In 1934, Dr H.V. Evatt published a small book titled “Injustice Within the Law”. It was a discussion of the case of \textit{R v. Loveless and Ors}. It concerned the case of six agricultural workers from a small town in Dorset, who had the temerity to form and recruit members for the friendly society of agricultural labourers. They were prosecuted for requiring new members of the union to swear an oath of loyalty to the union. The defendants were specifically targeted by a local employer, who was also the Magistrate of the first hearing. All six were convicted and sentenced to transportation to Australia for seven years. Their trial was unfair, their sentence was unfair and they quickly became known as the Tolpuddle Martyrs, after the town they lived in. Evatt wrote “Injustice Within the Law” in 1934, to commemorate the centenary of the trial of the Tolpuddle Martyrs.

It is easy, and comforting, to think that such an injustice within the law would not happen today. The truth is otherwise. The case of the Tolpuddle Martyrs had many vices. But the main one (at least so far as lawyers are concerned) is that it was a frank failure of the principle of legality. Mediating the use of power is the hallmark of any evolved legal system. The starting condition in any embryonic society is that might is right. A principal purpose of government is that the legitimate interests of all – the weak and the strong – should be protected by the rule of law. That is reflected in the writings of Hobbes and Locke in the troubled 17th Century. It was also the driving impulse behind the American Declaration of Independence and later the Universal Declaration of Human Rights. It is the highest aspiration of any legal system to ensure dignity and justice for all – rich and poor, powerful and weak, the popular and the despised.

The prosecution of the Tolpuddle Martyrs was the result of political manoeuvring, and the judicial process in that case was corrupted by political interference.
I do not think trials in Australia are subject to political interference of the kind seen in the Tolpuddle Martyrs’ case. That said, politics and injustice within the law are not strangers to each other.

There are several different causes of injustice within the law these days:

1. Injustice which results from the fact that the system is run by human beings, and human beings are fallible;
2. Injustices which result when a person does not have effective access to law; and
3. Injustices which are mandated by the Parliament.

The System is not Perfect

There are many examples, large and small, of the legal system failing simply because it is run by fallible human beings. A moment’s inadvertence can have large consequences. Some matters just don’t seem to have much merit, unless you look very closely, and this can lead to carelessness. The problems faced by clients with unpopular causes may seem less deserving of attention; the problems faced by clients with mental or social disabilities are too readily dismissed as figments of their disturbed lives. So let the case of Stefan Kiszko stand as a warning.

Stefan Kiszko lived in the northern part of England, with his German mother and aunt. Stefan was a big, lumbering young man and socially backward. He suffered from hypogonadism, a condition in which the testes are completely undeveloped. This was not diagnosed until he was 23, at which time he was a young boy in a man’s body. Although he was intellectually normal, his social backwardness made him the butt of jokes at school and, when he got a job in the Tax Office it made him the butt of jokes at work. His mother and his aunt were proud of him when he started working at the Tax Office: he was the first member of their family ever to have had a job which required them to wear a jacket and tie. He had no friends and no social life beyond his mother and his aunt.

On the 5th October, 1975 Lesley Molseed went down to the local shop to get some bread. She was a small, frail 11 year old. Three days later, her body
was found on the moors near the town. She had been stabbed 12 times and the killer had ejaculated on her underwear.

The Police set up a massive manhunt. They took statements from 6,000 people in the area. Their attention soon fixed on Stefan Kiszko. On their assessment of things, he fitted the likely profile of the killer.

They questioned Kiszko for many hours. They did not caution him until well after they had formed the firm belief that he was guilty. So he kept asking to be allowed to see his mother. Eventually he began agreeing with their assertions when they promised that, if he did so, they would let him go home to his mother. He signed a statement confessing the crime, but retracted it soon afterwards.

His trial began on the 7th July, 1976. He was represented on a Legal Aid brief by David Waddington Q.C. and Philip Clegg. At the start of the trial the prosecution delivered thousands of pages of unused material. The defence did not ask for an adjournment. They ran inconsistent defences. While the primary defence was that Kiszko had not killed Lesley Molseed, they also argued that he had just started hormone treatment for his hypogonadism, and that this caused uncharacteristic changes in his behaviour. The defence overstated this point. Kiszko’s endocrinologist would have said, if asked, that the hormone treatment would not have caused any behaviour at odds with his underlying personality. Worse, the alternative defences involved telling the jury, in substance, “he didn’t do it, but if he did he couldn’t help it because the hormone treatment had turned him into a sex monster”. On any view, this was not likely to attract the sympathy of the jury. With the best will in the world, it is hard to avoid the conclusion that the defence and prosecution alike thought that Kiszko was guilty.

He was convicted, and was sentenced to life imprisonment. For a person convicted of sexually molesting and killing a child, life in jail is hard. Kiszko was frequently beaten by other prisoners, and eventually retreated into a world of private delusion in which he was the victim of an immense plot to incarcerate an innocent Tax Office employee in order to test the effects of incarceration. It was an understandable fantasy. He ultimately
became to believe that even his mother was party to this elaborate conspiracy.

But Kiszko’s mother was the only person who continued to believe, from first to last, that Kiszko was innocent. She never missed an opportunity to tell anyone who was willing to listen about the hardship of the case and the unfairness of the verdict. As her entreaties became more desperate and forlorn, so her audience became less receptive. But eventually, in 1987, a regional solicitor agreed to have a look at the case. He consulted Philip Clegg, who had been Junior Counsel for Kiszko at the trial. Ultimately, they prepared a petition to the Home Secretary.

The draft petition was finalized on the 26th October, 1989. On that same day, by a remarkable coincidence, David Waddington QC, MP was appointed Home Secretary. It took him nearly a year to decide that there should be an investigation into the conduct of the original trial.

Detective Superintendent Trevor Wilkinson was given the task of unearthing the records of a trial which had been heard 13 years before. His investigators discovered several vital things. First, that the unused material delivered on the first day of the trial included material which cast doubt on the reliability of several important witnesses, and on the reliability of the confession. Second that the pathologist who had examined Lesley Molseed’s clothing had found sperm in the semen on her underwear. Third, that the Police had taken a sample of Kiszko’s semen at the time of the investigation. It contained no semen at all because he was medically incapable of producing semen. Those facts had not been disclosed to the defence or to the court.

Kiszko’s lawyers applied to the Court of Appeal. The application was heard on the 17th and 18th February, 1992. At the end of argument, Lane LCJ announced “It has been shown that this man cannot produce sperm. This man cannot have been the person responsible for ejaculating over the girl’s knickers and skirt, and consequently cannot have been the murderer”.

The appeal was allowed and the conviction was quashed.
Kiszko was released immediately, but needed nine months’ rehabilitation before he was mentally well enough to return to his mother’s house. He died 18 months later, aged 41. His mother died six months after that.

The conviction and imprisonment of Stefan Kiszko was an unspeakably terrible injustice. The investigation was flawed, but not corrupt. The trial was flawed, but not diligent. The system did not work as it ought to have done. The Police, convinced of Kiszko’s guilt from early on in the investigation simply ignored the impossible contradiction of the pathology evidence. They were not willing to allow their preconceived theory to be displaced. Second, defence counsel plainly did not think it worthwhile to look through the additional unused material delivered as it was inconveniently on the first day of the trial. It is not difficult to see that for them, at that stage, it must have seemed like an inconvenient waste of time to seek an adjournment and spend days looking through thousands of pages of additional material which, as they thought, would make no difference at all. And the sad truth is, in most cases it would make no difference. But, viewed with hindsight, a few days of inconvenience seems a small price to pay to avoid the destruction of an innocent life.

The West Australian case of Andrew Mallard has some disturbing parallels with Kiszko’s case. Mallard was convicted in 1995 of murdering Pamela Lawrence. He was sentenced to life imprisonment. His appeal failed. It was later revealed that the prosecution team had failed to disclose vital evidence to the defence team, and in 2005, when Mallard had served almost 12 years’ jail time, the High Court granted special leave and quashed Mallard’s conviction. It held that the prosecution’s suppression of evidence had resulted in a significant miscarriage of justice. A subsequent Cold Case Review showed that Mr Mallard had not killed Mrs Lawrence. Three members of the police force were later found to have engaged in misconduct by their non-disclosure of evidence at Mallard’s trial. It is chilling to recall that, on his first attempt to appeal to the High Court, Mallard was refused
special leave. Justice Kirby sat on the first special leave application. When, much later and on new material, Mallard successfully appealed to the High Court, Kirby J wrote a detailed judgment setting out the melancholy history of the case. He has publicly expressed his remorse at the fact that he had earlier failed to notice the injustice which Mallard had suffered.

Time doesn’t permit me to tell you about the trial of Dr Crippen. He was convicted and hanged in 1910 for the murder of his wife. The circumstantial evidence against him looked fairly compelling, in particular the discovery of a dissected human body buried beneath the floor of his cellar at 39 Hilldrop Crescent, and his sudden departure for Canada with his new girlfriend Ethel Le Neve. It was a sensational trial and Crippen’s name has lived the history of true crime as one of the great English poisoners. However in late 2007 researchers obtained tissue samples from the descendants of Cora Crippen, and a piece of flesh which had been found under the cellar floor at 39 Hilldrop Crescent. Mitochondrial DNA testing showed that the remains under the cellar could not have been Cora Crippen. There was never a suggestion that Crippen had taken to killing generally, so whatever the explanation of Cora Crippen’s unexplained disappearance, it is clear that her husband was wrongly convicted.

Access to Justice

Let me turn to the second form of injustice within the law. The law is complex; competent legal help is expensive. Many people cannot afford legal help when they need it. Accepting that reality, governments institute schemes for legal aid. Unfortunately, legal aid is grossly under-funded. The practical result is that many people are not eligible for legal aid and are forced to sacrifice their rights or to represent themselves.

Every practitioner has had the experience of a would-be client approaching them with a significant legal problem, but no money. Always, just below the surface, is the plea that “I have suffered unjustly, I have a good case, but I can’t pay you”. The case is usually complicated, the narrative is usually conclusory rather than factual, and there are always limitation problems because you are not the first lawyer they have approached.
For my sins, I get a couple of approaches like this every week. Apart from any other considerations, time prevents me from helping all of them. Some of them seem to have personality problems rather than legal problems; some of them have mental problems which distort their response to circumstances. But I live in dread that among them there will be one or two genuine cases of real injustice. To deal with the problem, I established a group of pro bono researchers: final year law students and young lawyers who examine the details of the cases and report whether there is a real legal problem which might be solved. We give advice and guidance when we can, but for practical and ethical reasons we are limited in what we can do.

Although this activity is tiring, it is good for the soul. But I cannot help feeling that it would not be necessary if legal aid were funded in the way it ought to be. The profession does a great deal of pro bono work. It should not be a substitute for adequate funding of Legal Aid. It is economically inefficient to have self-represented litigants in courts. Worse, it is a corrosive thing for our society to promise access to justice while making access to law impossible.

If governments were honest about access to justice, they would fund Legal Aid so as to meet the real need which exists. As it is, Legal Aid is trimmed to fit the budget and the result – every day in every jurisdiction – is injustice within the law.

In the Federal budget a fortnight ago, the government announced that additional funding will be provided from 1 July this year. It will include an additional $92.3 million over four years for Legal Aid, $34.9 million over four years for Indigenous legal services, and $26.8 million over four years for community legal services programs.

The additional Legal Aid funding amounts to $23 million per year and is significantly less than the $43 million the Law Council says is needed for Legal Aid this year alone if Legal Aid is to begin providing better access to justice.

The increased funding is better than nothing, but inadequate Legal Aid will continue to be a principal cause of injustice within the law.
There is another, insidious, way in which access to justice is denied: when the executive government makes it difficult or impossible for those suffering injustice to bring the matter before a court.

Mamdouh Habib was arrested by US forces in Pakistan in October 2001. He was in American custody for the next 38 months: in Pakistan, in Egypt and in Guantanamo Bay. During the time Mr Habib was held by America, he was denied access to his lawyer and the Australian government did nothing to help him.

Mr Habib was not charged with any offence. It is clear that he had not committed any offence against Australian law: the legislation which might apply was not passed until 9 months after his arrest. We can assume that he had not committed any offence against the law of Pakistan or Afghanistan, since those countries did not seek to extradite or charge him. It seems that he had not committed any offence against American law: if he had, he could easily have been taken to America for trial, but that did not happen.

Eventually, Habib was sent back to Australia in early 2005.

The decision to send Mr Habib home was the result of two US court decisions in 2004 which appear to have upset American plans. In American courts, evidence illegally obtained must be excluded, because the State should not break the law. Both in American and Australian courts, confessions obtained under duress must be excluded, because of their inherent unreliability. ‘Confessions’ obtained by use of torture are excluded on both grounds.

The Americans planned to try Guantanamo prisoners in Military Commissions which would not be bound by the ordinary rules of evidence. Specifically, the Commissions were to be able to receive evidence of ‘confessions’ obtained by use of torture.

However in July 2004 the US Supreme Court ruled that it had jurisdiction to review the circumstances of detention in Guantanamo. This was a blow to the Bush administration: they had banked on the fact that whatever they did in Guantanamo could be done without the inconvenience of lawyers asserting that detainees had rights. In November 2004 the Federal Court for the District of Columbia held that the Military Commissions violated the
standards required for fair trials. It ordered that the Commissions be halted until America complied with the Geneva Convention relating to prisoners of war.

That ruling spelt the end of the Military Commissions as then constituted. The conditions under which detainees in Guantanamo have been held and interrogated practically guaranteed that any ‘confession’ obtained would be excluded from evidence in any trial which could be described as fair.

In Camp X-ray, detainees were forbidden to speak; they were permitted two minutes per week for a shower; they were regularly subjected to body searches, including cavity searches; they were frequently held ‘short-shackled’ for hours on end: this involves squatting on the floor, the hands shackled between the legs and attached to the floor by a chain so short that the detainee can scarcely move. Detainees were held in cells in which the air-conditioning was set to freezing temperatures. Detainees were short-shackled while interrogated; they were not allowed to go to the toilet during interrogations which lasted up to 18 hours at a time. Detainees were threatened with electric shocks; they were threatened with the prospect of being sent to Egypt or Morocco to be tortured. They were subjected to water-boarding, which unquestionably amounts to torture.

It is not hard to see why Mr Habib was released. After his arrest in October 2001, he was sent to Egypt for 6 months, where he was tortured. He was then taken to Guantanamo and interrogated for three years. No American (or Australian) court would admit ‘confessions’ obtained by these methods.

What was really significant is the timing of his release. The November court decision means, in substance, that evidence obtained by use of torture would not be admitted. The Americans must then have realized that they could never make a case against Mr Habib. Only then did the Australian government ask that he be returned to Australia.

The overwhelming inference is that the Australian government knew or suspected that Mr Habib had been tortured, but believed that a Military Commission could use evidence obtained that way. Conditions in Guantanamo were the subject of many reliable reports since early 2003.
For several years, General Miller was in charge at Guantanamo. In April 2004 he was exposed as the person responsible for the outrages at Abu Ghraib prison in Baghdad. The Australian government knew of those events months earlier. It must have known of the mistreatment of prisoners in Guantanamo; it must have known that the mistreatment was designed to obtain evidence which could only be admissible in a trial which lacked the basic requirements of fairness. And it certainly knew that the victims of this mistreatment included two Australian citizens.

Despite all these matters, it was not until the middle of 2007 that the Australian government began politely asking America to try David Hicks or send him home. Australia did nothing constructive to help Hicks, despite what it knew about the circumstances of his detention.

(There is an interesting footnote to the Hicks case. He pleaded guilty before the Military Commission, to an offence which did not exist until years after he had been taken to Guantanamo. He was then brought to Australia to serve his 9 months imprisonment here. He was brought here pursuant to the International Transfer of Prisoners (Military Commission of the United States of America) Regulations 2007. In all the statutes and regulations of Australian parliaments, those regulations are the only place you will find the word “offence” spelled in the American manner, “offense”. It is remarkable what this country did in the name of protecting its sovereignty.)

Both the American and the Australian governments tolerated (or perhaps encouraged) treatment of prisoners which shocked the conscience of the world when it became generally known. America did what it could to obstruct any court challenge to the legality of the regime in Guantanamo.

In the same way, and at the same time, the Australian government actively obstructed any court challenge to the legality of detaining unwanted asylum seekers on the bankrupt Pacific Island of Nauru. It did this by the simple expedient of taking control of the Immigration Department of Nauru, and refused visas to all Australians other than those who worked for the Australian government.

Australian detention centres forbid journalists from visiting them, and forbid the use of cameras or tape recorders. This is ostensibly to protect the
privacy of detainees, but was enforced even over the protest of detainees who desperately wanted journalists to know what was happening inside.

The regime in Guantanamo Bay, and the regime in Australia’s various detention centres and refugee warehouses conceal injustices beyond number, but those injustices survive within the law because executive governments make it almost impossible to expose them to judicial scrutiny.

**Injustice mandated by law**

Of all the sources of injustice, the most distressing and outrageous is injustice which the law mandates. There are many examples of this. They are all a reflection of political expedience. Of course, it is a contestable point whether some of them can be characterized as injustices. Perhaps the best test is to imagine yourself hoist on one of these laws, and see how it feels.

An increasing number of statutes, in all jurisdictions, reverse the onus of proof. In a departure from the most basic tenet of the criminal law, it is increasingly common for parliaments to require a defendant to prove his or her innocence.

**Confiscating proceeds of crime.**

Another insidious development is the extended reach of legislation ostensibly aimed at confiscating the proceeds of crime. They include: the *Proceeds of Crime Act (Cth)*; the *Confiscation of Proceeds of Crime Act 1989 (NSW)*; the *Criminal Assets Confiscation Act 2005 (SA)*; the *Criminal Property Confiscation Act 2000 (WA)* and the *Confiscation of Criminal Assets Act 2003 (ACT)*.

Few people would reject the idea that a bank robber should have to hand back the stolen money. But it is less obvious that a person who has written a successful book about their past life as a criminal should have to disgorge the royalties earned from sale of the book; but the legislation reaches that far. Taking South Australia as a doleful example of the problem, its legislation defines “proceeds of an offence” as property which is wholly or partly derived or realized, whether directly or indirectly, from the commission of the offence. And it defines “instrument of an offence” as
property which is used (or intended to be used) in, or in connection with, the commission of an offence.

The SA Act goes on to provide that “property can be proceeds of an offence or an instrument of an offence even if no person has been convicted of the offence”.

Several years ago, a retired public servant in Adelaide was found to have 3 marijuana plants growing in her back garden. She was fined a modest amount, but then the DPP applied for an order confiscating her house as an instrument of crime.

Other provisions allow one item of property to be confiscated in lieu of property which was an instrument of crime. So, under the West Australian legislation, a person was convicted of an offence in a house which belonged to the victim. The accused owned a house. His house was broadly equivalent to the house where the crime occurred. So the DPP confiscated his house as the substitute instrument of crime.

The DPP can apply for restraining orders in respect of property asserted to be proceeds of crime, or an instrument of crime. If that property is subsequently forfeited, that forfeiture is not affected if the person charged with the offence is acquitted.

These provisions are simply unjust. They are as close as we have come to Bills of Attainder since the end of the 17th century.

Then we have the legislation concerning asylum seekers. By statute, until recently, anyone who came to Australia without a visa had to be detained and remain in detention until they received a visa or were removed from Australia. In practice, under Howard and Ruddock, this meant that men, women and children who had committed no offence at all were held in conditions of hopelessness and despair for months or years, even though most of them were eventually accepted as genuine refugees. The obscenity of this legislation culminated in the High Court case of al Kateb. Ahmed al Kateb had arrived in Australia as a boat person; his claim for protection was rejected, but he could not be removed from Australia because he was stateless. The Howard government argues, successfully, that the legislation meant that he could be held in detention for the rest of his life.
The Rudd government got rid of much of this. The new philosophy of
detention was announced by Senator Evans on 29 July 2008. Detention was
to be as short as necessary for health and security checks; children were not
to be detained except as a last resort; temporary protection visas were
abolished. Although the use of Nauru as a place to warehouse asylum
seekers was scrapped, some aspects of the Pacific Solution remained. These
have recently become a matter of great concern. Specifically, asylum
seekers are now being warehoused on Christmas Island: part of Australia,
but excised from the migration zone. Different rules apply to them.

For a time the new detention philosophy seemed to be working well.
Attitudes in the Department of Immigration were transformed. Processing
was swift and generally fair.

Things were getting worse in Afghanistan, and Tamils were fleeing Sri
Lanka in the wake of their failed separatist movement. More boats began
arriving. The arrival rate grew from a drip to a trickle. So many boats came
that, if the arrival rate kept up, we could fill the MCG with asylum seekers if
we waited 25 years or so. Panic broke out in the maggot end of the tabloid
press; the Opposition went once more into the breech with a few recycled
Howard policies. Just a couple of weeks ago they began running
advertisements which evoked all the crude fears of the 1950s: the Yellow
Peril, Reds under the Bed and all the rest of it.

Rudd, it seems, has been spooked by Abbott’s willingness to lie about the
facts in order to create a new Tampa episode, and Abbott knows from his
focus group testing that a good dose of xenophobia out-polls the Good
Samaritan any day. In the Senate recently, Senator Hansen-Young asked:
“Are mental health checks mandatory for immigration detainees…?”

She received an answer that included the following:

“…Due to the high proportion of Irregular Maritime Arrivals (on
Christmas Island) who have experienced torture and trauma, the
health induction assessment also includes an automatic referral for
torture and trauma assessment …”

It would be fair to guess that Afghans and Sri Lankans who arrive here who have experienced torture and trauma are probably fleeing persecution. But we will not allow them to tell us about it for the next 6 months.

Right now, in this country, the law is being used to work injustice on people who come here in minuscule numbers asking for help.

These injustices, like others, might be alleviated if we had a Federal Charter of Rights. Lawyers in the ACT could hardly have missed the announcement that the Federal Government does not intend to implement the Brennan Committee’s principal recommendation: it will not follow the enlightened lead of the ACT and introduce a Human Rights Act. I am acutely conscious of the fact that opinions on Charters of Rights are sharply divided. But Charters of Rights – even the weak model found in ACT and Victoria, and recommended by the Brennan Committee – work by superimposing human rights values across other legislation. They exist in order to ensure, as far as possible, that legislation conforms to broadly accepted human rights values. They provide a tool with which legislated bigotry and vindictiveness can be exposed and neutralized.

In that way, they offer the possibility of tackling injustice within the law.

**ASIO**

Let me finish with another source of injustice mandated by law. This arises from the modern obsession with national security. It is alarming then to see the powers which ASIO and the Attorney-General can wield, ostensibly in the service of our national security interests.

Terror suspects have been stripped of ordinary rights to an alarming extent. In 2002 the ASIO legislation was amended to permit the incommunicado detention, for a week at a time, of people not suspected of any wrongdoing; it is enough if they are thought to have information about others who may be involved in past or potential terrorist offences. The person may be taken into isolated custody, and will not have a free choice of legal help; they are not permitted to tell friends or family where they are; they must answer questions, or face five years’ imprisonment.
In 2005, the Commonwealth Criminal Code was amended to enable control orders and preventative detention orders to be obtained. A control order can include an order confining a person to a single address for up to 12 months, without access to telephone or the internet. A preventative detention order will result in a person being jailed for up to 14 days in circumstances where they have not been charged with, much less convicted of, any offence.

Both kinds of order are obtained in secret, and when the subject of the order is served with it, they are to be given a summary of the grounds on which the order was made, but not the evidence. These orders are a gross interference with a person’s rights in circumstances where they are not allowed to know the evidence which is said to justify the interference. Dr Haneef’s case is a useful illustration of the problem: he looked so very guilty and deserving, until he looked so very innocent and mistreated.

Furthermore, judicial review of orders of this sort faces a further difficulty, arising from the National Security Information (Criminal and Civil Proceedings) Act 2004 (the ‘NSI Act’).

The NSI Act is one of the most disturbing pieces of legislation ever passed by an Australian Parliament in a time of peace. It will produce many injustices. Among other things, it provides that if a party to any proceeding knows or believes that they will disclose in the proceeding information that relates to national security, or if they intend to call a witness who would, by their presence in court or by the evidence they could give, disclose information that relates to national security, then the party must notify the Commonwealth Attorney-General of the fact. The party must also notify the opposite party and the court. The court is then required to adjourn the proceeding until the Attorney-General acts on the matter. The Attorney-General can sign a conclusive certificate to the effect that the evidence proposed to be called, or the proposed calling of the witness, would be likely to prejudice Australia’s national security interests.

The certificate must then be provided to the court and the court must hold a hearing to decide whether or not to make an order preventing the evidence from being called or the witness from being brought to court. During that hearing the court must be closed. The Act authorises the court to exclude
both the relevant party and his or her counsel from the closed hearing in which the question will be decided.

In deciding the balance between the interests of a fair trial and the national security interests, the statute directs the court to give the greatest weight to the Attorney-General’s certificate that the evidence will present a risk of prejudice to national security.

These provisions are immediately alarming to anyone who understands the essential elements of a fair trial. They are all the more alarming when the real breadth of the provisions is understood. Their breadth comes, in part, from the definition of national security which means: ‘Australia’s defence, security, international relations or law enforcement interests.’

The apparently uncontroversial definition of national security is rendered astonishingly broad by the definition of ‘law enforcement interests’. That expression is defined as including interests in:

1. avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;

2. protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;

3. the protection and safety of informants and of persons associated with informants; and

4. ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation’s government and government agencies.

By reference to this definition, Australia’s national security is affected by each of the following things:

1. evidence that a CIA operative extracted a confession by use of torture;
2. any evidence that tended to reveal operational details of the CIA, Interpol, the FBI, the Australian Federal Police, the Egyptian Police, the American authorities at Guantanamo Bay, etc; and

3. evidence which tended to show the use of torture or other inhumane interrogation techniques by any law enforcement agency.

ASIO has power to make security assessments of a person. Among other consequences, an adverse security assessment from ASIO can result in a person’s job application being refused, or (for foreign visitors) a visa being refused or cancelled, or an Australian passport being cancelled.

In 2006, an Australian citizen’s passport was cancelled. He challenged the cancellation in the Administrative Appeals Tribunal. The the Attorney-General granted a certificate pursuant to provisions of the AAT Act:

‘I, Philip Maxwell Ruddock, the Attorney-General for the Commonwealth of Australia … hereby certify … that disclosure of the contents of the documents … described in the schedules hereto, … would be contrary to the public interest because the disclosure would prejudice security.

I further certify … that evidence proposed to be adduced and submissions proposed to be made …. concerning the documents … are of such a nature that the disclosure of the evidence or submissions would be contrary to the public interest because it would prejudice security.

As the responsible Minister … I do not consent to a person representing the applicant being present when evidence described … above is adduced and such submissions are made …’

The applicant who seeks to have his passport restored faced an impossible burden in running his case, because neither he nor his counsel was allowed to know the nature of the case against him. I know this. I acted for him. I spent most of the time sitting outside the hearing room, wondering what was going on. To this day I do not know what evidence was used to defeat my
client’s claim. By his certificate, Ruddock produced the same conditions that led to the wrongful conviction of Alfred Dreyfus in 1894.

This is injustice authorised by statute. We should not tolerate it.

ASIO is about to get a grand new building in Canberra. Its presence will be a forcible reminder that our freedoms are at risk, but not only from our enemies. It is the way of bureaucrats to extend their reach and expand their power. The more so when the use of power is largely shielded from effective judicial oversight. I accept that national security is an important objective. Security services must, in large part, operate secretly. Let all that be agreed. But in protecting national security we seek to protect our way of life, including our democratic institutions. Fair trials are one of the assumptions of our democracy. A concern for security should not be used to justify injustice within the law.