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Rix, Mark

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AUSTRALIA AND THE 'WAR AGAINST TERRORISM': TERRORISM, NATIONAL SECURITY AND HUMAN RIGHTS¹

Mark Rix
University of Wollongong

Abstract

This article considers whether in the 'war against terrorism' national security is eroded or strengthened by weakening or removing the human rights of the individuals who constitute the polity. It starts with the view that national security is, at its most fundamental, founded upon the security and liberty of the person from criminal and violent acts, including terrorist attacks. Such attacks, and the individuals and groups who perpetrate them, constitute a grave threat to the peace and security of nations the world over and thus endanger the security and liberty of the individuals who make up their populations. Governments are therefore compelled to use the machinery of the state to protect the nation and the individual from these attacks. However, the paper is based on another, equally important, assumption. This is that the defence of national security requires individuals to be protected from the arbitrary exercise of state power even in situations where the state claims to be acting to protect national security *and* individual security against grave threats such as terrorist acts. The Rule of Law not only protects individuals from such an exercise of state power by protecting their human rights, in so doing it also protects the peace and security of the nation from excessive and unchecked state power. But what happens when the Rule of Law is overturned by governments declaring that they are protecting national security from the terrorist threat? Who or what is then able to protect the individual and the nation from the state? The paper will take up these important questions by considering the implications of the anti-terrorism legislation that has been introduced in Australia since September 2001. It will also make an assessment of whether Australia's national security has been enhanced or damaged by this legislation. Finally, the paper will briefly consider whether in fighting the war against terrorism the Rudd Labor Government, elected to office in November 2007, is likely to depart in any significant measure from the approach of its predecessor, the conservative Coalition Government led by Prime Minister John Howard.

Keywords: war against terrorism; Australian anti-terrorism legislation; Rule of Law

Introduction

This article will investigate whether Australia requires a new conception of national security that better equips it to meet the challenges it faces in the age of terror than the conventional conception. In the conventional view, a major challenge facing any government is to balance its responsibility to protect the community from terrorist attack with its equally important responsibility to respect individual human rights and uphold the rule of law. According to this view, however, sometimes the defence of

¹ An earlier version of this paper was presented by the author at the second Research Network for a Secure Australia Workshop, held at the University of Wollongong in October 2007. I am grateful to my colleagues Susan Dodds and Luke McNamara for helping me to clarify several of the thorny issues discussed in the paper. Naturally, the usual disclaimers apply.

national security requires human rights and the Rule of Law to be relegated to a much lower priority. Instead, this paper argues that a new conception of national security may be required which embeds human rights and the Rule of Law in national security. On this view, therefore, in defending national security human rights and the Rule of Law also have to be protected. Put another way, the protection of human rights and the Rule of Law *is* effectively the defence of national security.

Focusing on two of the most important and far-reaching pieces of anti-terrorism legislation, the discussion will consider the exceptional measures contained in Australia's anti-terrorism legislation. These are the Australian Security Intelligence Organisation (ASIO) Act 2003 and the Anti-Terrorism Act (No. 2) 2005, referred to respectively as the ASIO Act and ATA (No. 2). The discussion and analysis of the exceptional measures will address two separate but inter-related questions: 1) Are the exceptional measures included in the anti-terrorism legislation necessary to protect Australia's national security in face of the terrorist threat? 2) Are there any protections available for the individual and society from abuse of state power when a government weakens the Rule of Law, thereby diluting the human, civil and political rights it protects, claiming that this is an essential measure to protect national security from the terrorist threat? The exceptional measures include removal of the right to remain silent, reversal of the onus of proof, and the detention in secret of non-suspects merely for questioning.² Moreover, the two Acts to be considered in the paper place tight restrictions on the disclosure of information about cases in which persons are held in custody by the security agencies. Under these circumstances, it is extremely difficult for independent legal representatives to scrutinise and monitor the activities of these agencies thus impeding them from exercising the right of habeas corpus on behalf of detained persons. They are also prevented from mounting media and advocacy campaigns around such cases. The former Conservative Government steadfastly maintained that the exceptional measures provided the Government and national security authorities, including the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police, with essential powers for effectively meeting and neutralising terrorist threats.³

² Mark Rix, 'Australia's Anti-Terrorism Legislation: The National Security State and the Community Legal Sector', *Prometheus*, 24(4) (2006) pp. 429-440.

³ See, for example, Philip Ruddock, 'Australia's Legislative Response to the Ongoing Threat of Terrorism', *University of New South Wales Law Journal*, 27(2) (2004) pp. 254-261 and Ruddock, 'Government Enhances Anti-Terrorism Bill (No. 2) 2005' (2005) Media Release 222/205 1st December. Available at: http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases (accessed 20 January 2007).

1 Australia's National Security, the Terrorist Threat and Human Rights

Two fundamental assumptions underpin this debate. First is the view that national security is founded upon the security and liberty of the person from criminal and violent acts, including terrorist attacks. This puts a heavy responsibility on the state, and the government administering it, to take effective measures to protect people, as individuals and as members of social and economic groupings, from threats and acts of this nature. Working from this basic assumption, governments are compelled to use the machinery of the state, and the law and legal system framing it, to take measures to protect individuals, the social and economic infrastructure of society, and the state itself from attacks mounted by terrorist organisations and individuals. However, the second underlying assumption is that the defence of national security requires individuals to be protected from the arbitrary exercise and abuse of state power even in situations where a government claims to be acting to protect national *and* individual security from the threat of terrorism. On this view, the Rule of Law not only protects the individual from the state, but in so doing it also protects the security and freedom of the nation from state repression. In the words of former President of the Israeli Supreme Court, Aharon Barak, 'there is no security without law. Satisfying the provisions of the law is an aspect of national security.'⁴ Legislation which does not respect the Rule of Law and the human and other rights it protects cannot credibly claim to be able to offer an effective defence of the individual or the nation against threats and attacks by terrorists who have nothing but contempt for these rights and for the rule of law itself. As Martin Scheinin, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, asserts in his study of Australia's record of human rights compliance in the war against terrorism:

States have a duty to protect their societies and to take effective measures to combat terrorism. States are also obliged, by reason of their international obligations and as emphasized in various documents of the United Nations, including resolutions of the Security Council, to counter terrorism in a manner that is consistent with international human rights law. As stated in the United Nations Global Counter-Terrorism Strategy (part IV) effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing ones. The defence of human rights is essential to the fulfilment of all aspects of a global counter-terrorism strategy.⁵

⁴ Aharon Barak J cited in Michael Kirby J, 'Terrorism and the Democratic Response 2004', *University of New South Wales Law Journal*, 28(1) (2005) p. 328

⁵ Martin Scheinin, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Australia: Study on Human Rights Compliance While Countering Terrorism', (2006). Available at:

Former Attorney-General Philip Ruddock, in his 2004 paper 'Australia's Legislative Response to the Ongoing Threat of Terrorism', seemed to be in agreement with the sentiments expressed by the Special Rapporteur when he asserted that the focus of measures to combat terrorism should be on 'creating "human security" legislation that protects both national security and civil liberties.'⁶ Recognising that 'the tightening of security will have some effect on certain rights', he assured his readers that 'it is our duty to ensure that we employ measures to minimise the impact of counter-terrorism laws on human rights.' Ruddock also responded to criticisms that the Government's anti-terrorism 'efforts' had failed 'to adequately protect our civil liberties.' While these criticisms were based 'on the false assumption that counter-terrorism legislation is inevitably at odds with the protection of fundamental human rights', Ruddock did nevertheless have to admit that 'the Government has sometimes compromised on these points to achieve the overriding goal of enacting new laws to combat terrorism.'⁷ Here, Ruddock was considerably at odds with the sentiments of the Special Rapporteur.

Since September 11, 2001 there has been a substantial increase in the volume of Australia's anti-terrorism legislation. During its hearing into Australia's anti-terrorism laws, the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights of the International Commission of Jurists (ICJ) remarked that its attention had been 'drawn to the large number of laws enacted since 2002 as part of Australia's strategy to counter terrorism.'⁸ In an earlier publication, ICJ Australia had pointed out that 'as at September 11, 2001, there was in place a patchwork of some 35 pieces of Commonwealth legislation in Australia relating to terrorism, dealing with issues including air navigation, police powers, chemical and biological weapons, criminal offences, hostages, immigration, border protection, intelligence, nuclear non-proliferation, proceeds of crime, telecommunications, and weapons of mass destruction.'⁹ Justice of the High Court of Australia, Michael Kirby, also called attention to the fact that since the attacks of September 2001 '17 items of legislation

<http://daccessdds.un.org/doc/UNDOC/GEN/G06/155/49/PDF/G0615549.pdf?OpenElement> (accessed 3 March 2007). A number of the relevant Security Council resolutions are briefly considered in the following section of the paper.

⁶ Ruddock, 'Australia's Legislative Response', p. 254.

⁷ *ibid*, pp.254-5.

⁸ EJP, 'Eminent Jurists Panel concludes Australia hearing on counter-terrorism law, practices and policies: Press Release' (2006) 17th March. Available at: <http://www.icj-aust.org.au/> (accessed 20 March 2007).

⁹ ICJ Australia, 'Human Rights and Terrorism: Legislative and Policy Responses to Terrorism Post September 11 in Australia', ICJ Biennial Conference (2004) 27th-29th August. Available at: <http://www.icj-aust.org.au/> (accessed 18 March 2007).

restricting civil freedoms have been adopted by the federal Parliament' with complementary State legislation also being passed.¹⁰

According to the Eminent Jurists Panel, Australia is widely regarded and admired 'as a country with longstanding democratic practices' in which 'the independence of the judiciary, respect for the rule of law, the rights of the accused and an accountable justice system are well established.' It also noted that both civil society and the media are 'active and vibrant'. Taken together all these factors 'provide an important protection against the arbitrary use of powers' by the state and its agencies.¹¹

However, the Panel also sounded a note of caution:

Members of civil society and the legal community questioned whether many of the new laws were indeed required. They stressed the need to complement counter-terrorism laws with the ability to effectively test them in court for compliance with international human rights standards. Concerns were raised regarding provisions that have introduced broadly defined offences, allowed retrospective application of the law, expanded powers of the executive branch of government and constrained avenues of judicial review and due process of law.¹²

A number of the issues raised will be considered below in the discussion of the exceptional measures that are included in the ASIO Act and the ATA Act (No. 2). These exceptional measures include the executive proscription power and the detention in secret of non-suspects merely for questioning and intelligence-gathering purposes.

2 Australia's Anti-terrorism Legislation: Review and Reality

Like the Eminent Jurists Panel, Martin Sheinin, the UN Special Rapporteur, acknowledged that the need for legislative reform since 11 September 11 2001 had been questioned by 'many from civil society'. But, as he also pointed out, while the then Australian Government itself had acknowledged in a report to the UN Counter-Terrorism Committee in 2003 that the pre-2001 legislative framework for counter-terrorism was adequate and comprehensive, after all, as at September 11 2001, there were already 35 pieces of terrorism-related legislation on the statute books, there had nevertheless been a need to bring the existing legislation into line with UN Security Council Resolution 1373. This resolution calls on States to prevent and suppress activities aimed at the financing of terrorism and to criminalise providing or collecting funds to finance acts of terrorism. There had also been a need to comply

¹⁰ Kirby, 'Terrorism', p. 226.

¹¹ EJP, Press Release, p. 1.

¹² *Ibid*, p. 2.

with the work of the UN Security Council Al-Qaida and Taliban Sanctions Committee established by UN Security Council Resolution 1267 in 1999. This Committee, amongst other things, maintains and constantly updates (based on information provided by member states) consolidated lists of individuals and groups belonging to or associated with Al-Qaida and the Taliban. Under Resolution 1267 all States are obliged 'to freeze the assets, prevent the entry into or the transit through their territories, and prevent the direct or indirect supply, sale and transfer of arms and military equipment, technical advice, assistance or training related to military activities, with regard to the individuals and entities included on the Consolidated List.'¹³

The Special Rapporteur also referred to the 2006 Report of the Security Legislation Review Committee (SLRC) in his report. He noted that the SLRC 'was satisfied that separate security legislation, in addition to the general criminal law, was necessary in Australia.'¹⁴ However, unfortunately the Special Rapporteur did not mention several aspects of the SLRC report which should have been taken as significant and far-reaching caveats on the SLRC's views regarding the necessity for separate and additional security legislation (several of these same caveats, and for similar reasons, apply to the Parliamentary Joint Committee on Intelligence and Security's 2006 Review of Security and Counter Terrorism Legislation).¹⁵ These caveats reveal the considerable difficulties in fully protecting the human rights of Australians in the absence of a Bill or Charter of Rights. They also demonstrate that such an instrument would play an important role in opening up the Australian Government and the law enforcement and security agencies to greater public scrutiny by making them subject to a more effective and transparent accountability regime. Before considering the report in some detail, some background information on the SLRC and the legislation it reviewed is required.

The independent Security Legislation Review Committee was established by the then Federal Attorney-General on 12 October 2005 with the Honourable Simon Sheller AO QC appointed as Chairman (thus, the Committee was known as the Sheller Committee). The Committee was composed of major stakeholders including

¹³ UN, 'The Consolidated List established and maintained by the 1267 Committee with respect to Al Qaida, Usama Bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them' (n.d.) Available at: <http://www.un.org/sc/committees/1267/consolist.shtml> (accessed 21 March 2007 and subsequently for updates).

¹⁴ Scheinin, 'Report of the Special Rapporteur', p. 4.

¹⁵ PJC IS, 'Review of Security and Counter Terrorism Legislation' (2006). Available at: <http://www.aph.gov.au/house/committee/pjcis/securityleg/report/report.pdf> (accessed 21 March 2007).

the Inspector-General of Security and Intelligence, the Privacy Commissioner, the Human Rights Commissioner, the Commonwealth Ombudsman and a representative of the Law Council of Australia. The latter is the peak national body of the legal profession in Australia, providing national representation for the tens of thousands of lawyers belonging to state and territory based bar associations and law societies. The Committee conducted a public inquiry which received nearly 30 submissions and took evidence from 18 witnesses during hearings in Melbourne, Sydney, Canberra and Perth. It reported to the Attorney-General on 21 April 2006 who tabled its report in the Parliament on 15 June 2006.

The SLRC was established pursuant to section 4(1) Security Legislation Amendment (Terrorism) Act 2002 as amended by the Criminal Code Amendment (Terrorism) Act 2003. Under Section 4(1) the Attorney-General is required to review 'the operation, effectiveness and implications' of the amendments made by the Act itself, the Suppression of Financing of Terrorism Act 2002, Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002, Border Security Legislation Amendment Act 2002, Telecommunications Interception Legislation Amendment Act 2002 and Criminal Code Amendment (Terrorism) Act 2002.¹⁶ Here is the first major caveat on the SLRC report. The SLRC was established to review the operation, effectiveness and implications of the anti-terrorism legislation enacted in 2002 and 2003, not the subsequent and even more far-reaching legislation, in particular, the ASIO Act and ATA (No. 2) which will be considered below. The task of reviewing amending legislation was made even more difficult for the SLRC because, since the enactment of the six amending Acts it was mandated to review 'the several amendments they made to other legislation, such as the Criminal Code Act 1995 (Criminal Code), were later further amended.'¹⁷ This is a second caveat on the SLRC report, for the complexity and confusion created by the use of amending legislation was a defining feature of the manner in which the former Government pushed its anti-terrorism legislation through both houses of the Federal Parliament. This involved, amongst other things,

the use of sprawling, omnibus legislation by which multiple Acts are amended in a complex web of interlocking changes within a single amendment Bill, which makes extensive debate and parliamentary supervision difficult; an absence of appropriately argued justification for such significant changes;

¹⁶ SLRC, 'Report of the Security Legislation Review Committee' (2006) June. Available at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~SLRC+Report+Version+for+15+June+2006\[1\].pdf/\\$file/SLRC+Report+Version+for+15+June+2006\[1\].pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~SLRC+Report+Version+for+15+June+2006[1].pdf/$file/SLRC+Report+Version+for+15+June+2006[1].pdf) (accessed 20 March 2007).

¹⁷ *Ibid.*, p. 17.

minimal time for consideration of the legislation by parliamentary committees; and, finally, a determination on the part of the Government to implement its original proposals in the face of parliamentary and community concerns.¹⁸

It is interesting that the SLRC did comment on the limited time available to it for review of the legislation. As well as being granted only six months to conduct the review (covering, as it pointedly noted, the Christmas/New Year and Easter holiday periods) the Committee had difficulty in reviewing the operation, effectiveness and implications of the 'significant amendments' to the relevant legislation because it was required to do so very soon after they had come into effect. Together, these can be taken as a third caveat, for the Committee had very little opportunity to conduct the comprehensive and far-reaching review that was required to ensure that fundamental human rights and the Rule of Law were being safeguarded in the legislation.

In addition to the above, a fourth caveat; the Committee was concerned with the perplexing and significant issue of which version of the legislative amendments should have been subject to review. It sought the advice of the Australian Government Solicitor as to whether its examination should be confined to the original text of the amending Acts or broadened to include the amendments contained in other legislation that had been created by the original legislation. Mr Henry Burmester QC, Chief General Counsel of the Australian Government Solicitor advised in this regard that 'so long as the review examined the original amendments (in the sense of noting that they had been replaced or amended), it could not be criticised if it took the sensible decision to review the current form of those amendments.'¹⁹ The Committee agreed that this would be a 'sensible' course of action for it to take but was nevertheless concerned that it would only exacerbate the considerable difficulties it already faced in fulfilling its mandate of reviewing the operation, effectiveness and implications of the specified amending legislation. There were two major issues here which together constitute a fifth caveat on its report. First, the Committee did not have access to information about the way in which the law enforcement and security agencies had used the legislation or how the relevant provisions had been interpreted and applied by the courts. Second, and perhaps more significantly, the SLRC had not 'itself received confidential briefings about the

¹⁸ Jenny Hocking, 'Protecting Democracy by Preserving Justice: "Even for the Feared and Hated"', *University of New South Wales Law Journal*, 27(2) (2004) p. 322.

¹⁹ SLRC, 'Report', p. 18.

level of threat of terrorist activity currently faced by Australia'.²⁰ This, however, was an issue on which the Committee undertook to elaborate in its report.

It did so, but only very obliquely, in the already cited comments about the difficulties associated with reviewing not only amending legislation but also subsequent amendments to the amending legislation. And it did so again in its remarks on the limited amount of time that it had been granted to review the operation, effectiveness and implications of this complex web of amending legislation so soon after its enactment. While these comments are interesting and valuable in their own right, they do not address the more fundamental concern with the secrecy surrounding the level of terrorist threat faced by Australia and whether therefore the anti-terrorism legislation provides the Government, and the law enforcement and security agencies it directs, with the resources and means adequate to meet the threat. In other words, the Committee's comments tell us next to nothing about whether the legislation taken as a complete package is actually necessary to protect Australia's national security from the threat of terrorism or even the precise nature of that threat.

The SLRC also expressed some misgivings about the ASIO Act 2003, but only to point out that its terms of reference prevented it from considering in detail the exceptional measures contained in that legislation. It was noted above that the SLRC was established under section 4(1) Security Legislation Amendment (Terrorism) Act 2002 (SLAT) which is headed 'Public and independent review of the operation of Security Acts relating to terrorism'. However, as the SLRC pointed out in its report 'Section 4 of the SLAT Act does not refer to what are arguably the most controversial aspects of the security legislation found in Division 3 of Part 3 of the Australian Security Intelligence Organisation Act 1979 (the ASIO Act) as currently amended, and in Divisions 104, 'Control orders' and 105, 'Preventative detention orders' of Part 5.3 of the Criminal Code.'²¹ These are some of the exceptional measures that will be considered in the next section. For clarification, the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 amended the ASIO Act 1979. In essence, the amendments enable ASIO to obtain a warrant to detain and question persons (who do not themselves have to be suspected of terrorism offences) in order to gather intelligence related to terrorist activity. This ASIO Act was further amended in the same year by the ASIO Legislation Amendment Act 2003 to

²⁰ *ibid*, p. 3.

²¹ *ibid*, p. 22.

ensure that in planning and executing warrants ASIO has the ability to collect intelligence and information that it regards as necessary to prevent a terrorist act.

Australian Security Intelligence Organisation (ASIO) Act

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (the ASIO Act) that was introduced into Parliament in 2003 was the outcome of a lengthy process of community consultation, inquiries conducted by several parliamentary committees including the Parliamentary Joint Committee on ASIO, Australia Secret Intelligence Service (ASIS) and Australia Defence Signals Directorate DSD (renamed the Parliamentary Joint Committee on Intelligence and Security in late 2005), and wider Parliamentary debate. Some minor improvements were made to the Bill's original harsh provisions such as those allowing for incommunicado detention, executive proscription and preventing independent legal representation for suspects during detention. But the Government's earlier failure to gain full Parliamentary endorsement of some of the harsher measures it had proposed for inclusion in the SLAT Act, in particular the proscription power, appears to have strengthened its resolve. When first introduced by the Government into Parliament, the SLAT Act had contained provisions enabling the Executive to proscribe so-called 'terrorist organisations' by allowing the Minister (Attorney-General) to issue just such a proscription on his own authority. After community consultation and parliamentary review a compromise was reached whereby 'an attenuated form of the power [of proscription] was introduced which allowed provision for the proscription of organizations listed by the United Nations as "terrorist organisations" [on the Consolidated List].'²² As Hocking notes, however, the Government effectively circumvented the Parliament and challenged its authority by including the power of ministerial (or, executive) proscription in the Criminal Code Amendment (Terrorist Organisations) Act 2004. But even before this, 'in late 2003, the Government introduced further amendments to the newly empowered ASIO Act, seeking stringent secrecy provisions in relation to public disclosure of the implementation of its detention regime and still further expanded interrogation powers' including the doubling of the questioning period to 48 hours if an interpreter had been present at any stage of the interrogation.²³

The ASIO Act gives ASIO the power 'to obtain a warrant to detain and question a person who *may have* information important to the gathering of intelligence in

²² Hocking, 'Protecting Democracy', p. 321.

²³ *Ibid*, p. 328.

relation to terrorist activity.²⁴ The Act defines a warrant 'issuing authority' as a person appointed by the Minister, who can be a federal magistrate or judge or 'another class of people nominated in regulations'.²⁵ As Christopher Michaelson points out, this Act empowers ASIO to 'detain people without judicial warrant for up to seven days and interrogate them for up to 24 hours (if no interpreter is present) within that seven-day period'.²⁶ Thus, persons can be detained without charge, and do not even have to be suspected of having committed any offence to be taken into custody. While being interrogated, a detainee has to answer all questions and provide all the information or material requested of them. A detainee also has to prove that they do not have the material requested. If the detainee is unable to do so and does not provide the material they can be imprisoned for up to five years. These special detention and questioning powers granted to ASIO had, as noted above, initially been part of the SLAT Act. The SLRC Report notes that the inclusion of these provisions in the ASIO Act 'generated extensive debate' which was 'in part' about 'detention for seven days, removal of the right to silence, some restrictions on access to legal representation, secrecy of interrogation and the extension of the system to non-suspects'.²⁷ After reviewing ASIO's questioning and detention powers in 2005, the Parliamentary Joint Committee on ASIO, ASIS and DSD recommended that they be continued beyond the sunset period of July 2006 subject to certain conditions. The Joint Committee will review the powers again in 10 years.²⁸ In the meantime, the continuation of ASIO's questioning and detention powers has been confirmed in the ASIO Legislation Amendment Bill 2006.

In addition to the above, the ASIO Act specifies that a 'prescribed authority' who watches over a person held in detention for questioning should be a federal magistrate or a member of the Administrative Appeals Tribunal (AAT). The AAT, however, cannot be treated as a judicial body. Instead, the International Commission of Jurists Australia regards the AAT as a 'quasi-judicial body' which lacks the full independence of the judiciary. This is because, with the exception of its presidential

²⁴ Australian Laws to Combat Terrorism (n.d.). Available at: <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/826190776D49EA90CA256FAB001BA5EA?OpenDocument> (accessed 19 October 2006 and subsequently).

²⁵ Christopher Michaelson, 'Antiterrorism Legislation in Australia: A Proportionate Response to the Terrorist Threat?', *Studies in Conflict and Terrorism* (28) (2005) p. 326.

²⁶ Christopher Michaelson, 'Security Against Terrorism: Individual Right or State Purpose?', *Public Law Review*, (16) (2005) p. 178.

²⁷ SLRC, 'Report', p. 22; see also Michaelson, 'Security Against Terrorism' pp. 178-18.

²⁸ PJC ASIO, ASIS and DSD, 'Review of Division 3 Part III of the ASIO Act 1979—Questioning and Detention Powers' (2005). Available at: http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/fullreport.pdf (accessed 29 January 2007).

members, the members of the AAT are appointed for fixed periods and are therefore 'dependent on the favour of the executive if they wish to be reappointed'.²⁹ It is inferior in this respect to the Special Immigration Appeals Commission (SIAC) that was established in Britain in the wake of the European Court of Human Rights ruling in *Chahal v. United Kingdom* 1996.³⁰ The AAT is rather more similar to the British 'three wise men' body that was superseded by SIAC. In the *Chahal* case, the ECHR ruled that the non-judicial body known as the 'three wise men', which up to then had reviewed decisions of the Home Secretary to remove people from Britain whose presence was regarded as 'not being conducive to the public good' for reasons of national security, was in contravention of the European Convention on Human Rights.³¹ Furthermore, notes Michaelson, "the 'prescribed authority' as established in the ASIO Act cannot be considered a 'court' or 'officer authorized by law to exercise judicial power' within the meaning of Articles 9(3) and 9(4) of the ICCPR [International Covenant on Civil and Political Rights]."³²

Anti-Terrorism Act (ATA) (No. 2)

The Anti-Terrorism Act (No. 2) 2005 was passed into law in December 2005. The 'key features' of ATA (No. 2) include:

- a regime that will enable courts to place controls on persons who pose a terrorist risk to the community
- arrangements to provide for the detention of a person for up to 48 hours to prevent an imminent terrorist attack or preserve evidence of a recent attack
- an extension of the stop, question and search powers of the Australian Federal Police (AFP)
- powers to obtain information and documents designed to enhance the AFP's ability to prevent and respond effectively to terrorist attack.³³

In issuing a control order a court can impose conditions on an individual including a requirement that the person wear a tracking device, a prohibition or restriction on the person talking to other people including their lawyer, and a prohibition or restriction

²⁹ ICJ Australia, 'Human Rights and Terrorism', p. 3.

³⁰ Christopher Michaelson, 'Derogating from International Human Rights Obligations in the "War Against Terrorism"? A British Australian Perspective', *Terrorism and Political Violence*, (17) (2005) p. 137.

³¹ House of Commons, Select Committee on Home Affairs, Appendices to the Minutes of Evidence. Appendix 16 'The Special Immigration Appeals Commission (SIAC)'. Available at: <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmhaff/351/351ap20.htm> (accessed 1 February 2007).

³² Michaelson, 'Derogating', p. 137.

³³ Philip Ruddock, 'Passage of Anti-Terrorism Bill (No. 2) 2005'. Media Release 230/2005. 7th December. Available at http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases (accessed 20 January 2007).

on the use of a telephone or the internet by the person.³⁴ As for preventative detention, the police can detain without charge a person who they suspect will carry out an imminent terrorist act or is planning to carry out such an act. They can also hold someone who they suspect 'has a "thing" that will be used in an imminent terrorist act.'³⁵ The Act allows for a person subject to a control order to be informed of why the restrictions were imposed. However, this 'would not require the disclosure of any information that is likely to prejudice national security, be protected by public interest immunity, put at risk ongoing law enforcement or intelligence operations or the safety of the community' with similar conditions applying to an AFP request for variation of a control order.³⁶

ATA (No. 2) also includes an 'updated' sedition offence 'to cover those who urge violence or assistance to Australia's enemies.'³⁷ Commenting on this offence, George Williams, Director Gilbert and Tobin Centre for Public Law, University of New South Wales points out that 'it punishes people with up to seven years' jail not for what they do, but for what they say, such as if they *urge* another person to forcibly overthrow the constitution or government.'³⁸ It includes sweeping bans on free speech and expression and allows for very few defences against the charge of sedition. Williams regards it as one of 'worst examples of law-making in the history of the Federal Parliament' and almost without precedent in that 'it is hard to think of another example where a law targeting something as fundamental as free speech has been enacted as quickly with as many people from all sides of politics recognising that it needed to be amended even as it was being enacted.'³⁹ Chris Connolly remarks that, with the exception of Australia, 'no modern democratic nation has used sedition provisions for 50 years.'⁴⁰ Countries that have repealed sedition laws, or which are in the process of doing so, include Canada, Ireland, Kenya, New Zealand, South Africa, Taiwan, and the United States. In introducing sedition laws, Australia joins China, Cuba, Malaysia, North Korea, Singapore, Syria, and

³⁴ Michael Walton, 'The Anti-Terrorism Bill (No. 2) 2005: An Overview', *Human Rights Defender Special Issue: The Anti-Terrorism Bill (No. 2) 2005* (2005), November/December p. 4.

³⁵ *Ibid.*

³⁶ Details of Amendments, attachment to Ruddock, 'Government Enhances Anti-Terrorism Bill (No. 2)'

³⁷ Australian Laws to Combat Terrorism

³⁸ George Williams, 'Speak up in defence of free speech', *Sydney Morning Herald*, 30 May 2006; emphasis added

³⁹ *Ibid.*

⁴⁰ Chris Connolly, 'Five key facts on sedition', *Human Rights Defender Special Issue: The Anti-Terrorism Bill (No. 2) 2005* (2005), November/December p. 14.

Zimbabwe.⁴¹ In response to such criticisms, the then Attorney-General requested the Australian Law Reform Commission to conduct a 'detailed review' of the crime of sedition. In May 2006, the Commission released its Discussion Paper 71 'Review of Sedition Laws' which called for the removal of the term 'sedition' from the Federal statute books and a redrafting of the offences relating to urging force or violence against the government or groups in the community.⁴² This recommendation was rejected by the former Government.

3 Australia, the War on Terror and Human Rights Protection

Why has Australia's anti-terrorism legislation failed to provide human rights safeguards and why has it with so little inhibition been allowed to subvert the rule of law? Although Australia is a signatory to the International Covenant on Civil and Political Rights (ICCPR), for example, its anti-terrorism legislation, such as the ASIO Act and ATA (No. 2), does not conform with its human rights obligations including those under Article 9 which prohibits arbitrary arrest or detention and under Article 14 on due process of law.⁴³ As the SLRC blandly acknowledged in an unintended response to the question at the opening of this section 'Australia has no formal Charter of Human Rights.'⁴⁴ Such an instrument would serve as a standard against which to assess the validity of anti-terrorism legislation and other legislation impinging on human rights. It would, for example, have allowed the Security Legislation Review Committee to be more adventurous in its analysis and critique, and to be more courageous in formulating the recommendations it provided arising from its review of the anti-terrorism legislation. The UN Special Rapporteur has expressed his concern that 'Australia does not have domestic human rights legislation capable of guarding against undue limits being placed upon the rights and freedoms of individuals.'⁴⁵ While he acknowledges that the 'Government of Australia points to a robust constitutional structure and framework of legislation capable of protecting human rights and prohibiting discrimination' the absence of domestic human rights legislation 'is an outstanding matter that has been previously raised by

⁴¹ Connolly, 'Five key facts'. See also Australian Law Reform Commission (ALRC), 'Discussion Paper 71: Review of Sedition Laws' (2006) (Ch. 6 Sedition Laws in other countries). Available at: <http://www.austlii.edu.au/other/alrc/publications/dp71>.

⁴² ALRC, 'Review of Sedition Laws'

⁴³ Louis A Coutts, 'A short review of the various Acts of the Federal Parliament that constitute what might loosely be called "anti-terrorist" legislation', International Commission of Jurists Australia (2006) p. 40. Available at: http://www.icj-aust.org.au/images/stories/documents/061101_-_L_A_Coutts_A-T_Legn_paper.pdf. See also Michaelson, 'Derogating'.

⁴⁴ SLRC, 'Report', p. 3.

⁴⁵ Scheinin, 'Report of the Special Rapporteur', p. 5.

the Human Rights Committee in its observations on Australia's reports under the International Covenant on Civil and Political Rights.⁴⁶

According to George Williams, for many countries with a written constitution like Australia,

constitutional development in the second half of the 20th century was dominated by concepts of human rights...Canada and South Africa gained Bills of Rights while the United States saw an existing Bill of Rights expanded through judicial interpretation.⁴⁷

In countries such as New Zealand and the United Kingdom that do not have a written constitution 'international human rights standards were incorporated into domestic law through statutory Bills of Rights.'⁴⁸ Though in the case of the United Kingdom the incorporating Human Rights Act 1998 did not come into force until 2000. The Eminent Jurists Panel has pointed out that Australia has yet to enact federal legislation incorporating international standards into national law, a move which 'would help to establish a clear human rights framework based on international standards'.⁴⁹ For Amnesty International Australia (AIA), these standards 'constitute the bare minimum necessary to protect the safety and integrity of individuals from abuse of power.'⁵⁰ Greg Carne points out that UN human rights bodies, such as the High Commissioner for Human Rights, the Commission of Human Rights, the Secretary-General, the Secretary-General's Policy Working Group on the United Nations and Terrorism, amongst many others, have long advocated a 'more holistic approach' to human rights to ensure that measures to counter terrorism are consistent with human rights values and the obligations they entail.⁵¹ Australia also is not a party to binding international human rights instruments. A good example of such an instrument, even if it is not directly applicable in the Australian context, is the

⁴⁶ *ibid*, p. 5.

⁴⁷ George Williams, 'Human Rights and the Second Century of the Australian Constitution', *University of New South Wales Law Journal*, 24(3) (2001) p. 782. See also: Williams, 'Australian Values and the War against Terrorism', National Press Club Telstra Australia Day Address (29th January 2003). Available at: <http://www.gtcentre.unsw.edu.au/publications/docs/pubs/australianValues.doc> ; Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror*, (University of New South Wales Press 2004); and, Alastair Nicholson, 'The Role of the Constitution, Justice, the Law, the Courts and the Legislature in the Context of Crime, Terrorism, Human Rights and Civil Liberties', an Address to the Post-Graduate Student Conference, Post-Graduate Criminology Society, University of Melbourne (2005), 4th November. Available at: <http://www.mpso.unimelb.edu.au/mpso/media/transcripts> (accessed 10th February 2007).

⁴⁸ Williams, 'Human Rights and the Second Century', p. 782.

⁴⁹ EJP, Press Release, p. 3.

⁵⁰ Amnesty International Australia, 'Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD regarding the Inquiry into the Operation, Effectiveness and Implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act (2005) pp. 5-6. Available at: http://www.amnesty.org.au/Act_now/campaigns/human_rights_and_security/submissions (accessed 10th February 2007).

⁵¹ Greg Carne, 'Detaining Questions or Compromising Constitutionality? The ASIO Legislation Amendment (Terrorism) Act 2003', *University of New South Wales Law Journal*, 27(2) (2004) p. 543.

European Convention on Human Rights (and its five protocols) to which many European countries are party the United Kingdom included. The Convention enables the citizens of European countries to appeal to the European Court of Human Rights and seek redress if they believe that the laws of their own countries are in breach of the Convention (just as in the Chalal case cited above).⁵²

As seen above in the examination of the Security Legislation Review Committee's review of Australia's anti-terrorism legislation, it is hard to gauge whether the legislation has been effective in protecting Australia from terrorist attack. Indeed, for those many Australians who are not members of the Federal Cabinet or the law enforcement agencies and security services it is an unanswerable question. This is because of the secrecy surrounding the issues of whether Australia currently faces a terrorist threat and, if so, the nature and imminence of that threat. In view of this secrecy, little can therefore be said in an informed or sensible way about any terrorist threat that Australia may face in the future. It is thus almost impossible to determine whether the legislation is actually required to protect Australia's national security now or into the future from the threat of terrorism. This is more than a little unsettling in the light of claims made by US President Bush and his allies, including the former Howard Government, that the 'war on terror' or 'war against terrorism' will either be of 'uncertain duration' or 'go for years'.⁵³ This means that counter-terrorism measures, like the exceptional provisions included in Australia's anti-terrorism legislation, could also be of uncertain duration or endure for years. To be sure, national security is conventionally and rightly regarded as being based upon the security and liberty of the person from criminal and violent attacks, including terrorist acts. But, beyond this, the conventional view also holds that there are times when the protection of national security requires human rights and the Rule of Law to be given a lower priority. This gives rise to a significant shortcoming with this view of national security, namely, its strong tendency to relegate the security and liberty of the person to a secondary consideration after state security.

If the volume of anti-terrorism legislation introduced and the measures included in it are anything to go by, then the former Australian Government was certainly not backward in using the machinery of the state to protect the country and its people

⁵² Nicholson, 'The Role of the Constitution', p. 3.

⁵³ Samantha Power, 'Our War on Terror', *The New York Times* (July 29 2007) and Australian Broadcasting Corporation (ABC) 'War on terrorism will go on for years: PM', ABC News Tasmania (15 July 2007). Available at: <http://www.abc.net.au/news/stories/2007/07/15/1978787.htm>

from the threat of terrorism (whatever the actual nature of that threat happens to be). It was also not backward in privileging state security over human rights and the rule of law. Indeed, in these respects its diligence is to be commended. But, if national security is also regarded as being just as fundamentally based on the security and liberty of the person from the arbitrary exercise or abuse of state power then the legislation would appear to be an abject failure. In the war on terror, as in any other armed conflict or type of war, national security cannot be fully protected by giving priority either to the security and liberty of the person from terrorist attacks or from the arbitrary exercise or abuse of state power. For, these are two indivisible and absolutely equal aspects of national security. Legislation such as Australia's anti-terrorism laws, therefore, which does not respect the Rule of Law and the human and other rights it protects cannot credibly claim to be able to offer an effective defence of the individual or the nation against threats and attacks by terrorists who have nothing but contempt for these rights and for the rule of law.

4 The Rudd Labor Government, the War against Terrorism and National Security

On 22 February 2008, the new Government (elected November 2007 and led by Prime Minister Kevin Rudd) announced that a comprehensive review would be undertaken of arrangements for homeland and border security in Australia. According to the Prime Minister, the review confirms the new Government's commitment to conduct an assessment of whether there is a need for change to Australia's current homeland and border security regime. Ranging across the roles and functions of all Federal departments and agencies having responsibility for homeland and border security, the review will consider the changes required 'to optimise the coordination and effectiveness of our [Australia's] homeland and border security efforts.'⁵⁴ The Review is due to report by the end of June 2008.

The above announcement seems to suggest that the Homeland and Border Security Review will in some measure honour a commitment made in late 2007 by the then Shadow Minister for Homeland Security, Arch Bevis. Bevis stated that a Rudd Labor Government would produce a Counter Terrorism White Paper shortly after coming into office (neither the Rudd Cabinet nor outer ministry includes a Minister for Homeland Security *or* Arch Bevis; the new portfolio of Minister for Home Affairs falls

⁵⁴ Prime Minister of Australia, 'Media Release: Homeland and Border Security Review' (22 February 2008. Available at: http://www.pm.gov.au/media/release/2008/media_release_0084.cfm (accessed 25 February 2008).

within the Attorney-General's purview). The White Paper was to have assessed the terrorist threat faced by Australia and developed a blue print for a whole-of-government response to that threat. In announcing that a White Paper would be produced by a Rudd Government, Bevis observed that six years after the September 11 terrorist attacks Australia still lacked 'a clear, comprehensive statement of the threat presented by various terrorist organisations and their sponsors together with a clearly enunciated blue print in response.'⁵⁵ The White Paper was to have been accompanied by an unclassified version with the dual aims of better informing the Australian public about the nature of the terrorist threat faced by the country and contributing to a more informed and rational public debate about the terrorist threat and how best to respond to it. Being better informed and having a more 'realistic' view of the threat, the Australian people would more be likely to support the 'often controversial' counter terrorism measures which a government was often compelled to adopt. The 2008 announcement of the homeland and border security review does not include a commitment to produce an unclassified version. It also made no mention of a White Paper. As for anti-terrorism legislation and the controversial measures it contains, according to Bevis 'strong anti-terrorism laws' are needed but so also is getting 'the balance right'. These laws therefore should 'enjoy broad community support', 'effectively target the terrorists' and 'not undermine the very freedoms we all seek to defend.'⁵⁶

Some of these themes were taken up by Robert McLelland, the new Attorney-General, in a speech to the Security in Government Conference held in Canberra in December 2007 (this conference has been held annually since 2004). The change in Government presented an opportunity to introduce a new approach to national security, including the adoption of a broader perspective on the terrorist threat. This new approach would, like the old, include 'hard intelligence and law enforcement'. But, in addition, 'steps to promote greater inclusiveness and opportunity' would be important elements.⁵⁷ In calling for greater inclusiveness and opportunity, McLelland observed that 'a terrorist threat in Australia has as much prospect of emanating from a disgruntled and alienated Australian youth as it does from the awakening of a

⁵⁵ Arch Bevis, Address to Counter Terrorism Summit (1st November 2007) p.4. Unfortunately, Bevis' Address is not available online. However, interested readers should contact Mr Bevis (Arch.Bevis.MP@aph.gov.au) should they wish to procure a copy of his Address.

⁵⁶ Ibid, p. 10.

⁵⁷ Robert McLelland, Address to Security in Government Conference (7th December 2007). Available at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)-i000071207+Security+In+Government+-+Canberra.pdf/\\$file/i000071207+Security+In+Government+-+Canberra.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)-i000071207+Security+In+Government+-+Canberra.pdf/$file/i000071207+Security+In+Government+-+Canberra.pdf) (accessed 15 February 2007)

sleeper cell planted by an overseas terrorist organisation.’ Fighting terror thus not only required ‘determination’, it also required just as surely an approach which promoted ‘justice, the rule of law, genuine peace and inclusive development.’⁵⁸

There are some hopeful even if still faint signs in these views of the former Shadow Minister for Homeland Security and the new Attorney-General. Certainly they appear to be somewhat at odds with the views and comments of the former Opposition Leader Kim Beazley who in the lead up to the passage through Parliament of ATA (No. 2) in late 2005 had commented that this new piece of anti-terrorism legislation ‘did not go far enough’. He had also recommended even stronger powers than those proposed in ATA (No. 2) including ‘allowing police to lock down entire suburbs and carry out house, vehicle and people searches without judicial approval.’⁵⁹ In another hopeful sign that in fighting the war against terrorism the new Government is to some extent distancing itself from the approach taken by its predecessor (and that of the former Opposition Leader), the new Foreign Minister Stephen Smith has recently endorsed an international campaign, supported by the Law Council of Australia and the Australian Bar Association, to close the US prison holding terrorist suspects at Guantanamo Bay. Similar organisations in Britain, Canada, France and Germany are also supporting the campaign.

Conclusion

After September 11, 2001 the former Australian Government introduced a whole raft of anti-terrorism legislation which it claimed was needed to protect the country and its citizens from terrorist attack. This legislation includes the ASIO Act and the ATA (No. 2) both of which contain exceptional measures diluting or removing established rights and liberties and seriously weakening the rule of law. They thus fail a crucial test when the notion of national security is extended beyond the narrow, conventional view which holds that national security is based on the security and liberty of the person from criminal and violent acts including terrorism. On this view, sometimes the defence of national security requires human rights and the Rule of Law to be relegated to a much lower priority. This can lead to the privileging of state security over the security and liberty of the person. When the conventional view is widened to encompass the security and liberty of the person from the arbitrary exercise or abuse of state power the anti-terrorism legislation clearly does not protect Australia’s national security and even effectively undermines it. The absence of a Bill or Charter

⁵⁸ Ibid.

⁵⁹ Beazley cited in Rix, ‘Australia’s Anti-Terrorism Legislation’, p. 433

of Rights has left Australians highly vulnerable to arbitrary and excessive state power. Not only is such an instrument urgently required, so also but even more fundamentally is a new conception of national security that will help to ensure that the country's national security is fully protected in the age of terror. A conception of national security which includes the security and liberty of the person from terrorist attack and from state repression as two of its indivisible and absolutely equal aspects would go a long way to providing such protection.

It is unfortunate that the former Shadow Homeland Security Minister and the current Attorney-General made no mention in their addresses of the need in the war against terrorism (and more generally) for human rights protections for Australian citizens, and residents, such as would be afforded by a Bill or Charter of Rights. It is also not clear whether their remarks about ensuring that the anti-terrorism laws do not undermine the very freedoms they seek to defend, and on the need for justice, the rule of law, inclusive development and so on are anything more than populist rhetoric. In any event, without a Bill or Charter of Rights to give them meaning and substance such remarks are likely to remain rhetorical, even if they are well-intentioned and sincerely expressed. The failure to include an assurance that an unclassified version of the homeland and border security review would be produced is a worrying sign that secrecy and suspicion are just as much part of the new Government's approach to fighting the war against terrorism as it was of the previous Government's. There is little hope of having a better informed public, and a better informed and more sober public debate about the threat of terrorism and how it might most effectively be met, if the Government continues to treat the public with suspicion and distrust and does not even allow it to have access to an unclassified, and therefore incomplete or bowdlerised, version of the review. It seems, then, that a new conception of national security which includes the security and liberty of the person from terrorist attack and from state repression as its two indivisible and absolutely equal aspects is still a long way off. Indeed, it has not yet even appeared on the horizon of law making in Australia.