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# Australia and the 'War against Terrorism': Terrorism, National Security and Human Rights

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## **Abstract**

This paper 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? This 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 consider whether Australia's national security has been enhanced or damaged by this legislation.

## **Keywords**

'war against terrorism', national security, human rights, security and liberty of the person, state power, rule of law

## **Disciplines**

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# Australia and the ‘War against Terrorism’: Terrorism, National Security and Human Rights<sup>1</sup>

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## **Abstract**

This paper 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? This 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 consider whether Australia’s national security has been enhanced or damaged by this legislation.

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## **1. Introduction**

This paper 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 the 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 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 is 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 paper will consider the exceptional measures contained in Australia's anti-terrorism legislation. These are the ASIO Act (2003) and the Anti-Terrorism Act (No. 2) (2005). The 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 (Rix 2006). 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 the security 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 Government maintains that the exceptional measures provide the Government and national security authorities (including ASIO and the Australian Federal Police) with essential powers for effectively meeting and neutralising terrorist threats (see, for example, Ruddock 2004 and 2005).

## **2. Australia's national security, the terrorist threat and human rights**

Two fundamental assumptions underpin the paper. 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 paper's 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, 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 (Barak J cited in Kirby J 2005: 328)." 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. 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 human rights compliance while countering 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 (Scheinin 2006: 5; a number of relevant Security Council resolutions will be briefly considered in the following section).

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 that were expressed by the Special Rapporteur. In the paper, the Attorney-General asserted that the focus of measures to combat terrorism should be on "creating 'human security' legislation that protects both national security and civil liberties (Ruddock 2004: 254)." Recognising that "[t]he 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 2004: 254)." Ruddock also responded to criticisms that the Government's anti-terrorism "efforts" had failed "to adequately protect our civil liberties (Ruddock 2004: 255)." 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 (Ruddock 2004: 255)."

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 (EJP 2006: 1)." In an earlier publication, ICJ Australia had pointed out that "[a]s 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 (ICJ Australia 2004: 1)." High Court Justice Michael Kirby has also called attention to the fact that since the attacks of September 2001 "17 items of legislation restricting civil freedoms have been adopted by the federal Parliament" with complementary State legislation also being passed (Kirby J 2004: 226).

According to the Eminent Jurists Panel, Australia is widely regarded and admired "as a country with longstanding democratic practices" in which "[t]he independence of the judiciary, respect for the rule of law, the rights of the accused and an accountable justice system are well established (EJP 2006: 1)." 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 (EJP 2006: 1). However, the EJP 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 (EJP 2006: 2).

A number of the issues raised by the Eminent Jurists Panel will be taken up 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.

### **3. Australia's anti-terrorism legislation: review and reality**

Like the Eminent Jurists Panel, Martin Scheinin, the UN Special Rapporteur, acknowledged that the need for legislative reform since 11 September 11 2001 had been questioned by “[m]any from civil society”. But, as he points out, while the Australian Government itself 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 the financing of terrorism and to criminalise providing or collecting funds to finance acts of terrorism. There had also been a need to comply 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 members states) Consolidated Lists of individuals and groups belonging to or associated with Al-Qaida and of groups and individuals belonging to or associated with 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 (UN n.d.)”

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 (Scheinin 2006: 4; see SLRC 2006: 3).” However, unfortunately the Special Rapporteur did not mention several aspects of the SLRC’s report which should have been taken as caveats on the SLRC’s statement regarding the necessity of 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; see PJCIS 2006). These caveats reveal the 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 Government and the law enforcement and security agencies to greater public scrutiny by making them subject to a more effective accountability regime. Before considering these aspects of 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 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 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 representative body of the Australian legal profession, representing approximately 50,000 Australian lawyers through its representative bar associations and law societies” (SLRC 2006: 20).” 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) of the Security Legislation Amendment (Terrorism) Act 2002 (the SLAT Act) 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 SLAT 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 (SLRC 2006: 17). Here is the first caveat on the SLRC’s 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 the ATA Act 2005 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 (SLRC 2006: 17).” This is a second caveat on the SLRC report, for the complexity and confusion created by the use of amending legislation has been a defining feature of the manner in which the Government has pushed the anti-terrorism legislation through both houses of the Parliament. This has involved

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; 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 (Hocking 2004: 322).

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 that 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 (SLRC 2006: 18).” 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 difficulties 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 level of threat of terrorist activity currently faced by Australia” (SLRC

2006: 3). This, however, was an issue on which the Committee undertook to elaborate in its report.

It did so, but only 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 small 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 currently 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 tells us next to nothing about whether the legislation taken as a complete package is actually necessary to protect Australia's national security from that threat or even the precise nature of the 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) of the SLAT Act (as amended by the Criminal Code Amendment (Terrorism Act) 2003) 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 (SLRC 2006: 22)." 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 by the ASIO Legislation Amendment Act 2003 to 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.

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 such as the Parliamentary Joint Committee on ASIO, ASIS and 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' (Hocking 2004: 321)." 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 this was not enough, for "[i]n 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 (Hocking 2004: 328).

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 relation to terrorist activity (‘Australian Laws to Combat Terrorism’ n.d.; emphasis added).” 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” (Michaelson 2005: 326). 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 (Michaelson 2005a: 178).” 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 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 (SLRC 2006: 22; see also Michaelson 2005a).” 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 (PJCASIO, ASIS and DSD 2005). In the meantime, the continuation of ASIO’s questioning and detention powers was confirmed in the ASIO Legislation Amendment Bill 2006.

In addition to the above, the ASIO Act specifies a “prescribed authority” who watches over a person held in detention for questioning as a federal magistrate or a member of the Administrative Appeals Tribunal (AAT). The AAT, however, cannot be regarded 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 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” (ASICJ 2004: 3). 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 (Michaelson 2005b: 137). 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 England whose presence in England 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 (House of Commons 2003). 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] (Michaelson 2005b: 137).”

The Anti-Terrorism Act (No. 2) 2005 (the ATA Act 2005) was passed into law in December 2005. The “key features” of the ATA Act 2005 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 (Ruddock 2005a).

In issuing a control order a court can impose conditions on an individual including a requirement that the person wears a tracking device, a prohibition or restriction on the person talking to other people including their lawyer, and a prohibition or restriction on the use of a telephone or the internet by the person (Walton 2005: 4). 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 (Walton 2005: 4)." 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 ('Details of Amendments'; attachment to Ruddock 2005).

The ATA Act 2005 also includes an "updated" sedition offence "to cover those who urge violence or assistance to Australia's enemies ('Australian Laws to Combat Terrorism' n.d.)." Commenting on this offence, George Williams points out that "[i]t 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 (Williams 2006; emphasis added)." 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 the history of law-making in the history of the Federal Parliament" and almost without precedent in that "[i]t 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 (Williams 2006)." Chris Connolly remarks that, with the exception of Australia, "no modern democratic nation has used sedition provisions for 50 years (Connolly 2005: 14)." 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 Zimbabwe (Connolly 2005: 14; see also ALRC 2006: Chapter 6, Sedition Laws in Other Countries). In response to such criticisms, the 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 (ALRC 2006). This recommendation has been rejected by the Government.

#### **4. 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 the ATA Act 2005 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 (Coutts 2006: 40; see also Michaelson 2005b cited above). As the SLRC blandly acknowledges in an unintended response to the question at the opening of this section "Australia has no formal Charter of Human Rights (SLRC 2006: 3)." 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 the review of the 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” (Scheinin 2006: 5).” 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 the Human Rights Committee in its observations on Australia’s reports under the International Covenant on Civil and Political Rights (Scheinin 2006: 5).”

According to George Williams, for many countries with a written constitution like Australia “constitutional development in the second half of the 20<sup>th</sup> 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 (Williams 2001: 782; see also Williams 2003 and 2004 and Nicholson 2005).” 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 (Williams 2001: 782).” 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” (EJP 2006: 3).” For Amnesty International Australia, these standards “constitute the bare minimum necessary to protect the safety and integrity of individuals from abuse of power (AIA 2005: 5-6).” 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 (Carne 2004: 543). 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 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) (Nicholson 2005: 3).

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 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 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 Howard Government, that the ‘war on terror’ or ‘war against terrorism’ will either be of “uncertain duration” or “go for years” (see, for example, Power 2007 and ABC 2007). This means that counter-terrorism measures, like the exceptional provisions included in Australia’s anti-terrorism legislation, will also be of uncertain duration or go 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 and the measures included in it are anything to go by, then the Australian Government has certainly not been backward in using the machinery of the state to protect the country and its people from the threat of terrorism

(whatever the actual nature of that threat happens to be). It has also not been 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 to the security and liberty of the person either from terrorist attacks or from the arbitrary exercise or abuse of state power. 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.

## 5. Conclusion

Since September 11, 2001 the Australian Government has introduced a whole raft of anti-terrorism legislation which it claims is needed to protect the country and its citizens from terrorist attack. This legislation includes the ASIO Act and the ATA Act 2005 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 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 its two indivisible and absolutely equal aspects would go a long way to providing such protection.

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