been detained under an original warrant.*

Section 34D(1A) provides that if a second or subsequent warrant is requested, the issuing authority must be satisfied that the issue of the warrant is justified by information additional to or materially different from that known to the Director-General at the time s/he sought the Minister's consent for the previous warrant. If there are not proper grounds for the issuing authority to be so satisfied the subsequent warrant may be set aside.

However, it is difficult to know what kind of additional or materially different information can justify an officer's request for a further warrant. If the 'materially different' information is information gathered pursuant to the questioning performed so far, it is arguable that it was not the intention under the Act that a suspect would be detained further in this way because it is circular to rely on 'new' information derived from the initial questioning. However the issue is unclear and unsatisfactory for the reasons set out in the Law Council of Australia's letter to the Prime Minister referred to earlier above.

What procedures govern such applications to the Federal Court?

The usual procedures provided for commencing proceedings in the Federal Court (Order 4, Federal Court Rules) are likely to be too cumbersome to use on behalf of someone in detention. However, in urgent cases it is possible to seek an injunction or other remedy by informal originating processes.

All Federal Court registries have an after hours number listed in the telephone book for this purpose. It is possible for judges to be called out to hear urgent matters without a lawyer having to formally commence action via statement of claim or affidavit under the Rules. The registry will however insist upon you providing some written statement of the reasons for urgency and an undertaking to file formal documentation in due course.

The litigant in person

A real difficulty is likely to arise when a detainee cannot obtain or has been denied legal representation. Although the Act states that a person in detention must be told once in every 24 hour period of questioning that they are able to seek the assistance of the Federal Court, neither the Act nor the protocol explicitly deals with how that could be done by a detainee without legal assistance. There is little doubt that the Federal Court would try to assist any such litigant in person who contacted the registry but the Act is silent on the subject.

Is it sufficient, if when a person tells the prescribed authority that they want to pursue a remedy in a federal court, that they just be given the phone number of the registry and left to their own devices to phone the registry and explain the situation they are in?

Will your client's family be told of his detention?

If your client is in detention he will not be permitted to contact (and may be prevented from contacting) his family or anyone else (34F(8)). The only exceptions are:

- A person may contact anyone whom the warrant under which they are detained permits them to contact (34F(9)(a)) (e.g. a lawyer, or a family member).
- A person may contact the Inspector-General of Intelligence and Security or the Ombudsman in order to make a complaint (34F(9)(b)).

Once your client is brought before a prescribed authority, the prescribed authority is entitled to make any directions s/he sees fit, and it is at least arguable that contact with a family member would be a standard direction to be given by a prescribed authority^{xviii}. However, if the prescribed authority were of the opinion that contact with a family member might create a security risk it seems unlikely your client would be allowed to contact his wife or other children.

The Act does not make clear how your client, or you on his behalf, can make an application to the prescribed authority for a direction that he be permitted to contact a family member.

Warrants for the detention children (aged 16-17), by contrast, must provide for them to be allowed to contact a family member.

Can you inform your client's family that they are detained? - What are you allowed to say to the media, before, during and afterwards?

Section 34U(7) provides that a legal adviser commits an offence if they 'communicate to a third person information relating to the questioning or detention of the suspect', while the subject is being detained, unless they are authorised to do so by the prescribed authority. The offence carries a penalty of five years imprisonment. In the absence of authorisation you would not be able to tell a worried wife about her missing husband.

Section 34U(8) allows the prescribed authority to authorise the legal adviser to communicate to another person specified information relating to the questioning or

detention of the subject, provided such authorisation is not inconsistent with any regulations made under the section. It must be implicit that you can make submissions to this effect.

Ironically there are no prohibitions regarding publication of the identity of persons detained for questioning by anyone *other* than the person's lawyer.

What remedies can be sought if your client is mistreated during detention?

Section 34J provides that a person detained under the Act must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment, while in detention. Other sections set out how specific incidents are to be dealt with such as when ASIO can enter premises to take someone into custody (34JA), reasonable use of force when detaining a suspect (34JB) and power to conduct ordinary and strip searches (34L). The protocol expands on these rights. However the Act does not clearly set out what detainees can do if they object to behavior while they are detained, other than allowing them to make a complaint to the Inspector-General of Intelligence and Security or the Commonwealth Ombudsman (34F(9)(b)).

Additionally, as discussed above, if the requirements of these sections are not complied with, you may be able to take proceedings in the Federal Court on the basis that your client's detention has become unlawful.

What can you or your client say publicly after your client's release? - What can your client tell his daughter who may still be under suspicion?

While the ASIO Act creates an offence if a lawyer reveals information to third parties without authority while their client is detained, it is not an offence for your client, after his release, to go on to speak publicly about the experience.

Similarly, it is not an offence for a lawyer to speak publicly after his client has been released, and the Act does not create an offence for a person who has been questioned for speaking to other potential suspects about the questioning – once they have been released.

However you should advise your client to be cautious about what they say and do that could assist persons suspected of terrorism. While no separate offence is created for clients who behave in this way, they would still need to be cautious to avoid becoming complicit in some future terrorist offence or an accessory after the fact to an act of terrorism.

As your client's legal representative you would also need to be similarly careful.

A concluding postscript: My tribute to Tony Abbott and the Rule of Law

I should end this paper with a sincere, if ironic, tribute to the stand taken by the Minister for Industrial Relations, Tony Abbott.

In a recent paper delivered to the usually conservative Centre for Independent Studies, Tony Abbott advanced the argument, with which I substantially agree, that our leaders will never be able to mount an effective defense of western civilization unless they and our community as a whole are prepared to defend our values with the same passion and commitment as shown by those attacking it.

One of the values Tony Abbott identified to defend, as a key element of liberal democracy, was the Rule of Law.

The antithesis of the Rule of Law is arbitrary executive power.

As Australia edges closer to establishing what George Williams has described as part of the apparatus of a police state, Tony Abbott's injunctions should ring in the ears of both the Howard government and in the ears of members of the legal profession such as yourselves.

If parliamentarians and lawyers have no stomach to defend the Rule of Law, it will be abandoned. That is what the terrorists are counting on.

They count on the victory of fear over our commitment to freedom, civil liberties and democratic values.

ⁱ Ronald Dworkin *The Threat to Patriotism* *The New York Review of Books* Feb 28, 2002.

ⁱⁱ *Ibid.*

ⁱⁱⁱ Benjamin Franklin, Reply to the Governor, Nov 11, 1755—*The Papers of Benjamin Franklin*, ed Leonard W. Labaree, vol. 6, p. 242 (1963).

^{iv} Alan Dershowitz *A choice among evils* *The Globe and Mail* 5 March 2003 Metro A17.

^v I am indebted to Simon Bronitt for the argument that the Rule of Law has been threatened by both the 'war on drugs' and the 'war on terror': see, Simon Bronitt *Constitutional rhetoric v Criminal justice realities: Unbalanced responses to Terrorism?* (2003) 14 PLR 69.

^{vi} George Williams, *The ASIO Bill* Paper delivered to the Government and Service Delivery Committee, Federal Parliamentary Labor Party 26 August 2002.

^{vii} *Ibid.*

^{viii} Although the Parliament did rush through a special law proscribing the Hezbollah External Terrorist Organisation after the government argued that urgent action was required. Such parliamentary declarations are of doubtful constitutionally effect given the High Court's reasoning in the *Communist Party Dissolution Case* 83 CLR 1.

^{ix} *R v Foster; ex parte Rural Bank of New South Wales* 79 CLR 43 There is also a less clear but arguable case that the existing state of threat to Australia's defence and security does not justify the current passage of such draconian laws. The High Court's central role in determining constitutionality means that it would be open to a plaintiff to argue that the current risk to Australia does not justify such measures. However the High Court's reasoning in the *Communist Party Dissolution Case* 83 CLR 1 allows the parliament to rely on the defence power not only at times of war but also in times of 'uneasy peace'. What approach the current High Court would adopt to the so called 'war on terror' is harder to

predict. It would be entitled to take judicial notice of the actuality of terrorist attacks on Australian targets and the critical question would be whether the court robustly characterised these and the threat of further acts of terrorism as being no more than ordinary, albeit serious, breaches of the criminal law (which would not justify extreme measures to limit civil liberties), or, instead characterises them as attacks on Australia and Australians of such seriousness as to engage the defence power. Both are plausible characterisations but the latter seems slightly more probable, at least while the current levels of perceived threat remain.

^x Information supplied by Lex Lasry QC of the Victorian Criminal Bar Association.

^{xi} I am grateful to Ms Peta Murphy, solicitor, for much of the research that underpins this discussion.

^{xii} Section 34G(3) does not apply if the person does not have the information requested in the warrant, but the burden of proof lies with the suspect in this regard.

^{xiii} It is unclear what is intended to occur if the person in detention asks for the assistance of a lawyer but does not know anyone to contact. It is reasonable to assume that the prescribed authority would assist the detainee by providing information regarding suitable advisors to contact. Such an outcome is however speculative as nothing in the Act mandates that outcome.

^{xiv} The attorney general has indicated that the power to begin asking questions before access to legal advice is provided would be exercised only in circumstances of urgency.

^{xv} The ASIO Act states that a lawyer may only intervene in the questioning of a client to clarify the meaning of a question. However, it is submitted, it is improbable that any retired judge would prevent a lawyer making a brief and reasoned submission as to the propriety of continuing a period of questioning.

^{xvi} This is the provision that was the subject of submissions to the Prime Minister by the Law Council of Australia referred to earlier in this paper.

^{xvii} See by analogy the reasoning of the High Court in *Plaintiff S157 of 2002 v The Commonwealth* 195 ALR 24

^{xviii} The failure of the protocol to deal with this matter is an unfortunate and serious omission. It can hardly be intended that the families of detainees will suffer the fears that go with coping with a missing son, daughter, father, mother or spouse unless that is absolutely necessary.