THE UNIVERSITY OF
NEW SOUTH WALES

FACULTY OF LAW

DR BEN SAUL

DIRECTOR
Charter of Rights Project

ASSOCIATE
Australian Human Rights Centre

MEMBER
International Law & Policy Group

Preventive Detention and Terrorism in Australia*

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INTRODUCTION

In responding to the threat of terrorism after September 11, the Australian government has made radical changes to the Australian legal landscape. The most important shift has been towards adopting preventive measures, including a wide range of preparatory terrorism offences (such as training, financing or assisting in terrorism); the banning of terrorist groups and criminalizing membership of and association with such groups; and powers for the Australian Security Intelligence Organization (ASIO) to question and detain people, for up to seven days, who are not even suspected of terrorism but who may know something about it.

The Anti-Terrorism Act (No 2) of late 2005 continues and accelerates this trend, introducing preventive detention and control orders for people who have not been charged with any criminal offence, and indeed who cannot be charged with an offence for lack of evidence that would satisfy the criminal standard of proof. It also extends the grounds for banning an organization as terrorist where it praises terrorism, and creates new offences of sedition to combat incitement to violence.

The Act also allows the Federal Police to issue notices to produce information without the approval of a magistrate, thus by-passing the protections of regular search warrant procedures. The Act allows notices to produce to be issued in the investigation of serious non-terrorist offences, thus exploiting the anti-terrorism justification for the Act to undermine regular criminal procedure.

The Act triples the length of some ASIO warrants, inviting the authorities to conduct fishing expeditions over extended periods in the absence of sufficient evidence of specific criminal conduct. A new offence of financing terrorism even in the absence of an *intention* to finance extends criminal liability too far and makes it impossible for any person to know the scope of their legal liabilities with any certainty.

SYDNEY 2052 AUSTRALIA
Email: b.saul@unsw.edu.au
Telephone: +61 (2) 9385 1529
Facsimile: +61 (2) 9385 1175
Web: www.law.unsw.edu.au

The Act also contains sunset clauses which are too long to really be classed as sunset clauses, even though the nature and extent of the terrorist threat cannot possibly be predicted over a forthcoming ten year period, and the government has not shown that the threat to Australia will be remain constant or will increase over that period.

I will focus first on the justification for the new laws; secondly on the lack of a human rights framework in combating terrorism in Australia; and thirdly on the lack of consultation involved in the adoption of the Act. I then consider three recent preventive detention mechanisms for detaining people in connection with terrorism investigations but wholly outside the regular criminal justice system: (1) detention of even non-suspects for up to seven days by ASIO; (2) preventive detention for up to 14 days of 'future' suspects on security grounds; and (3) control orders of up to 12 months which may permit indefinite, virtual house arrest. I describe and scrutinize the government's justifications for these measures and consider their impact on criminal procedure, international human rights law, constitutional law, and the rule of law.

JUSTIFICATION FOR THE NEW LAWS

In evaluating whether the new counter-terrorism laws of 2005 were *objectively* needed in Australia, a number of factors must be considered. Since 2001, Australians have officially been told that there is a 'medium' risk of terrorist attack, unhelpfully meaning merely that 'a terrorist attack in Australia *could* occur'. The Alert Level has never been set at a 'high' risk of attack, nor at an 'extreme' risk. The government clearly has primary competence in evaluating security threats. However, given its geographic location and position in international affairs, the threat facing the United States and Britain is likely to be far higher than that facing Australia.

Indeed, it is highly doubtful whether Australia faces 'a public emergency threatening the life of the nation', which would be necessary to allow Australia to suspend some basic rights under international law (such as freedom from arbitrary detention, as in the United Kingdom after September 11). Under human rights law, an emergency must be actual or imminent, not merely anticipated, and threaten the whole population, the physical or territorial existence of the state, or the functioning of state institutions (*Lawless* case (1 July 1961, Ser B: Report of the European Commission, No 90); *Greek* case (Report of the European Commission, (1969) YBECHR 12)).

Recently, in the *Belmarsh* case Lord Bingham, reflecting the majority view, allowed the British government a wide margin of appreciation in declaring a public emergency, based on the government's political view that:

> an emergency could properly be regarded as imminent if an atrocity was credibly threatened by a body such as Al-Qaeda which had demonstrated its capacity and will to carry out such a threat, where the atrocity might be committed without warning at any time. The government, responsible as it was and is for the British people, need not wait for disaster to strike before taking necessary steps to prevent it striking. [*A v Secretary of State for the Home Department* [2004] UKHL 56 at para 25].

Yet, as Lord Hoffman stated in dissent in that case (at paras 95-96):

> Of course the government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom.

> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation…. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

Even the appalling prospect of an isolated suicide bombing in an Australian city is not sufficient to amount to an emergency threatening the whole Australian population. Australia has not notified the United Nations that it faces such an emergency, even though this is required under the ICCPR where a country seeks to suspend rights. Such derogation may be necessary to support the new powers of preventive detention and some of the more invasive control orders, as well as to support existing ASIO detention powers. Either Australia does not believe that the terrorist threat rationally amounts to a public emergency, or Australia is breaching its international obligations.

If we suspend human rights too quickly or too easily, we soon lose sight of the value of rights themselves, as we trade them away for speculative gains in security. The Universal Declaration of Human Rights was drafted in 1948. Its drafters were fully aware of the need for security, having just witnessed the massive violence of a global war and the terrible threat of Nazi victory. Yet, the countries which drafted the Universal Declaration (including Australia, which made important contributions to the drafting) insisted that human rights were too important to surrender too readily. That is why they imposed a fairly high threshold for taking them away, so that governments were not tempted to remove them when it was not absolutely necessary.

All of this points to a deeper problem affecting the Australian government's response to terrorism. Countries like Britain and France have long experience in combating terrorism, whether the Irish Republican Army in Northern Ireland or in the Algerian war of independence. Both countries soon realized that overreacting to terrorism was counter-productive. Internment in Northern Ireland was an abject failure, and succeeded only in radicalising resistance to British rule. In Algeria, the ruthless torture of suspects by French paratroopers helped to win battles but lost the war.

Australia has had no comparable experience of sustained terrorist violence on its home soil, with only one minor hotel bombing in the late 1970s. Confronted with real terrorist threats for the first time, Australian governments are susceptible to the kinds of overreactions which plagued other democracies in the past. It also makes Australia more likely to lack perspective on how rights and security should be properly balanced. While Australia purported to base some of its new laws on British legislation, its comparisons proved frequently misleading, as when it used the false analogy of Britain's extended periods of detention for terrorist *suspects* to justify prolonged executive detention of *non-suspects* in Australia.

The government has also not demonstrated that existing counter-terrorism laws were insufficient to meet the terrorist threat, which would be necessary to justify radical new laws. In 2003, Australia gave ASIO very extensive powers to question and detain for up to seven days people who are not even terrorist suspects, while the Federal Police may hold suspects for an extended period of 24 hours.

Australia has also created a large number of wide terrorist offences, as well as wide powers to ban terrorist organisations and prevent terrorist financing. The definitions of terrorism and national security are very broad in Australian law, despite courts in Europe and the Americas

finding that a lack of specificity in the definition of terrorist offences may violate the right to freedom from retroactive criminal punishment.

Intelligence sources can be protected in court under new laws of evidence applying in both criminal and civil cases (*National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)). State police have also been granted enhanced anti-terrorism powers (such as the *Terrorism (Police Powers) Act 2002* (NSW)). ASIO's powers of surveillance and evidence gathering have been increased, while its budget grew exponentially from $63 million in 2000-01 to $153 million in 2004-05, with staff increasing from 584 to 1,000 between mid-2001 and mid-2006 (ASIO Annual Report, 2003-04, at 6).

Despite the breadth of these powers, Australia has seldom made use of them, with only ten people being questioned in 2004-05 (and none detained) by ASIO (ASIO Annual Report 2004-05), and scarcely any prosecutions for terrorism. This may suggest that the threat facing Australia is not as acute as imagined, and also that further laws were unnecessary.

Australians have also been told little about the effectiveness of terrorism laws. There has been no public disclosure of the usefulness of information obtained by ASIO questioning. The ASIO Annual Report 2003-04 (at 5) states merely that 'the questioning warrants have provided valuable information'. What is not disclosed is whether, for example, the 'valuable information' has led to any arrests or convictions, or to the prevention of any terrorist acts. At best, ASIO discloses that one person is awaiting trial on 'among other charges, providing and/or misleading information under a questioning warrant'. Information about the 'other charges', and whether questioning assisted the prosecution case, is not revealed.

While protecting intelligence is important, it is impossible for the community to evaluate the need for, and effectiveness of, laws if their use remains secret. It would be possible, for example, to disclose whether any information obtained has led to the arrest or prosecution of any terrorist suspects, or contributed to the prevention of terrorist incidents or the disruption of terrorist networks. This would not require disclosing the identities of any persons questioned, arrested, or prosecuted.

The government flatly rejected the recommendation of the Parliamentary Joint Standing Committee on ASIO in 2006 that ASIO's annual report to parliament should detail the number and length of ASIO questioning sessions, the number of formal complaints, and the number and nature of charges laid as a result the powers.

This level of unnecessary secrecy is exacerbated by harsh criminal penalties of up to five years imprisonment for disclosing 'operational information' about ASIO interrogations within two years after the expiry of a warrant. The offence effectively makes it a crime to tell a police officer or a journalist about abuses in detention. It prevents public scrutiny of the propriety of the investigative process and reduces the accountability of ASIO. In mid-2006, the government rejected the recommendation of the Parliamentary Joint Committee on ASIO to define more narrowly the meaning of 'operational information' and to reduce the heavy penalty for the disclosure offence.

The 2005 Act was presented to Parliament even before the Joint Standing Committee on ASIO had tabled its report on the review of ASIO's powers of questioning and detention, suggesting that it was premature to extend counter-terrorism powers before understanding whether existing powers should even continue. It was similarly premature to extend powers before the independent Security Legislation Review Committee, announced by the Attorney-General in October 2005, reported to Parliament in mid-2006 – which made some blistering criticisms of existing laws.

Finally, the focus on new laws deflects attention from practical measures. Making new law is no substitute for properly enforcing the existing law. Further, making new laws obscures efforts to address the structural causes of some terrorist violence. For example, by supporting the unlawful invasion of Iraq in 2003, Australia increased the risk of terrorism worldwide and placed all Australians in greater danger. A similar result may be expected from Australia's uncritical support for Israel's excessive use of military force in southern Lebanon in July-August 2006.

LACK OF A HUMAN RIGHTS FRAMEWORK

Some of the 2005 Act's provisions are purportedly fashioned on British counter-terrorism laws. If Australian laws are really to reflect world's 'best practice' (as claimed by the Prime Minister: 'Counter-Terrorism Laws Strengthened', Media Release, 8 September 2005), then they must be adopted alongside an Australian *Human Rights Act* – as in Britain. The British courts can independently supervise the impact of terrorism laws on the rights of people in Britain. In contrast, the Australian Act does not require decision-makers to interpret provisions consistently with human rights obligations, nor was the International Covenant on Civil and Political Rights annexed to the Act, as suggested during a Senate Committee inquiry into the Bill.

Indeed, the report of the independent Security Legislation Review Committee observed in June 2006 that submissions made by government agencies in favour of Australia's anti-terrorism legislation 'at times passed over the invasive effect of particular legislation on human rights, and said little about the particular steps that might be taken by their agencies to alleviate such effects'.

No doubt this absence of concern for human rights stems from the lack of an entrenched framework of rights in Australia; it may also derive from a bureaucratic culture of unhealthy deference towards the political imperatives of the government, which clouds the objective judgment of government lawyers. In extreme cases, this problem of agency capture has led to Australian government lawyers being radically out of step with the rest of the world: most recently, in advising that the trial of David Hicks by military commission would be fair, contrary to last week's finding by the US Supreme Court in *Hamdan* and the overwhelming balance of legal opinion worldwide; similarly troubling was the advice that invading Iraq was lawful.

Human rights law does not prevent effective responses to terrorism, since it allows rights to be limited or even suspended (in a public emergency) if necessary to ensure security (see, eg, arts 4, 12, 17, 18 and 22 of the *International Covenant on Civil and Political Rights* 1966). As noted earlier, the UK courts have accepted the government's view that terrorism is a serious threat to that country which may justify temporarily suspending some rights (*A v Home Secretary* [2004] UKHL 56).

That is not to claim, as the Australian Attorney-General does in articulating a distorted concept of 'human security', that governments must protect the right to life in article 3 of the Universal Declaration of Human Rights above all else. Aside from the fact that the UDHR is not a binding treaty, human rights law does not permit the assertion of one right to destroy all others, but requires a weighing and balancing of rights and other interests in particular cases.

Governments enjoy a margin of appreciation in evaluating the necessity of restricting or suspending rights, though they must precisely specify the nature of the threat and the reasons for restrictions. Derogation from rights must also be temporary and terminate once the

emergency ends. Any restriction must also be *proportionate* to the threat. Proportionality is relevant to both the existence and duration of a limitation, as well as the manner of its operation. The principle of proportionality means that (*de Freitas* [1999] 1 AC 69, at 90):

> (a) the legislative objective must be sufficiently important to justify limiting fundamental rights;
> (b) the measures adopted must be rationally connected to that objective; and
> (c) the means used must be no more than that which is necessary (meaning that less invasive or restrictive measures have failed, and the measures must last only as long as the emergency).

At the same time, human rights law ensures that governments are accountable for restrictions placed on rights, thus enhancing public confidence in security measures. It provides a principled framework for evaluating terrorism laws, ensuring they are strictly necessary and proportionate to the threat, and preventing unjustifiable interference in liberty.

Unlike every other democratic nation, Australia lacks a bill of rights and is not part of a regional human rights system. The absence of binding human rights makes it more difficult to evaluate anti-terrorism laws, which are subject only to political judgment (which may be impaired by a climate of crisis) and limited constitutional protections. These are insufficient to provide a proper policy or legal assessment of such laws, or to ensure that rights and security do not tip dangerously out of balance. In the absence of entrenched rights protections in Australia, Parliament should proceed particularly carefully before agreeing to further terrorism laws.

Australia’s first bill of rights was recently adopted not at the federal level but in the Australian Capital Territory. During the debates about new terrorism laws in late 2005, the *Human Rights Act 2004* (ACT) encouraged a robust and principled analysis of the Bill in that jurisdiction, which raised important questions in the national debate about the need for, and proportionality of, its measures. This encouraged some State and Territory governments, and federal parliamentarians, to question whether the measures were firmly justified as necessary and proportionate restrictions on the rights and freedoms of citizens and residents. Ultimately some States and Territories departed from complete consistency with the complementary federal anti-terrorism scheme originally envisaged, partly because of this human rights debate. In the absence of a constitutional or statutory human rights framework in federal law, meaningful and independent judicial review also assumes the greatest importance.

Even if Australia adopted a federal bill of rights, it will still not be part of a regional system of supervision as in Europe or the Americas. Supervision by strong regional human rights institutions ensures that there is independent external scrutiny of limitations on rights adopted by a national government. This is particularly important since, in the face of domestic political pressures, national courts may be unduly deferential to the judgment of the executive on security matters.

Of course, the converse may also be true; in late 2005, the European Court of Human Rights upheld a Turkish university’s ban on the wearing of Muslim headscarves by students (*Sahin v Turkey*), in a judgment that is arguably far too deferential towards a national decision which unjustifiably interferes in religious freedom.

The value of a bill of rights also depends on the form of bill adopted, whether a stronger model allowing the judiciary to strike down legislation that unjustifiably infringes rights, to the weaker UK and ACT models, which provide for a declaration of incompatibility with rights (which does not affect the validity of the legislation) and a referral back to the government for a response. Even the weaker model is valuable because it requires governments to publicly justify why certain rights should be limited in particular ways, to

meet specific threats, during defined periods. Compatibility can also be assessed during the drafting of bills, to help prevent legislation being enacted which would unjustifiably infringe rights.

Whatever the appropriate model for Australian conditions, momentum for a bill of rights has gathered pace in recent years, provoked in part by concerns about anti-terrorism powers but also by issues such as the treatment of asylum seekers. Judicial heavyweights such as Sir Anthony Mason and Justice McHugh have called for debate on the issue in the aftermath of the High Court's *Al-Kateb* decision in 2004, which left some judges reeling at the impact of laws (providing for indefinite detention of non-removable non-citizens) which they felt they had to uphold in light of their (some would say incorrect) approach to statutory interpretation. The non-government group New Matilda has launched a national campaign for a bill of rights, with a draft bill for community consultation, while Liberal stalwart Malcolm Fraser and even a Liberal backbencher from Queensland, Steven Ciobo MP, have made similar calls.

With the ACT Human Rights Act successfully functioning, without clogging the courts with unmeritorious, overly-litigious claims, other States have been encouraged to consider bills of rights in their jurisdictions. A consultation process in Victoria resulted in a recommendation in 2005 to adopt a Charter of Rights and Responsibilities in that State, which has been accepted by the Victorian Government and a bill was presented to parliament in 2006. New South Wales and Tasmania have announced interest in considering the issue, with other States possibly to follow.

It appears that one positive development coming out of the Australian government's pursuit of excessive anti-terrorism laws is increasing interest in creating legal and institutional mechanisms to better protect human rights from undue interference.

LACK OF PUBLIC AND PARLIAMENTARY CONSULTATION

In the absence of a human rights framework, laws which impair rights should only be made after an adequate opportunity for public debate, community consultation and proper parliamentary scrutiny. The Anti-Terrorism Act (No 2) 2005 imposes significant restrictions on the rights and freedoms of people in Australia, yet Australians were not given a fair opportunity to consider the Bill. The Prime Minister released a vague two-page summary of the new laws in September 2005, making meaningful debate difficult because of the lack of detail. The government planned to release the Bill on 31 October 2005, and require a Senate committee to report by 8 November – allowing only one week for consultation on 100 pages of legislation.

Even the leaking of the Bill by the ACT Chief Minister allowed only three weeks for debate on complex changes, in contrast to the three inquiries over 15 months of debate which preceded the new ASIO laws after September 2001. Criticism of the Bill was difficult because after its unauthorised release, the government continued to make undisclosed changes to the Bill without providing opportunity for public comment. The Attorney-General even made the extraordinary claim that the public did not need any further details precisely because the ACT Chief Minister had released the Bill.

The government's approach plainly discourages public engagement in the law-making process, at a time when Senate Committees have less independence from the government than in previous years. A Senate Committee inquiry was allowed only one week to consider 100 pages of legislation amending numerous statutes; almost 300 public submissions; and countless proposals for amendments that changed by the day, making the Bill a moving target for its critics. The Senate and the public had to simultaneously consider 600 pages of

industrial relations reforms, including a one week Senate Committee inquiry which had to digest 4500 submissions, along with major other legislative proposals such as Voluntary Student Unionism.

The predicted emasculation of the Senate Committee process after the government gained control of the Senate in mid-2005 was realized. The government allowed only 2 hours and 19 minutes of debate in the Senate before forcing a vote on the Bill. In Opposition, the Labor Party's criticism of the Bill was resolutely tepid; Labor ultimately voted for it in the Senate. Although Labor moved a censure motion in the Senate late last week to protest the hurried manner of law-making, the government blocked the censure motion for the first time since Federation a century ago.

The government's contempt for the Parliament has been noted by Sir Anthony Mason, who said recently that 'the high standards of what was liberal constitutionalism are in decline in Australia'. In a speech to the Law and Justice Foundation, he said:

> Today's political process is largely about the pursuit of political power. One illustration… is the practice of pushing controversial legislation through Parliament without providing the opportunity for Parliamentary debate and public consideration of the measure.
>
> Here we have a classic example of the Executive controlling Parliament – the very converse of the historical conception that Parliament's role is to act as a watchdog over the Executive government.
>
> Party discipline and loyalty to the party have compromised… the essence of representative and responsible government…

Some opinion polls suggest that many Australians are responsive to calls for new anti-terrorism laws and feel the need for more security from terrorist threats, suggesting that the government is being representative. Yet, the deficiency of the legislative process aggravates the problem that Australians are hamstrung by a lack of information about the nature and extent of the terrorist threat. This makes it difficult for citizens to determine what laws are necessary and justifiable. It also makes Australians more susceptible to the culture of fear engendered by repeated, but always ambiguous, official claims about the seriousness of the threat, and renders Australians more likely to consent to unnecessary new laws.

It also requires Australians to accept, on faith, judgments about security made on their behalf by intelligence agencies and politicians. This is expected even though the lead-up to the Iraq war in 2003 exposed real concerns about the credibility of some intelligence assessments, and the manipulation of intelligence by politicians (see *A v Home Secretary* [2004] UKHL 56 at 94 (Lord Hoffman)). The result is a narrowing of democratic decision-making, since only a small coterie of intelligence analysts and senior politicians have access to the information necessary to make informed decisions about the need for new laws.

The narrowing of decision-making is compounded by a narrowing of the institutions of civil society under this government. The power of unions has been increasingly curtailed; charitable status has been limited where organizations engage in political activities; there is increasing pressure on the independence of universities and academic freedom; the power of the churches is long in decline; and now even the student unions are in danger of extinction.

DETENTION UNDER HUMAN RIGHTS LAW

Before turning to the three Australian mechanisms of preventive detention, the limitations on detention under international human rights law are worth recalling. Detention without criminal charge is not expressly prohibited, but essential legal guarantees apply. Detention must not be

arbitrary (meaning it must not be unjust or unreasonable), and must be established by, and in accordance with, law (International Covenant on Civil and Political Rights, art 9(1)). The grounds of detention must be specified with sufficient precision and detention must be necessary (meaning less invasive measures would not be sufficient), proportionate and non-discriminatory. Those detained are also entitled to substantively challenge the lawfulness of detention in court (ICCPR, art 9(4)).

In Europe, article 5(1)(c) expressly recognises the possibility of detaining a person without charge 'when it is reasonably considered necessary to prevent his committing an offence'. Yet, the European Court of Human Rights has restrictively interpreted this provision as not authorising any general regime of preventive detention or residential orders. Instead, the Court has indicated that evidence of an intention to commit a concrete offence will be necessary, in which case it would be expected that the person could be arrested for preparatory criminal offences. While the Court has found that a lower standard of 'reasonable suspicion' might be acceptable in terrorism cases, objectively realistic grounds are still required.

ASIO'S DETENTION POWERS SINCE 2002

I turn now to the first preventive detention mechanism adopted in Australia after 11 September 2001 – ASIO's power to question a person, or to question and detain a person for up to seven days, in relation to terrorist investigations. As at August 2005, no-one had been detained under the new powers, but 14 questioning warrants had been issued against 13 subjects. In June 2006, the seven-member Parliamentary Joint Committee on ASIO, with a majority of government members, found that the powers had been useful in monitoring potential participants in terrorist acts, and that the powers had also been used lawfully and professionally.

Following extensive community and parliamentary debate, amendments to the original ASIO Bill in 2002 produced substantial improvements. These included: raising the minimum age of detainees to 16 years; allowing detainees access to a lawyer (except where the lawyer poses a security threat); reducing the maximum questioning period to 24 hours over seven days; and the inclusion of a three-year sunset clause in the legislation.

In addition, the process of issuing warrants and supervising questioning now provides some essential protections. Judicial authorisation of questioning and detention is required, as is supervision of questioning by a retired Federal or State judge or Administrative Appeals Tribunal member. The threshold for issuing warrants is set relatively high, since a warrant must 'substantially assist' in the collection of 'important' intelligence about a terrorist act.

People under warrant must be treated with humanity and with respect for their dignity, and cruel, inhuman or degrading treatment is forbidden (s 34J). A Protocol detailing standards on questioning and detention is also to be welcomed, as is the practice of the independent Inspector-General in attending almost all questioning sessions. The Inspector General has observed that questioning has been conducted professionally and appropriately; that subjects have been accorded dignity, respect, physical comfort and religious needs; and facilities have been appropriate (Annual Report 2003-04).

Nonetheless, important concerns remain about both the need for, and nature of, the special powers. First, the duration of questioning is arguably excessive: up to 24 hours (or 48 hours with an interpreter) within a maximum detention period of 168 hours (or 7 full days). This period, applicable to non-suspects, is seven times longer than the already prolonged investigative period for those suspected of federal terrorism offences (a maximum period of 24 hours, double the maximum 12 hour period allowed for other serious criminal offences).

Legal Advice, Representation and Assistance

Secondly, the availability of legal advice, representation and aid was uncertain under the legislation. While those held for questioning appeared entitled to contact a lawyer of their choice (s 34D(4)), the right was located in a 'Note' to the legislative provision, and not in the provision itself, raising doubts about its legal enforceability. In 2006, the government accepted the recommendation of the Parliamentary Joint Committee on ASIO to insert into the legislation an express right to contact a lawyer. As adopted, there was also no provision for legal aid, although the government accepted the Joint Committee's recommendation in 2006 to insert a statutory right to apply for financial assistance for legal and related costs.

Next, while the prescribed authority (who supervises the questioning) must provide a 'reasonable opportunity' for a legal adviser to advise the subject during breaks in questioning (s 34U(3)), there is no right to receive advice prior to the commencement of questioning. Further, legal advisers were precluded from intervening in the questioning, or from addressing the prescribed authority (s 34U(4)), and may be removed for 'unduly disrupting' proceedings (s 34U(5)). Such restrictions unjustifiably restrict the ability of a lawyer to represent and protect his or her client's interests. In 2006, the government accepted the recommendation of the Parliamentary Joint Committee on ASIO to allow lawyers to be present during questioning, and to address the prescribed authority by consent, but rejected recommendations to permit lawyers to intervene in questioning and to be present when subjects are in detention.

The legislation was also silent on whether lawyer-client confidentiality is protected when advice during breaks is sought. The legislation permits monitoring of initial contact with a legal adviser (s 34U(1)), giving rise to an inference that legal advice during breaks may also be monitored. Further, while the legislation expressly preserves legal professional privilege (s 50), there is no express protection of lawyer-client confidentiality. In a context of secret intelligence gathering, it is crucial to protect the right to freely consult a lawyer and to impart and receive information without fear of surveillance. In 2006, the government accepted the recommendation of the Parliamentary Joint Committee to recognise lawyer-client confidentiality in questioning, but not in detention (though legal professional privilege may still apply).

Offence of Failing to Provide Information

Thirdly, the ASIO legislation imposes criminal penalties for failing to answer questions or produce documents (in addition to the penalties mentioned above for disclosing operational information). It is accepted that the right to silence is not absolute, but may be justifiably abrogated in limited circumstances where the privilege against self-incrimination is preserved (entailing the conferral of use immunity on subjects in civil or criminal proceedings). Other areas of federal regulation adopt this approach.

In abrogating the right to silence, the ASIO legislation confers use immunity in criminal proceedings and thus preserves the privilege against self-incrimination (s 34G(9)). However, the legislation does not confer *derivative use immunity* (to prevent disclosures being used to gather other evidence against the person in future criminal proceedings), nor does it confer any immunity at all in civil proceedings (thus allowing incriminating evidence in, for example, deportation proceedings).

Detention Powers

ASIO's power to detain persons suspected of no crime has not been used in three years (although questioning under compulsion itself is necessarily a deprivation of liberty and constitutes detention). Detention is the most invasive restriction on individual liberty and security of person. As such, it must be regarded as a means of last resort to be used after all feasible alternatives have been exhausted. The source of legal protection of liberty is not only international human rights law, but, more importantly in the Australian context, the common law and the underlying rule of law.

As stated recently by Lord Hope of Craighead in the House of Lords decision in *A v Home Secretary* (at para 100): 'It is impossible ever to overstate the importance of the right to liberty in a democracy'. Or as Baroness Hale of Richmond stated (at para 222): 'Executive detention is the antithesis of the right to liberty and security of person.' The right to liberty from the libertarian tradition in English common law dates back to the Magna Carta, the 1628 Petition of Right, the 1688 Bill of Rights, and habeas corpus. Liberty applies to all within jurisdiction, not just citizens (*A v Home Secretary*, Lord Rodger of Earlsferry, at para 178).

If the stated purposes of the detention provisions are to prevent a subject alerting others that a terrorist offence is being investigated, to prevent absconding, or to prevent the damage or destruction of evidence (*ASIO Act 1979* (Cth), s 34F(3)), then it is arguable that those purposes can be achieved by less invasive means. As the House of Lords stated in *A v Home Secretary*, less drastic alternatives to detention are capable of preventing the commission of terrorist offences, such as electronic monitoring, home detention, telephone reporting, home surveillance, prohibitions on visitors or contact with others, and banning the use of computers and telephones.

In mid-2006, the government rejected the recommendation of the Parliamentary Joint Committee on ASIO that the issuing authority be satisfied that other methods of intelligence gathering would not be effective before authorising use of the powers.

The ASIO legislation is inconsistent with basic democratic and judicial principles. Individuals should not be detained beyond an initial short period except as a result of a finding of guilt by a judge or as part of the judicial process (such as being held in custody pending a bail hearing). Detention is only justifiable as part of a fair and independent judicial process resulting from allegations of criminal conduct.

It is not acceptable in a liberal democracy for a State police force to detain people in secret for some days, nor should it be acceptable for intelligence agencies like ASIO. No other comparable jurisdiction has enacted laws permitting the detention of citizens not suspected of any crime. Anti-terrorism laws in the UK and the US allow detention only where a detainee is suspected of terrorism or of endangering security, and do not permit fishing expeditions to make intelligence gathering more convenient. ASIO's detention powers are unnecessary and unjustifiable and should be repealed.

The legislation also does not establish any statutory right to judicial review, although in mid-2006 the government decided to insert a 'note' into the legislation signposting the existing possibility of judicial review under s 39B of the Judiciary Act 1903 or in the High Court under s 75(v) of the Constitution. The powers are, however, exempt from the operation of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

Finally, while the powers were initially authorised for a temporary three year period, in June 2006 the government extended the powers for a further ten years (rather than the 5.5 years

recommended by the Parliamentary Joint Committee on ASIO). Thus exceptional, emergency powers, adopted in response to a specific threat, have become regularised and normalised as a semi-permanent feature of Australia's legal landscape. It would have been better to enact such powers as temporary measures so as not to serve as a precedent for adopting more invasive powers in the future, or to make it easier to justify other exceptional powers in less exceptional circumstances.

PREVENTIVE DETENTION UNDER THE 2005 ACT

Not content with ASIO's already excessive powers, the government enacted a second preventive detention scheme at the end of 2005. The law now provides for the issue of preventive detention orders enabling detention of 'future' suspects for up to 48 hours at the Commonwealth level, and up to 14 days at the State/Territory level (the more restrictive Commonwealth time limits being for federal constitutional reasons).

A preventive detention order now may be made if (Criminal Code (Cth), s 105.4):

> (a) there are reasonable grounds to suspect that the subject:
> (i) will engage in a terrorist act; or
> (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
> (iii) has done, or will do, an act in preparation for, or planning, a terrorist act; and
>
> (b) making the order would substantially assist in preventing a terrorist act occurring; and
>
> (c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary...

In addition, the anticipated terrorist act must be imminent and expected to occur in the next 14 days. A preventive detention order is also available where it is necessary to preserve evidence of a terrorist act which occurred in the previous 28 days (and even if the person detained is not involved in the terrorist act).

In many cases, if the grounds for issuing an order can be satisfied, the person could already be charged for one or more of the many existing preparatory terrorist offences in the Criminal Code, which would avoid the terrorist act taking place (including by applying the modified presumption against bail for terrorist offences). Terrorism is already defined very broadly in federal law (s 100.1, *Criminal Code*), and the definition of a 'terrorist act' even includes mere threats to commit terrorism (so that a person could be arrested merely for preparing to threaten to commit terrorism). In addition, ASIO's power to question and detain non-suspects would also be available to prevent the commission of terrorism in these circumstances.

The orders are, however, intended to operate more widely than the criminal law. First, they can be issued where the authorities lack sufficient evidence to secure a conviction, since the standard of proof for obtaining an order ('reasonable suspicion') is lower than the criminal standard of proof – though different to the standard required to make an arrest (in which case the purpose of preventing terrorism may still be served even if a conviction later on is unlikely).

Secondly, the power may also be intended to protect against the disclosure of security sensitive evidence during a criminal trial. Yet, the *National Security Information (Criminal and Civil Proceedings) Act 2004* was enacted precisely to protect such evidence, whilst attempting to balance the rights of suspects. The orders may, therefore, operate in circumstances where the government does not want to disclose evidence because even these

protections are considered insufficient. The orders clearly allow the government to deal with terrorism by avoiding the regular judicial procedures for testing evidence in criminal trials.

As with the ASIO powers after September 11, it is arguable that the purpose of preventive detention orders could be fulfilled by less invasive means. In the UK, control orders were introduced as an alternative to detention for precisely this reason, whereas Australia has embraced both preventive detention and control orders.

The government argued that surveillance is so resource intensive that preventive detention is preferable. Yet the relative expense of surveillance cannot be accepted as a basis for depriving even non-suspects of their liberty without charge. To do so would be to reduce the right to liberty to an economic calculation, rather than recognising and preserving it as a foundational element of human dignity.

A number of human rights concerns have been raised about preventive detention. The legislation allows detention without a judicial hearing, based on the low standard of proof of 'reasonable grounds'. The issuing authority includes retired judges, who may not be subject to review under s 39B(1) of the Judiciary Act 1903 (Cth). Judicial review may also be difficult due to the lack of access to full reasons for decisions. Merits review by the Administrative Appeals Tribunal may only occur after detention is finished. Detainees are held virtually incommunicado, with severe restrictions on free communication with family members and others; grave penalties of five years imprisonment for disclosing the detention; and lawyer-client communication may be restricted and monitored, potentially impairing the ability to prepare an adequate defence to enjoy a fair trial.

Last minute amendments to the legislation did, however, make some significant improvements. Detainees were given a right to present information to the Australian Federal Police (AFP) to put before the issuing authority concerning applications for a continued preventive detention order, while detainees also gained a right to receive a summary of the grounds on which an order is made. The legislation now elaborates the grounds on which a prohibited contact order can be made, and the AFP must notify the Ombudsman of the order and provide a copy of it and the grounds for it. The Attorney-General's annual report to parliament must specify any orders voided or set aside by the AAT.

Further, the AFP must assist detainees to choose and contact a lawyer, and to access an interpreter. Detainees must be advised of their right to contact a family member, and in emergencies the police have a limited discretion to allow contact with lawyers on matters outside the terms of the legislation. Children 16-18 years old must not be detained with adults except in exceptional circumstances, although there is still no requirement that children only be detained as a last resort. Questioning must be video or audio taped, and guidelines must be developed to cover the treatment of detainees. The offence of disclosing an order does not apply where one parent tells another.

CONTROL ORDERS UNDER THE 2005 ACT

The third potential preventive detention mechanism, control orders, pursue similar objectives to preventive detention orders. Control orders are enable the imposition of numerous restrictions on a person, including their residence, travel, communication and association, activities, access to technology, or possession of articles or substances, and may require a person to be fingerprinted or photographed, to wear a tracking device, to report periodically, or to be re-educated or counselled. Orders may be imposed for up to 12 months, but are renewable as long as the law is in force. A most invasive order could include house arrest for

rolling 12 month periods. The possibility of the renewal of orders for an indefinite period suggests their punitive character, yet the protections of criminal proceedings are absent.

Procedurally, the AFP, with the Attorney-General's consent, may seek an order from a federal court, which must be satisfied on the balance of probabilities that (i) making the order would substantially assist in preventing a terrorist act; or (ii) the person has provided training to, or received training from, a listed terrorist organization (Criminal Code, s 104.4). It is at least questionable whether merely training with a terrorist organization should be a sufficient basis for an order, where there is no ongoing risk of future involvement in terrorism, and particularly where training was not unlawful when it was engaged in (given the fairly recent criminalisation of such conduct).

The standard of judicial review is higher than that performed by the British courts, which are limited to determining whether the Secretary of State's decision to impose a control order was 'obviously flawed'. In April 2006, the High Court of Justice found that the imposition of a control order on an individual in the UK violated the right to a fair hearing under the European Convention. The government suspected that the man intended to travel to Iraq to fight British forces. As Mr Justice Sullivan stated:

> The thin veneer of legality… cannot disguise the reality that controlees' rights under the Convention are being determined not by an independent court… but by executive decision-making untrammelled by any prospect of effective judicial supervision. (*Re: MB* [2006] EWCH 1000 (Admin) at para 103).

Nonetheless, key human rights concerns were raised about the Australian orders. Initial criticisms included that the procedures for issuing the orders were inconsistent with natural justice and procedural fairness. An affected person was denied an opportunity to be heard, since proceedings were ex parte, and there was inadequate notice, reasons, access to evidence and witnesses, and hearsay was admissible.

The original Bill was significantly improved at the eleventh hour, with initial orders made ex parte only on an interim based and later confirmed in an inter partes hearing. The hearing to confirm, vary or revoke order must be as soon as reasonably practicable after issue, although there is no absolute time limit. Even so, it may still be disproportionate to require the initial hearing to be ex parte, and the court could, for example, be given a discretion in the circumstances of individual cases, in order to avoid the risk of arbitrary detention and an unfair trial.

Other improvements included the exclusion of hearsay evidence in confirmation proceedings, although it is still allowed at the interim phase. Also at the confirmation stage, the person must be served with notice of the decision, a statement of facts, an explanation of why restrictions should be imposed and any details to help the person understand the order, but there is no requirement to disclose information likely to prejudice national security. However, the limited notice of grounds for the order before the confirmation hearing may prejudice the right to a fair trial.

Whether an order unjustifiably infringes human rights to freedom of movement, communication, association, privacy and family life, and so on, will largely depend on who the order is imposed on, for what reasons, containing what kind of restrictions, and for how long. In issuing an order, the court must be satisfied that each of the obligations, prohibitions and restrictions to be imposed by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. This requirement largely incorporates the proportionality requirement found in human rights law, and should be an important protection. However, in the absence of a bill of rights, the courts

are unfamiliar with human rights analysis and ways and means of appropriately balancing competing rights and interests, and it remains to be seen how effective this protection will be.

CONSTITUTIONAL VALIDITY OF PREVENTIVE DETENTION

A number of serious concerns have been raised about the constitutional validity of the preventive detention mechanisms in Australia. It is not possible to discuss these in detail here, but only to sketch the general contours of the arguments. The separation of powers under the Australian Constitution means that federal judicial power can only be exercised by the judiciary, and the judiciary cannot exercise executive power.

First, the *ASIO legislation* empowers the executive to detain Australian citizens who have not committed an offence may breach the separation of powers. As the High Court stated in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ, with Gaudron J agreeing):

> the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

There are exceptions to this rule where detention is non-punitive in character, such as detention due to mental illness and infectious disease, or, in the case of non-citizens, for immigration-related purposes (see *Al-Kateb v Godwin* (2004) 208 ALR 124 and *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* [2004] HCA 49).

Although the 'categories of non-punitive, involuntary detention are not closed' (*Kruger v Commonwealth* (*Stolen Generations Case*) (1997) 190 CLR 1 at 162, Gummow J), particularly in war time (*Lim*, at 28), the present level of terrorist threat might be considered insufficiently serious to warrant the administrative detention of citizens on national security grounds, particularly when those detained are suspected of neither having committed a terrorist offence nor preparing to commit one in future.

Secondly, the issue of *preventive detention orders* by federal judges, acting in their personal capacity, may be incompatible with the judicial function (see G*rollo v Palmer* (1995) 184 CLR 348 at 365), since it comprises the independence of judges by involving them intimately in secretive law enforcement functions, without any proper determination of guilt and in the absence of any charge. These orders are categorically different to judges issuing telephone intercepts in their personal capacity, which has been permitted by the High Court, because of the serious nature of the consequences of an order – the deprivation of liberty – recognised as the most precious right under the common law.

Thirdly, the involvement of the federal courts, acting as courts, in issuing *control orders* may be constitutionally invalid since it may involve punishment in the absence of a finding of criminal guilt, thus requiring a federal court to exercise a non-judicial function. While limited exceptions are available permitting administrative detention for protective purposes (such as immigration detention), those cases are distinguishable because the executive, not the judiciary, is exercising the power and it concerns aliens not citizens. Control orders are also much more invasive than AVOs or search warrants, both as to the nature of the restriction and their duration.

CONCLUSION: CONJECTURE REPLACING PROOF

When invasive new legislation is enacted in Australia, critics sometimes make dubious comparisons with fascism, Nazi Germany or police states in general. Such comparisons bluntly ignore the very different political and social conditions of our democracy, and similar legal techniques need not yield the same outcomes in different places at different times.

Even so, I want to conclude with two quotes from one of the architects of state terror during the French revolution, Cardinal Richelieu. Something he said in the late 18th century neatly justifies the thinking underlying our new preventive detention and control orders. He said:

> In normal affairs the administration of justice requires authentic proof; but it is not the same in affairs of state… There urgent conjecture must sometimes take the place of proof; the loss of the particular is not comparable with the salvation of the state.

He also said something which further supports the preventive thrust of the new laws:

> There are some crimes which it is necessary to punish first, then investigate. Among them, the crime of *lèse-majesté* is so grave that one ought to punish the mere thought of it.

The Australian government is starting to be driven the terrible logic that impelled the Jacobin terror during the French revolution. That is not to claim that the government is now a terrorist state. But it is worth remembering that the modern use of the word terrorism stems from the *terreur* imposed by a government on its own citizens.

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* Some of the ideas in this paper were developed jointly with my colleagues Dr Andrew Lynch and Professor George Williams at the Gilbert + Tobin Centre of Public Law, but responsibility for opinions and errors is mine.