WHITHER DEMOCRACY:
Australian Immigration Law since September 11 –
Musings of a Human Rights Activist

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ABSTRACT

The shock waves emanating from the September 11 tragedy have had dramatic consequences in Australia's immigration laws. Legislative and policy changes have occurred in the administration of Australia's immigration system which have broader implications for many of the fundamental principles on which the Australian democratic political system is founded. Largely affecting new Australians, many of these changes, which mirror those occurring in other Western democracies, have involved a dismantling of traditionally accepted Conventions which underpin our way of life, and have been made largely without publicity or serious political debate.

The paper argues that long-term ramifications of these developments should be a cause of real concern. It is time for a stock-take to be made and for those clamouring for ever more control being vested in the Executive to be called to justify more publicly their actions.

THE BACKGROUND

There are certain events in history which are so monumental that we all recall what we were doing at the relevant time. Given our close allegiance with Great Britain and the USA, events occurring in these countries are often as remembered as significant Australian events.

I can recall the disruption caused to my last law exam on November 11, 1975 by events occurring in Canberra that day – Australia's first political coup - and perhaps the lighting of the flame at the Sydney Olympics by Cathy Freeman in September 2000, as well as her great

victory in the 400 metres that followed, will also go down in the watershed of Australian history as events of iconoclastic significance – who knows? Certainly it may be as important for national reconciliation with our indigenous people as the result of the 1967 Referendum – where we could feel united in celebration and pride for the nation symbolically lead by an elite aboriginal female athlete.

I am sure that we all recall what we were doing on that fateful August 1997 day in Paris when Princess Diana died in a car accident – an event which could well mark the start of the demise of the British monarchy.

I still remember vividly what I was doing that hot (in Sydney) November day in 1963 when President Kennedy was assassinated (lying on Harbord beach); and also when other year 12 students and I were clustered around a TV set especially brought in to screen the historic first time man set foot on the moon in 1968.

And then there was 11.00 pm Tuesday (Sydney time) 11 September 2001! I was driving home from the monthly meeting of the NSW Jewish Board of Deputies, and tuning in to the late ABC news the newsreader announced the crashing of the first plane into the Twin Towers. It seemed an accident then, however surreal the TV images were, but as we watched later that night glued to our TV screens until the wee hours of the morning, the full extent of the horrific events occurring in the USA unfolded. At that time we sensed history was being made.

Now, in retrospect, with the passing of over 2 years we see that our initial views were clearly well-founded.

THE PRINCIPLES STATED

National security has become an obsession for Western democratic governments (perhaps cynically, a commentator might conclude, clearly aware of the electoral benefits of the issue for a serving administration).

History is cyclic, of course, and human memory quickly forgets the past: the McCarthy anti-communist witch hunts would be known today to very few, except the keenest of political aficionados and historians, or the families of those affected – and earlier episodes of national paranoia are only the topics of historical theses or plays or movies. It would seem that in every generation another outbreak occurs of security-driven hysteria against the threat to our lifestyle caused by some adversarial extremist group or another. Each episode in turn is used to justify the imposition of restrictive ordinances vesting greater power in the Executive. The rights of the individual are diminished as opposed to the needs of the community at large – the greater good of the community – which are the common and unifying justifications.

Nevertheless, in our political system, safeguards have been developed over the centuries to provide protection from the tyranny of an all-powerful Executive. These include fundamentally the doctrine of the separation of powers between the 3 levels of government: the Executive, the Legislature and a truly independent Judiciary; universal suffrage; a free press; the subordination of the military to civil control, the right of due process (or natural justice) to all; trial by jury; equality before the law; and a criminal justice system which prevents arbitrary detention and retrospectivity of laws.

Many mechanisms have been developed over the years to afford and enforce these protections. National constitutions enshrining rights, international Conventions protecting the rights of people, and peoples, developed under a United Nations System, and regulating what is acceptable conduct in warfare, recent very important developments in international protective human rights like the International Criminal Court established by the Treaty of Rome, and multilateral human rights treaties at regional level, enforced by Human Rights Courts, are all significant in this respect.

Of course, in Australia we lack a Bill of Rights, and a system subordinate to internationally enforced human rights law. Cataclysmic human confrontations like the First and Second World Wars of the 20th century ironically resulted in the advancement of protections of human rights against tyrannical dictatorships. Bear in mind the ease with which tyranny in the name of public security and the common good can develop into a means by which the equally important rights of the minority can be oppressed. Remember that neither Hitler nor Stalin were voted in to power by a majority of the electors in a democratic vote.

One doesn't have to go beyond the views expressed by that great US statesman Thomas Jefferson in his first inaugural address:

> *… All too will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression. …*
> *…*
> *About to enter, fellow-citizens, upon the exercise of duties which comprehend everything dear and valuable to you, it is proper you should understand what I deem the essential principles of our government, and consequently, whose which ought to shape its administration. I will compress them within the narrowest compass they will bear, stating the general principle, but not all its limitations. Equal and exact justice to all men, of whatever state or persuasion, religious or political; peace, commerce, and honest friendship with all nations, entangling alliances with none; the support of State governments in all their rights, as the most competent administrations for our domestic concerns, and the surest bulwarks against anti-republican tendencies; the preservation of the general government in its whole constitutional vigor, as the sheet-anchor of our peace at home and safety abroad; a jealous care of the right of election by the people, a mild and safe corrective of abuses which are lopped by the sword of revolution where peaceable remedies are unprovided; absolute acquiescence in the decisions of the majority, the vital principle of republics, from which there is no appeal but to force, the vital principle and immediate parent of despotism; a well-disciplined militia, our best reliance in peace, and for the first moments of war, till regulars may relieve them; the supremacy of the civil over the military authority; economy in the public expense, that labor may be lightly burdened; the honest payment of our debts, and sacred preservation of the public faith; encouragement of agriculture, and of commerce as its handmaid; the diffusion of information, and arraignment of all abuses at the bar of the public reason; freedom of religion, freedom of the press, and freedom of person, under the protection of the habeas corpus, and trial by juries impartially selected. These principles form the bright constellation, which has gone before us, and guided our steps through an age of revolution and reformation. The wisdom of our sages, and blood of our heroes, have been devoted to their attainment; they should be the creed of our political faith, the text of civic instruction, the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or of alarm, let us hasten to retrace our steps, and to regain the road which alone leads to peace, liberty, and safety.*[1]

In at least 2 significant areas the policies of the current Bush administration in the USA in my view fail to meet these standards.

[1] Reproduced from The World's Greatest Speeches, p. 260-262.

The indefinite detention of people in Guantanamo Bay is inexcusable. If the detainees have committed a crime let them be charged and prosecuted and let them defend their innocence, if that is their choice. The failure to do so brings the administration to the same level of injustice as that practised by the regime overthrown in Afghanistan in the name of liberty and other democratic values. The longer the present situation continues, the greater the travesty of justice and the more the present situation becomes intolerable.

The doctrine of pre-emptive strike, whilst superficially appealing, creates a precedent whereby the rule by force, and not the rule of law, between nations, and by corollary by states against its citizenry, is justified. There is a patent contradiction between accountability and transparency of the political process, on the one hand, and a system in which the end is used to justify the means. I do not accept the propriety of Australia being the Deputy Sheriff or enforcer for such an abusive world view.

At the last 3 International Bar Association conferences I have attended – in Durban, South Africa in September 2002, in San Francisco in September 2003 and in London in November 2003 – significant sessions were devoted to presentations on the impact of September 11 on immigration laws of various countries. At all of these sessions, a common thread emerged. Western Governments, in the name of national security, were introducing a variety of restrictive laws, the combined effect of which was to whittle away to varying levels of insignificance cherished human rights which had evolved over the centuries, and many of which had remained notwithstanding equally serious if not greater threats to national security.

One of my greatest concerns is the open-ended and ill-defined nature of the "War against Terrorism," in the name of which so many of the newly introduced measures have been made. But this is the topic of another paper.

Migrants, outsiders, have always been a convenient whipping board for those anxious to protect the perceived purity of the nation. The generous terms expressed in the poem of Emma Lazarus which adorn the Statue of Liberty:

> *"Give me your tired, your poor,*
> *your huddled masses yearning to breathe free,"*

are hardly matched by the political rhetoric of today, where governments loudly and erroneously proclaim that governments alone have the right to determine who shall enter a country and control the border. Those uttering these statements fail to mention that international human rights Conventions that the civilised international community has developed, such as the Refugee Convention of 1951 and the Convention Against Torture of 1984, to name the most important, contain non-refoulement clauses which form a very significant exception to the unilateral power of governments. The practice of demonising the victims, and defenceless, with terminology and means that Goebbels would have envied, has been developed into an art, to the moral shame of the perpetrators of this injustice, as well as their gullible and inexcusably ill-informed supporters.

Refugees are of course by definition victims of gross human rights violations, usually of governments. Cross border flight is a concomitant feature of the refugee's plight. Restrictive legislation which impairs or prevents a refugee accessing the protection of another State clearly runs counter to the spirit, if not the letter, of obligations voluntarily accepted by States party to the Convention.

AUSTRALIAN RESPONSES

It is with these opening observations in mind that we should consider the legislative and policy changes which have taken place in Australia since September 11, many of which in fact pre-empted those taken by other countries, and others of which mirror developments in traditional allies like the UK and the USA.

Australians have now been the direct target of terrorist attacks in Indonesia. To date, there have been no such onslaughts within our borders and the focus of the Australian government therefore seems to be to take pro-active steps to implement hard-line preventative measures. Because of its relative geographic isolation, Australia has historically escaped enemy attacks within its borders to a greater extent than most other countries. International terrorism, however, is not bound to the restrictions of conventional warfare and does not leave any country inviolate. The Australian government, in an attempt to protect the country's borders, seems intent on obtaining sweeping executive powers to take concise and unchallengeable

action in dealing with immigration law matters, on the basis that this is needed in the interest of national security.

True, Australia had initiated stricter border protection measures even before the terrorist attacks in America. The Border Protection Legislation Act 1999 was introduced to give immigration officers greater powers in dealing with illegal non-citizens.[2] In this legislation, the Executive was authorized to pursue and board foreign ships, to search such ships, to move and destroy hazardous ships, and to seize and/ or dispose of things used in the commission of an immigration offence.

Australia has a long spanning immigration history and its community comprises of a rich mixture of cultural and ethic backgrounds. Australia has also been a longstanding responsible member state, being the sixth country to accept responsibilities towards refugees, of the United Nation Convention on Refugees. We have operated on a per capita basis the world's largest refugee resettlement programme, jointly with the UNHCR.

Despite the fact that many Australians come from migrant or refugee families, or are migrants themselves[3], there is inexplicably a very strong public sentiment – fanned by political pronouncements - against the entry of the so called 'boatpeople', the great majority of whom ironically end up being granted protection in Australia under its UN refugee obligations.

Unfortunately, a significant portion of the Australian community's view on asylum seekers is that of suspicion and intolerance. In opinion polls[4] that were taken on 2 September 2001 (at the height of the Tampa crisis) regarding boats carrying asylum seekers: 50% of participants felt that all boats should be turned back and 38% was of the opinion that only some boats should be allowed to enter Australia depending on the circumstances – a mere 9% thought that all boats carrying asylum seekers should be permitted to enter for assessment as refugees. Not surprisingly, public sentiment grew less tolerant after 11 September and the following statistics were recorded from a poll taken in October 2001: 56% for no asylum seeking boats, 33% depending on the circumstances and 8% accepting the boat arrivals.

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[2] Australian immigration law only recognizes three classes of people, i.e. citizens, legal non-citizens (people with visas) and illegal non-citizens.
[3] Approximately one in every four Australians is a first generation migrant.
[4] 'No change of view: turn back the boats'. Dennis Shanahan, The Australian, 5 September 2002.

Confusing the issues?

There is of course a danger in confusing issues of national security with the plight of asylum seekers/ refugees and other immigrants in the aftermath of September 11. Public opinion is easily swayed by media attention to selective material and anti-refugee views are exacerbated by the ever-increasing influx of illegal immigrants and people smuggling worldwide.

The United Nations High Commissioner for Refugees expressed a number of concerns related to the issues raised above in a press release dated 24 October 2001. He records increasing public perception of refugees and asylum seekers as criminals and abhors other attempts to create unwarranted links between refugees and terrorism and to demonise the victims. The press release mentions racism and xenophobia, problems of entry and access to refugee status determination, the exclusion of genuine asylum seekers, the worsening treatment of asylum seekers, increased withdrawal of refugee status from refugees, increased deportation, and an over emphasis on resettlement to third countries. It was further stated that care must be taken in the implementation of the United Nations Security Council Resolution 1373, which calls for the cooperation of countries against terrorism, not to unfairly prejudice bona fide asylum seekers.

By taking too strict a view on these matters and giving excessive powers to the Executive over border protection and immigration regulation, the essential principles of liberty, democracy and rule of law will be jeopardized.

Policy changes

The Australian government moved quickly after September 11 to introduce vast and far-reaching security and immigration legislation justified on the ground of better protecting Australia's borders.

Examples of new immigration regulations and screening actions that have been introduced as a direct or indirect response to September 11 are:

Firstly, the introduction of 'privative clauses' into Australian immigration law.

Privative clauses in essence disallow an appeal of the executive's (administrative) decision-making powers to the courts. Under current legislation certain visa applicants are entitled to have adverse decisions by DIMIA to be reviewed by either the Migration Review Tribunal (MRT), the Refugee Review Tribunal (RRT) or, under specific circumstances, the Administrative Appeals Tribunal (AAT). These tribunals have a quasi-judicial nature, are constituted by members who do not necessarily have legal training and who are appointed by the government for short terms (usually 3 years, subject to extension). On 2 October 2001 the Australian Parliament, in a bid to effectively prevent visa applicants from seeking judicial review, introduced sections 486A[5] and 474[6] of the Migration Act.

A grave concern that arises from such restrictions is the unchallengeable use of executive power. It is accepted by all democratic and free countries that the separation of powers is fundamental to fair and accountable government. Australia's Constitution specifically protects the Judiciary's powers, while restricting the Executive's powers. A challenge was mounted in the High Court of Australia against this law.

On 4 February 2003, a unanimous decision was handed by the High Court of Australia[7] that found: where a jurisdictional error exists in an administrative decision, no actual decision has been made, and accordingly the privative clause would not be applicable to preclude judicial review. The end result of this decision is that applicants once again have the right to access the court system to have legal errors scrutinised by the courts. This is a positive development

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[5] Section 486A Time limit on applications to the High Court for judicial review

1) An application to the High Court for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of a privative clause decision must be made to the High Court within 35 days of the actual (as opposed to deemed) notification of the decision.
2) The High Court must not make an order allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 35 day period.
3) The regulations may prescribe the way of notifying a person of a decision for the purposes of this section.

[6] Section 474 - Decisions under Act are final

1) A private clause decision:

a) Is final and conclusive; and
b) Must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
c) Is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

[7] *Plaintiff S157 of 2002 v Commonwealth of Australia*, (2003) 195 ALR 24, [2003] HCA 2.

in that the rule of law has been protected, ensuring that Commonwealth officers do not exceed their executive power.

Secondly, there is a greater focus on visa applicants' character in the immigration process.

The traditional method of removing undesirable non-citizens from Australia was by way of deportation, affected by the Minister for Immigration under sections 200-201 of the Migration Act. Under these sections a deportee must have been convicted of a criminal offence and served sentence of at least one year. In recent times the government has however made increasing use of its power under section 501[8] of the Migration Act to refuse or cancel a visa on much less stringent character grounds.

Under section 501 (6), a person does not pass the character test if the person has a substantial criminal record, or (in the discretion of the minister and/ or his delegate) is not a person of good character having regard to *inter alia* the person's past and present criminal conduct, or the person's past and present general conduct (for example providing inaccurate information to DIMIA or breaching visa conditions). The breadth of the section is huge.

In instances where the Minister makes the decision personally the principles of natural justice have been statutorily excluded and do not apply. The Minister also has the power to override a decision of the Administrative Appeals Tribunal (which has the jurisdiction to review

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[8] '501. Refusal or cancellation of visa on character grounds
Decision of Minister or delegate - natural justice applies
501. (1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.
Note: Character test is defined by subsection (6).
(2) The Minister may cancel a visa that has been granted to a person if:
(a) the Minister reasonably suspects that the person does not pass the character test; and
(b) the person does not satisfy the Minister that the person passes the character test.

Decision of Minister - natural justice does not apply
(3) The Minister may:
(a) refuse to grant a visa to a person; or
(b) cancel a visa that has been granted to a person; if:
(c) the Minister reasonably suspects that the person does not pass the character test; and
(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

(4) The power under subsection (3) may only be exercised by the Minister personally.
(5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3).'

departmental decisions relating to character under section 501) and any decision affording leniency to applicants.

Further, there is now a far greater scrutiny of all applications by the Australian Security Intelligence Organisation (ASIO).

Thirdly, reference needs to be made to the excision of Australian islands from its 'migration zone'.[9] The publicly expressed reason behind these measures is to prevent persons on unauthorized boat arrivals in Australian territories from making valid visa applications or seeking protection as refugees on Australian soil. The advantage to such an applicant is that he/she is then entitled to lawfully remain in Australia until the matter (including any appeal) has been finalized, which could take months or even years.

The vast majority of illegal immigrants arriving in Australia commence their journey from Indonesian shores. Indonesia is geographically close to Australia and has to date been unable to effectively control the influx and exodus of asylum seekers from a variety of countries. It is however not a signatory of the Refugee Convention. By excluding these islands from the Australian migration zone, intending visa applicants are barred from lodging valid onshore visa applications, as they are technically not in Australia for that purpose.

The precedent of such a policy raises serious implications for the effectiveness of the protection regime mandated under the Refugee Convention.

A fourth example is the Migration Legislation Amendment (Identification and Authentication) Bill 2004.[10] This Bill seeks to amend the Migration Act to insert provisions to provide for a legislative framework for the collection of personal identifiers from non-citizens. The Bill will enable specified personal identifiers to be collected from visa applicants and persons entering Australia, as well as non-citizens within Australia whilst checking compliance with visa conditions. Non-citizens detained in terms of the Migration

[9] The Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 was introduced into the Senate on 24 June 2002. This bill proposes to expand the definition of 'excised offshore places' to include the Coral Sea Islands Territory and certain islands that form part of Western Australia, Queensland and the Northern Territory.

[10] Previous citation: *Migration Legislation Amendment (Identification and Authentication) Bill 2003*. The House agreed to the Senate's amendments on 11 February 2004.

Act and placed in immigration detention can also be subjected to these measures. The following types of personal identifiers are proposed:

1. Fingerprints and handprints.
2. Photographs or other images of the face and shoulders.
3. Weight and height measurements.
4. Audio and video recordings.
5. Signatures.
6. Iris scans; and
7. Any other personal identifiers as prescribed in the Regulations.

While the Bill provides some protection to non-citizens subjected to these measures (for example, a personal identifier that involves the use of an intimate forensic procedure - such as blood tests or hair samples - will be prohibited from being prescribed), there are obvious concerns raised in relation to the enforcement of such procedures. Although it is recognised that identity fraud is a huge problem for many Western countries, it does raise concerns such as:

1. What are the safeguards that would apply to the procedures?
2. Can a personal identifier be taken without consent?
3. What are the consequences of failure to comply with identification requirements?
4. Can identifiers be taken from children or people with mental illness?

There are many privacy issues of concern about this Bill, such as: What measures are taken in relation to the destruction of the personal identifiers, the treatment of minors, data base projection etc.

Further, there is the fundamental concern that the regime implemented will be a far too intrusive power to the Executive to control people.

Fifthly, an important legislative change directly linked to anti-terrorism is the introduction of Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003. The Australian Security Intelligence Organisation (ASIO) Legislation Act was introduced to enhance the capacity of Australian security organisations to combat terrorism. It grants ASIO powers to collect intelligence that may substantially assist in the investigation of terrorism offences. The Act provides ASIO with the ability to seek a warrant to detain and question people for the purposes of investigating terrorism offences. The Act provides for the development of a written statement of procedures or protocol to be followed in the exercise of authority to take persons into custody, to detain persons and conduct questioning under warrants issued under the Act. The Act also provides that no action can be taken under the warrant until the protocol has been followed.

The protocol has been developed (in accordance with the requirements of the Act) by the Director General of Security in consultation with the Australian Federal Police, the Inspector General of Intelligence and Security and the Attorney General's Department. The protocol sets out the basic standards that will apply in the questioning and detention of persons under a warrant. It clarifies concepts used in the Act and addresses issues such as:

1. Transportation of a person under warrant.

2. Treatment of a person being questioned, for example, the conditions applicable during questioning such as access to drinking water and toilet and other facilities at all times during questioning.

3. Supervision of detention under warrant and the conduct of any searches undertaken pursuant to a warrant.

4. Health and welfare of a person subject to a warrant, such as accommodation facilities and food and sleep requirements.

5. The video recording of procedures.

6. Contact with other persons and a complaint mechanism; and finally

7. Arrangement for liaison with other persons such as the Inspector General of Intelligence and Security and the Commissioner of the relevant police service.

In summary, ASIO now has the power to detain and question people believed to have information about terrorist attacks. In a media statement by the Australian Government, it was said: "The Australian community demands that our counter-terrorism laws are strong and effective. The Howard Government has repeatedly and consistently demonstrated the seriousness with which we take our responsibility to protect Australians and Australian interests from terrorism."

Obtaining and issuing warrants under the ASIO Act: In obtaining a warrant, the Director General of ASIO must obtain the consent of the Attorney General before seeking a warrant from an issuing authority. Before consenting, the Attorney General must be 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. If the warrant being sought requires a person to be taken into custody immediately and detained, the Attorney General must also be satisfied that the person may alert another person involved in a terrorism offence of the investigation, or the person may fail to appear before the prescribed authority, or the person may alter or destroy a record or thing that he may be requested to produce. If the warrant concerns a person between the ages of 16 and 18, the Attorney General must also be satisfied on reasonable grounds that the person will commit, is committing or has committed a terrorism offence. An issuing authority will be either a Federal magistrate, a Federal judge or another authority set out in the regulations. An issuing authority may only issue a warrant if it has been requested in accordance with the proper procedure and it is satisfied that there are reasonable grounds for believing that the warrant will substantially assist in the collection of intelligence that is important to a terrorist offence.

Under the warrant if a person is taken into custody immediately and detained, this will be the responsibility of the police, normally the Australian Federal Police. A warrant can allow up to a total of 24 hours of questioning in 8-hour blocks over a maximum period of 7 days, subject to the protocol governing the questioning process. The person will have access to a lawyer of choice, with safeguards to protect security sensitive information and increased penalties for security offences. A security provision places a ban on the legal adviser

communicating any unauthorised information while the subject is detained under warrant. The penalty for breaching this provision is up to 5 years imprisonment.

Former Immigration Minister Ruddock, now the Commonwealth Attorney-General, has foreshadowed an expansion of these powers, justified on national security grounds.

As a corollary to the above, in NSW, specific anti-terrorism powers have been given to the police in controversial legislation passed in 2003. Extended powers to hold and detain persons on general suspicion have been enacted.

The Australian Government has also foreshadowed new legislation and administrative measures to protect sensitive information disclosed during court cases involving classified or security sensitive material. The range of new measures that has been designed to overcome the procedural and evidentiary problems associated with prosecuting criminal offences involving sensitive material include:

1. Enabling closed hearings on the use, the relevance or admissibility of such material before it becomes an issue in open court.

2. Enabling the court to allow summaries or stipulations as to the facts to be substituted.

3. Requiring all persons to obey, under threat of criminal penalty, any court order or direction relating to handling and disclosure of information.

4. Requiring legal representatives who require access to the information to be security cleared at an appropriate level.

The Government has advised that these measures have been drawn from legislative regimes in other countries such as the United States, the United Kingdom and Canada.

Finally, in this ever changing area, comment needs to be made of the Government's homeland security style audit of precautions against terrorist attacks and illegal entry into Australia revealed on page 1 of *The Australian* on 18 February 2004. To quote the article:

> *The sweeping nationwide review, which will cost hundreds of millions of dollars when recommendations are implemented, will check the security of the coastline; immigration procedures; airport security, particularly at isolated regional airports; airlines; travel advice for tourists; intelligence alerts; harbour security and transport.*
>
> *It will be the first national stocktake of Australia's security precautions since the terrorist attacks of September 11, 2001.*
>
> *The plan is to check Australia's preparedness to deal with terrorist events and gauge the effectiveness of steps taken so far. The report is likely to be completed and released before the federal election, expected in October or November.*
>
> *Co-ordinating and measuring preparedness against domestic terror attacks in the US is one of the tasks of the Department of Homeland Security, but the Coalition has refused to establish such a department because it believes it adds another layer of bureaucracy.*
>
> *The departments of Immigration, Customs, and Transport and Regional Services will be the main areas examined and there is expected to be a further drain on the budget surplus to fund the stocktake.*
>
> *Australia's northern coastline and the Coastwatch program – meant to detect illegal boat arrivals – will also be reviewed.*

Note again the direct linking of Immigration with national security; a logical link one might believe, but a convenient one given the context the subject of this paper.

Finally, and in my view, one of the most serious developments has been the decision to use the military to perform essentially civilian operations to repel would-be asylum seekers. It is noteworthy that this occurred soon after legislative amendments permitted the military to perform security during the 2000 Sydney Olympic Games, and also that there was almost no expression of community concern at the broader implications of this decision. Established Conventions call for the deployment of the military in domestic crises with the utmost caution, and not as is becoming apparent, whenever a perceived problem, with a political genesis, occurs. A military used to involvement in domestic affairs creates a recipe for future serious problems.

CONCLUDING COMMENTS

At the 2003 London Conference two immigration officers from the newly created monolithic USA Department of Homeland Security presented papers. They spoke of a new immigration regime driven by, in their words: "fear, ignorance and hysteria" – dare I say paranoia! A zero

tolerance policy has been introduced – officers who make one error in visa issue in terms of security are dismissed summarily. Needless to say a collective malaise has developed, with the visa issuing system there largely grinding to a halt, notwithstanding all the hi tech systems in place to provide case officers assistance in identifying potential security risk, from bona fide visitors. Smart security has been replaced by a fortress USA approach. Biometric identifiers, such as proposed for Australia, will further enhance the security screen developed to protect the country. A range of other oppressive measures have also reportedly been introduced.

In the UK, detention without trial, differential treatment of visa applicants based on country of origin, and interdiction policies which in large part mirror those developed in Australia have caused serious angst to human rights advocates.

And yet amidst these developments let me recount my own personal experience of the effect of September 11 on UK immigration laws.

I was lucky enough by birth to hold dual citizenship: Australia and UK. I therefore have two passports – Australian (which I use to leave and enter Australia), and UK, which I use on entry into and departure from that country.

In 2000 when I passed through border control at Heathrow Airport I waved, unopened, my UK passport in front of the bored immigration officer who ushered me through without the slightest check! In November 2003 as I approached the control booth I saw those in front had opened their passports at the photo page. Expecting a more detailed analysis of mine, I did likewise. As I approached the booth, open passport extended in my right hand, the officer again waved me through without bothering to conduct even the most cursory check. On both occasions when I left I was not required to show my passport.

On neither occasion was any record kept of my entry into or departure from the country.

If this is the level of commitment to border security in the UK in practice, I query the real reason for the introduction in the UK of the draconian laws in the name of national security there.

Of course, the USA, UK and Australia immigration practices are clearly different. But the consequence of the loss of our cherished rights is equally alarming in all countries.

In my mind the statement attributed to Edmund Burke ought never be forgotten:

> *"Evil is perpetrated when good men remain silent."*

And finally to conclude with the words of John Philpot Curran given in his speech on the Night of Election of Lord Mayor of Dublin on 10 July 1790:

> *"The condition upon which God hath given liberty to man is eternal vigilance, which condition if he break, servitude is at once the consequence of his crime, and the punishment of his guilt."*

BIO-DATA
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David Bitel is a partner of the long-established Sydney law firm Parish Patience Immigration, specialising in immigration law and administrative law. He is a registered migration agent and an accredited immigration law specialist by the NSW Law Society.

Since 1989 he has been a Judicial Member of the Equal Opportunity Tribunal of NSW, now the NSW Administrative Decisions Tribunal, Equal Opportunity Division.

He has been Secretary-General of the Australian Section of the International Commission of Jurists since 1983.

He has particular interest in the problems of refugees and has been President of the Refugee Council of Australia since 1995 and chairman of the Australian Refugee Foundation since 1998. He was founding chairman of the Refugee Advice and Casework Service. David received Austcare's Paul Cullen Humanitarian Award in 2002.

He helped to found - and subsequently was Chairman of - the Immigration Advice and Rights Centre (IARC), the Gay and Lesbian Immigration Task Force (GLITF), and the Australian Forum of Human Rights Organisations (AFHRO).

David has authored many publications, presented papers at legal conferences and has made many submissions to Parliamentary enquiries on issues relating to human rights, the rule of law and immigration and refugees. He is a consultant author of Butterworth's Australian Immigration Law Service.

He is and has been a member of various committees of the Law Society of NSW, the Law Council of Australia and the International Bar Association, the world body of lawyers. In 2000 he was appointed Vice Chair of Committee 14 (Migration and Nationality) of the Section on Legal Practice of the International Bar Association, and since 2002 he has served as Senior Vice Chair of that Committee. David is also a member of the executive of the I.B.A.