

AXIOMS OF AGGRESSION

Counter-terrorism and counter-productivity in Australia

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It did not take Australia long to reach for a legislative response to the terrorist attacks of September 11, 2001. Within months, the Federal government was proposing new anti-terrorism legislation promoting what has since become a familiar scheme: new species of offences relating to a statutorily-defined terrorism, and expanded powers for police and the Australian Security Intelligence Organisation (ASIO) enabling them to detain and question a person who may have information useful in countering a terrorist attack — possibly without access to a lawyer for 48 hours.¹

Thus began the most dramatic era in Australia's counter-terrorism history; one characterised by frenetic legislative activity, heightened investigation and prosecution. Now, more than six years into the War on Terror, patterns of counter-terrorism behaviour are beginning to emerge. The most vivid examples occurred in the second half of 2007 in the form of two controversies:

- the attempt to prosecute Dr Mohamed Haneef in connection with the failed terror attacks in the UK in late June 2007; and
- the collapse of the case against Sydney medical student Izhari Ul-Haque in November 2007.

I will draw on the above developments to illustrate a worrying trend in Australian counter-terrorism towards unthinking and irresponsible belligerence and then consider how strategically counter-productive such an approach might be in responding to the terror threat.

In the beginning: measures of last resort?

In February 2002, when pressed on proposed legislation that could deny terrorism suspects the right to access a lawyer for 48 hours, then Federal Attorney-General Daryl Williams reassured the nation that such detention powers would be only rarely invoked.² A year later, in his Second Reading speech to the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth), Williams reinforced this point: 'It must be remembered that these warrants are a measure of last resort. It is anticipated that they will be used rarely and only in extreme circumstances,' he reiterated.³

This brand of reassurance — that we have little to fear because the authorities' more extraordinary legislative powers will scarcely be used — has proved itself to be anything but scarce. ASIO itself invoked this reasoning in a submission to the Senate Legal and Constitutional Legislation Committee in relation to the Anti-Terrorism Bill No 2 2005 (Cth). There, ASIO first maintained

that '[t]he questioning and detention powers which were passed in 2003 by both Houses of Parliament have proved important in progressing a number of investigations,' while simultaneously affirming that 'ASIO has not yet had to use the detention powers which were always intended to be used only in the most exceptional circumstances.'⁴ Presently, as the British government is facing considerable opposition to its proposal to extend the available period of detention of terror suspects without charge from 28 days to 42, Home Secretary Jacqui Smith's description of the new limit as a 'safeguard' to be used in exceptional circumstances rather than a 'target' rings familiarly. All the while Smith has accepted that there has 'not been a case at the moment that had needed more than 28 days in order to be able to either charge or release somebody'.⁵

It is an intriguingly paradoxical argument. On the one hand, the reason we need not fear such potentially draconian counter-terrorism legislation is that it is unlikely to be used. On the other, an (always unsatisfactorily explained) imperative exists to retain these powers and even extend them. Occasionally, such measures are so urgent that they must be passed immediately, even without thorough political debate. In this regard, the *Anti-Terrorism Act 2005* (Cth) is quintessential, passed as it was after an extraordinary recall of both Houses of Parliament in the space of a day. But as Andrew Lynch observes, it is merely an extreme example of a broader

pattern of behaviour which consists primarily of introducing substantial laws into the Parliament, stressing that they are urgently needed and that any delay caused by those seeking amendment of these Bills is not to be countenanced.⁶

In this way, normal processes of scrutiny, reflection and evaluation of new legislation are circumvented. As David Wright-Neville observes, the federal government did not even bother to ask intelligence agencies to undertake a security audit to determine the nature and extent of any terrorism threat to Australia before enacting new and far-reaching legislation after September 11. Such an audit — similar to one carried out prior to the Sydney Olympic Games in 2000 — would have allowed any new legislation to be precisely calibrated, to generate a response tailored to Australia's security landscape. As it was, the proposed legislation simply assumed Australia faced the same threat profile as the United States.⁷ Extraordinary legislation was the inevitable result.

The suggestion that these harsh powers would be used only sparingly violates the most basic intuitions of the nature of power: that those who have it will find

REFERENCES

1. This ultimately found its expression in July 2002 in the form of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), and a year later in the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth).
2. 'Australia's Proposed Anti-Terrorism Laws', The Law Report, ABC Radio National, 12 February 2002. Transcript available at <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s479175.html>, at 29 February 2008.
3. Commonwealth, *Parliamentary Debates*, House of Representatives, 20 March 2003, 13172 (Daryl Williams).
4. ASIO Statement to the Senate Legal and Constitutional Legislation Committee, Anti-terrorism Bill (No 2) 2005, 17 November 2005. Available at http://www.asio.gov.au/Media/Contents/slcl_committee_anti_terrorism_bill.aspx, at 29 February 2008.
5. Louise Radnofsky et al, 'Terror detention extension a "charade", say dissenting MPs', *The Guardian* (London), 11 December 2007. Available at <http://www.guardian.co.uk/terrorism/story/0,2225701,00.html>, at 29 February 2008.
6. Andrew Lynch, 'Legislating with Urgency — The Enactment of the *Anti-Terrorism Act [No 1] 2005*', *MULR* 30(3) 2007: 747–781, 776.
7. David Wright-Neville, 'Australia's Counter-terrorism Laws and the Assault on Politics' in Tom Davis (ed), *Human Rights 2003: The Year in Review* (2004), 55–75, 60.

Confronted with the threat of home-grown terrorism, we enact a suite of anti-terror laws that radically alter the legal environment, creating offences essentially of future crime, providing for extended detention without charge and possibly allowing convictions on evidence the accused cannot even see.

excuses to use it. Sometimes that use might be indirect, but it is nevertheless worrying. And certainly, in the case of Australia's anti-terrorism laws, examples of this have long been alleged. As far back as November 2003, Sydney lawyer Stephen Hopper told ABC Radio National's AM program that his client, whose home ASIO had raided the previous week, had been threatened with three days' detention if he failed to cooperate with the raid.⁸ This found support in a submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD's Review of Division 3 Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) by the Australian Muslim Civil Rights Advocacy Network (AMCRAN). That submission warned startlingly that expanded police and intelligence powers were being used coercively, to intimidate people into cooperating with authorities where they had no legal obligation to do so. Drawing on its interactions with members of the Australian Muslim communities, AMCRAN claimed to have identified 'a clear pattern of behaviour from ASIO's officers', where people who demonstrated some reluctance to talk informally to them were threatened with questioning or detention warrants, and the possible suspension of their passports, unless cooperation was more forthcoming.⁹ AMCRAN reiterated these concerns some seven months later in its submission to the Senate Legal and Constitutional Affairs Committee inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005 (Cth).¹⁰

Recent revelations about Australian counter-terrorism operations have proven AMCRAN's warnings to be far from the product of paranoid imagination. In fact, they bear a remarkable similarity to the facts in the New South Wales Supreme Court decision of *R v Ul-Haque*¹¹ which merely highlights what is increasingly emerging as a worrying trend of belligerence in Australian counter-terrorism. And, as we shall see, it is a trend that has infected both elected government, and its law enforcement and intelligence organs.

The approach of law enforcement and intelligence agencies: *R v Ul-Haque*.

In April 2004, Australian Federal Police arrested and charged Izhaz Ul-Haque under section 102.5(1) of the *Criminal Code* for receiving training from the terrorist organisation Lashkar-e-Taiba (LeT). The prosecution alleged that Ul-Haque had returned to Sydney from Pakistan on 20 March 2003 having spent 21 days at an LeT camp, and that he was carrying several documents concerning weaponry and events in Afghanistan, as

well as a letter addressed to his family expressing his intention to join LeT and go to Kashmir for 'jihad'. Customs officers seized this material, before allowing Ul-Haque to go freely.¹²

It appears that the inspiration for Ul-Haque's trip to Pakistan came from Faheem Lodhi, who is presently serving a 20-year sentence for three terrorism offences.¹³ Lodhi's wife was friends with Ul-Haque's mother, and Lodhi and Ul-Haque remained in contact after the latter's return to Australia. Neither the police, nor ASIO sought to approach Ul-Haque until some eight months later. When they did, it seems they were principally interested, not in his training with LeT, but with whatever information he could provide on Lodhi.¹⁴ Indeed, Ul-Haque gave evidence, which the Court accepted, that ASIO officers attempted to convince him to act as a spy on 'the one person we're interested in', namely 'Mr Lodhi', perhaps even by wearing 'those microphones or wires that people do in the movies'.¹⁵

That Ul-Haque made the seemingly vast journey from a potential ASIO spy to a man accused of a terrorism offence is, in some respects, curious. But if an explanation was required, it probably came in the evidence of Federal Agent Kemuel Lam Paktsun, a senior counter-terrorism officer with the Australian Federal Police who was the senior case officer on Operation Newport (which led to Ul-Haque's arrest). In the course of cross-examination in a pre-trial hearing in October 2007, Lam Paktsun explained that:

'[a]t the time [of Ul-Haque's arrest] we were directed, we were informed, to lay as many charges under the new terrorist legislation against as many suspects as possible because we wanted to use the new legislation.'

Certainly this makes a mockery of politicians' reassurances that extensive powers in the hands of police and intelligence organisations would be used only sparingly, in extreme circumstances. Moreover, for Ul-Haque, the implications were clear, and quite remarkably, Lam Paktsun put them in express terms:

So regardless of the assistance that Mr Ul-Haque could give, he was going to be prosecuted, charged, because we wanted to test the legislation and lay new charges, in our eagerness to use the legislation.¹⁶

Such a mindset is worryingly cavalier, given the gravity of the issues involved. Worse, it was apparently reiterated subsequently by Australian Federal Police Commissioner Mick Keely in a speech to Federal and New South Wales police officers, where he asserted that the police's counter-terrorism role involved

8. 'Lawyer hits out at ASIO raid speculation', AM, ABC Radio National, 1 November 2003. Transcript available at <http://www.abc.net.au/am/content/2003/s980064.htm>, at 29 February 2008.

9. AMCRAN (Australian Muslim Civil Rights Advocacy Network), submission no 88 Parliamentary Joint Committee on ASIO, ASIS and DSD Review of Division 3 Part III of the ASIO Act 1979: ASIO's Questioning and Detention Powers, 13-14. Available at http://www.aph.gov.au/HOUSE/committee/pjcaad/asio_ques_detention/subs/sub88.pdf, at 29 February 2008.

10. Australian Muslim Civil Rights Advocacy Network, submission no 157 Senate Legal and Constitutional Affairs Committee Inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005, 8. Available at <http://www.aph.gov.au/senate/committee/legcon.ctte/terrorism/submissions/sub157.pdf>, at 29 February 2008.

11. [2007] NSWSC 1251 (5 November 2007).

12. *Ibid* [12].

13. See *R v Lodhi* [2006] NSWSC 691 (23 August 2006). The decision was upheld on appeal: *Lodhi v R* [2007] NSWCCA 360 (20 December 2007).

14. *R v Ul-Haque* [2007] NSWSC 1251, [13].

15. *Ibid* [110].

16. Sally Neighbour, 'Charge as many as possible', *The Australian* (Sydney), 13 November 2007. Available at <http://www.theaustralian.news.com.au/story/0,23500,22747968-2,00.html>, at 29 February 2008.

'testing the courts'.¹⁷ This approach infected the entire prosecution of Ul-Haque, and led ultimately to its spectacular collapse before the courts.

ASIO officers' conduct

In *R v Ul-Haque*, the issue before Adams J was the admissibility of records of three interviews with the accused conducted by the Australian Federal Police on 7 and 12 November 2003, and 9 January 2004. The prosecution sought to rely on alleged admissions made in the course of those interviews. As it happens, Adams J found the records of interview were inadmissible on a relatively simple application of sections 84, 85 and 138 of the *Evidence Act 1995* (Cth). Indeed, in pure doctrinal terms, *R v Ul-Haque* is a relatively uninteresting case. It is far more significant for its facts, and what they disclose about the operations of ASIO and the Australian Federal Police.

The story relevantly begins on 6 November 2003, when two ASIO officers approached Ul-Haque in a car park near Blacktown train station on his way home from the University of New South Wales. On the version of the facts accepted by the Court, the confrontation was a decidedly intimidating one, with an officer immediately telling Ul-Haque:

You're in serious trouble. You need to talk to us and you need to talk to us now... We are doing a very serious terrorism related investigation and we require your full cooperation and it's in your own benefit to talk to us... We need to have a discussion with you and we need to have it right now and you need to come with us.¹⁸

Ul-Haque was being accompanied by his younger brother. Upon bringing this to the ASIO officers' attention, the officers suggested his brother drive himself home. When informed that he was too young to drive, the officers were unmoved: 'Well we need to have the discussion now. Leave the other matters as they are.' Ul-Haque's brother waited in the car as Ul-Haque left with the officers. 'We are taking you somewhere to have a private discussion and talk to you,' they declared, without telling the accused where they were going. As it unfolded, the discussion took place in a nearby park.¹⁹ For Adams J, this entire confrontation was intended precisely to be 'frightening and intimidating'.²⁰ Such coercive conduct would continue as the officers spoke to Ul-Haque: whenever he failed to provide answers to the officers' liking, they would warn him that 'we can do this the easy way or we can do this the hard way. Either you co-operate with us or there'll be consequences for you,' or alternatively that 'if you don't co-operate, things will get worse for you.'²¹ This was a frequent pattern. Ul-Haque would fail to give the officers the answers they sought, only to provide them after being encouraged by, in one ASIO officer's words, 'robust discussion and considerable prompting'.²²

There was no warrant issued to cover such activity. ASIO did have a warrant to search Ul-Haque's home, which they were doing simultaneously, but this did not extend to a shadowy encounter at a train station, or a conversation in a park. At no stage was Ul-Haque informed of his right to a lawyer, or indeed, to refuse to speak to ASIO. Rather, the opposite

impression was given: that Ul-Haque would suffer for failing to cooperate. In Ul-Haque's mind, this implied 'unspecified but possibly dire consequences',²³ including deportation of his family and himself, that 'anything would be possible because they were involved in the highest levels of government in Australia, that it was in their power to do those things if you did not co-operate with them.'²⁴ Moreover, this was a fear that, in Adams J's view, was entirely reasonable, and indeed deliberately nurtured by the ASIO officers' conduct:

Any ordinary member of the public, let alone a 21-year-old, would, I think, be disturbed and frightened by being informed by intelligence officers that, rather than going to some office for questioning, this was going to take place (close to dark) in a park where the conversation would be 'private'... I believe... [this] was intended to bring about precisely what I have described as would be likely to have been the response of any ordinary citizen.²⁵

Of this, his Honour was caustically scathing. 'The very mode of questioning was intimidating,' he found. 'He was not told what was being investigated except in the most general terms. He was told in effect, that he knew what he had done wrong... This is reminiscent of Kafka.'²⁶ This led naturally to his Honour's conclusion that:

...neither the actual powers of the officers nor the legal rights of the accused were conveyed. It is inescapable that this was deliberate. Language was used which was calculated to suggest both that the officers were legally empowered to require the accused to accompany them and that he must answer their questions. This was deceptive and could not have been accidental.²⁷

The facts of the case continue in this vein. Another similarly coercive interview took place in Ul-Haque's home with an Australian Federal Police officer present. Then came an interview, at ASIO's insistence, with the Australian Federal Police, and another two months later. The entirety of this process was tainted in Adams J's view by ASIO officers' behaviour, which accordingly rendered all the records of interview inadmissible on the grounds that any admissions they contained were influenced by oppressive and improper conduct. In fact, Adams J embarked upon an unnecessary digression to find that, as a matter of law, the ASIO officers' conduct amounted to the kidnapping and false imprisonment of Ul-Haque, both at common law and under section 86 of the *Crimes Act 1900* (NSW). That is, that the ASIO officers had committed criminal offences, that their 'conduct was grossly improper and constituted an unjustified and unlawful interference with the personal liberty of the accused.'²⁸ Whether or not such an inquiry was gratuitous, there is no doubting its rhetorical force. And while no commentator appears to have noted its dubious legal relevance,²⁹ many in mass media have drawn on it in criticising ASIO for its conduct.³⁰

A broader pattern?

There is a methodology here that we must regard as deeply troubling. One that assumes the best way to respond to the threat of terrorism is to take invariably the most aggressive option: to intimidate and rough up suspects — even if, like Ul-Haque, they are 'no immediate danger [but] [m]ay be able to be used as a source'. In the aftermath of *R v Ul-Haque*,

17. Dan Box, 'Keelty attacked for "court testing"', *The Australian* (Sydney), 17 December 2007. Available at <http://www.theaustralian.news.com.au/story/0,25197,22934582-2702,00.html>, at 29 February 2008.

18. *R v Ul-Haque* [2007] NSWSC 1251, [17].

19. *Ibid.*

20. *Ibid.* [19].

21. *Ibid.* [21].

22. *Ibid.* [23].

23. *Ibid.* [46].

24. *Ibid.* [32].

25. *Ibid.* [29].

26. *Ibid.* [31].

27. *Ibid.* [34].

28. *Ibid.* [62].

29. The secretary of the Federal Attorney-General's department did, however, complain to the Judicial Commission of New South Wales over this aspect of the ruling: Tom Allard, 'Complaint filed against judge who slammed ASIO', *The Age* (Melbourne) 26 December 2007. Available at <http://www.theage.com.au/articles/2007/12/25/1198345010234.html>, at 29 February 2008. The Commission rejected the complaint: Gerard Noonan, 'Judicial body rejects call to discipline judge', *Sydney Morning Herald* (Sydney) 15 January 2008. Available at <http://www.smh.com.au/articles/2008/01/14/1200159363454.html>, at 29 February 2008.

30. See for example: Editorial, 'Terror must be fought within the law', *The Age* (Melbourne) 14 November 2007. Available at <http://www.theage.com.au/articles/2007/11/13/1194766674415.html>, at 29 February 2008; Editorial, 'ASIO's credibility now on trial', *Sydney Morning Herald* (Sydney) 14 November 2007. Available at <http://www.smh.com.au/articles/2007/11/13/1194766671759.html>, at 29 February 2008; Mike Carlton, 'Bully for you, ASIO — the dumb face of intelligence', *Sydney Morning Herald* (Sydney) 17 November 2007. Available at <http://www.smh.com.au/articles/2007/11/16/1194766964928.html>, at 29 February 2008.

... to capture the thrust of the federal government's counter-terrorism instincts: suspects are to be demonised, their formal innocence never to be acknowledged explicitly, even if charges have been dropped or never laid.

Stephen Hopper warned that this case 'is the norm rather than the exception'.³¹ Indeed such recklessness has characterised much of the 'war on terror' internationally. On even the weakest (and ultimately false) intelligence suggesting a connection between Saddam Hussein and al-Qa'ida, we bomb a country into civil war. Having captured hundreds of people in Afghanistan and Pakistan, we incarcerate and almost certainly torture them in a prison at Guantánamo Bay. Confronted with the threat of home-grown terrorism, we enact a suite of anti-terror laws that radically alter the legal environment, creating offences essentially of future crime, providing for extended detention without charge and possibly allowing convictions on evidence the accused cannot even see. This is the product of counter-terrorism's contemporary orientation.

Inevitably, such hairy-chested sloppiness exposes itself. *R v Ul-Haque* is only the most recent example of a counter-terrorism operation brought undone by the illegal and oppressive manner of its prosecution. In the 2005 prosecution of Zaky Mallah for terrorism offences, the New South Wales Supreme Court also found that state's police force had acted illegally in obtaining evidence against the accused.³² In 2006, the Victorian Court of Appeal overturned the terrorism conviction at trial of Jack Thomas on the basis that his confession to Australian Federal Police was tainted by earlier torture in Pakistan.³³ To be sure, that torture was not performed by federal police officers, but they did encourage Thomas to cooperate with them through what the Court of Appeal described as 'emotional manipulation'.³⁴ For example, police officers would show Thomas a picture of himself with his family, before telling him that the officers 'might give [him] another look at that later' if he responded appropriately to questioning.³⁵

But there can be little doubt that the landmark episode in shambolic, over-zealous counter-terrorism was the 2007 odyssey of Dr Mohamed Haneef, the Indian doctor charged with recklessly providing support for terrorism under section 102.7(2) of the *Criminal Code* in the aftermath of the failed bombing of Glasgow airport in June. That attack was perpetrated by Haneef's second cousin, Kafeel Ahmed, who was ultimately the only fatality. Unsurprisingly then, Haneef was implicated largely by association. Initially the prosecution alleged he had lent to his relative a mobile phone SIM card that subsequently formed part of the triggering device for the bomb used in the failed attack. In truth, the SIM card was some 300 kilometres away

from Glasgow, in Liverpool; a fact that, once admitted by the Federal Police, ultimately caused the entire prosecution to collapse.³⁶

But the case's weakness did not prevent Haneef becoming a symbol for the intimidatory use of police power. By now almost every Australian would have seen the infamous photograph for which Eddie Safarik won the 2007 Walkley Award for News Photography: the austere metallic environment, the large padlock in the foreground, the cramped space, and of course, the hunched over figure of Haneef, head between his knees, perhaps seeking anonymity, perhaps in pain, wearing a loose brown track suit strangely reminiscent of more infamous orange Guantánamo Bay attire.³⁷ Haneef, of course, was first detained for twelve days before charges were laid, then held in solitary confinement for twenty-three hours per day once they were. In short, the apparatus of the state descended heavily upon Haneef, principally because of its own incompetence and knee-jerk reaction.

But for all the criticism that can be (and has been) leveled at the Australian Federal Police's handling of the Haneef case, perhaps the most extraordinary conduct came from the then Federal government. It is an important dimension to the story, because it indicates that the imperative of belligerent counter-terrorism is not confined to law enforcement and intelligence agencies. It is more plenary.

The Haneef Affair: the Howard Government's approach *The Migration Act as a weapon*

So weak was the case against Haneef, that Magistrate Jacqui Payne ultimately granted bail on a \$10 000 surety.³⁸ This, it must be remembered, was a significant development, given that bail may only be granted in connection with a terrorism offence in 'exceptional circumstances'.³⁹

One could be forgiven for thinking at this point that Haneef had been treated harshly enough for someone who, if he was involved in a terror plot at all (and it does not appear he was), was not even alleged to have known it. Yet it was at this point that the Federal government's conduct thrust itself into contemplation. Within hours of the magistrate's decision, then Immigration Minister Kevin Andrews took the extraordinary step of cancelling Haneef's visa on the basis that he failed the 'character test' under section 501 of the *Migration Act 1958* (Cth). The result

31. Natalie O'Brien, 'Spying on the spies', *The Australian* (Sydney) 14 November 2007. Available at <http://www.theaustralian.news.com.au/story/0,25197,22754199-28738,00.html>, at 29 February 2008.

32. See *R v Mallah* [2005] NSWSC 358 (11 February 2005). Wood CJ at CL held that the evidence in question was nevertheless admissible, but Mallah was acquitted of the terrorism offences in any event.

33. See *R v Thomas* [2006] VSCA 165 (18 August 2006).

34. *Ibid* [78].

35. *Ibid* [78].

36. Craig Skehan, Julia May and Amrit Dhillon, 'Haneef case descends into farce', *Sydney Morning Herald* (Sydney), 21 July 2007. Available at <http://www.smh.com.au/articles/2007/07/20/1184560040251.html>, at 29 February 2008.

37. For the photograph see Matthew Ricketson, 'Age writer, photographers take out Walkley awards', *The Age* (Melbourne) 30 November 2007. Available at <http://www.theage.com.au/articles/2007/11/29/1196037074775.html>, at 18 December 2007.

38. 'Haneef granted bail', *The World Today*, ABC Local Radio, 16 July 2007. Transcript available at <http://www.abc.net.au/worldtoday/content/2007/s1979473.html>, at 18 December 2007.

39. *Crimes Act 1914* (Cth), s 15AA.

was that, upon posting bail, Haneef would be sent to immigration detention where he would remain until the conclusion of his trial, after which he would be either imprisoned or deported. Haneef chose to remain in prison, preferring it to immigration detention.

The basis on which Andrews held Haneef had failed the character test was his alleged 'association with someone else, or with a group or organisation, whom the minister reasonably suspects has been or is involved in criminal conduct'.⁴⁰ The criminal conduct in question was, quite obviously, the attempted terrorist attacks in the United Kingdom. But precisely what was so sinister about Haneef's association with the perpetrators — who, after all, were his relatives — Andrews refused to say at this point. Clearly, though, Andrews was relying on a very broad reading of 'association'. When Haneef petitioned the Federal Court to review the minister's decision, the minister's lawyers relied on *Minister for Immigration and Multicultural Affairs v Kuen Chan*⁴¹ to argue that even an innocent association would be sufficient. The Federal Court rejected this argument, holding that section 501(6)(b) of the *Migration Act 1958* (Cth) contemplated a more sinister association; one that 'reflects adversely on the character of the visa holder.' Accordingly, Andrews had applied the wrong test in deciding to cancel Haneef's visa, which rendered his decision invalid.⁴² On appeal, the Full Court went even further, holding that an application of the correct test by Andrews would necessarily have yielded a different outcome. After considering the matters Andrews adduced to justify his suspicion of Haneef, the Full Court concluded that:

None of these elements, individually or together, is capable of supporting a reasonable suspicion that Dr Haneef knew of, was sympathetic to, supported, or was involved in any way in criminal conduct undertaken by the Ahmeds.⁴³

From the start, we were asked to believe that the timing of Andrews' decision was entirely coincidental; that his decision was 'not related' to that of the magistrate, and that they each had 'separate responsibilities'.⁴⁴ As a matter of legal metaphysics, this is undoubtedly correct. The two decisions were made under different Acts, and neither relied on the other for its legal legitimacy. But in facing cynicism over the motives of his decision to cancel Haneef's visa, Andrews was being asked a political question, and in political terms, his response was difficult to believe. It became even harder to believe a few months later when *The Australian* reported that confidential email correspondence between Australian Federal Police agents and one of Andrews' advisers declared plainly that

[c]ontingencies for containing Mr HANEEF and detaining him under the Migration Act, if it is the case he is granted bail on Monday, are in place as per arrangements today.⁴⁵

This clearly suggests government involvement in a police prosecution. Such a plan would point to a pervasive politicisation of the Haneef case. Of course, Andrews' office denies any such scheme was hatched. But the circumstantial evidence — including Andrews' appalling timing — meant the suspicion of collusion was ever-present. Whatever the truth of the Minister's motives, in acting so outlandishly mid-prosecution he

irredeemably politicised what was, until then, a judicial process. Suddenly, Minister Andrews became the story.

For nearly two weeks, Andrews kept the information on which he ostensibly based his decision confidential. When finally he did release information, it consisted of excerpts of emails between Haneef and his cousin, suggesting that Haneef leave Australia immediately, using the fact that his wife had just given birth to a girl in India as an excuse.⁴⁶ The excerpts publicised were, of course, selective and devoid of any context. They were put to Haneef in the course of police interviews, and his responses were clearly not sufficiently incriminating to sustain any charge against him. Later, Andrews released further excerpts from a police interview with Haneef, again selectively and devoid of the explanatory context that emerged only when Haneef's lawyers released the entire record of interview into the public domain.⁴⁷

Questions of character

There is a mode of conduct here that expresses a governmental determination to cast Haneef publicly as villain, rather than victim. And, perversely, it found its fullest expression on Haneef's release, when Haneef left almost immediately for India to be with his family, especially the new daughter he was yet to meet. In response, Andrews spun Haneef's rapid departure as a sign of guilt, asserting that 'if anything' Haneef's departure 'actually heightens rather than lessens my suspicion'.⁴⁸ It was a desperate and absurd remark. The greater challenge was to imagine any reason Haneef would have had to stay in Australia. This was, after all, the country that had detained him without charge for an inordinate period, kept him in solitary confinement when he was charged on the basis of a flimsy case, then cancelled his visa and promised to deport him. Only a man desperate to broadcast an *ad hominem* smear could have made Andrews' comments. This, as well as anything, demonstrates the Governmental tendency to parade its toughness towards terrorists — a tendency neatly captured by then Prime Minister John Howard's defence that '[w]hen you are dealing with terrorism, it's better to be safe than sorry'.⁴⁹

Such an attitude has clearly hitherto informed the governmental response in Australia to a range of similar scenarios. Perhaps the most publicly ventilated of these was the David Hicks saga, but we must similarly recall the case of Hicks' fellow Guantánamo Bay inmate, Mamdouh Habib, who unlike Hicks, was released without charge after three years' incarceration. Now it has emerged that a report on Habib's welfare at Guantánamo Bay, which detailed Habib's claims of suffering torture in Egypt, was sent to senior Howard Government figures as early as 2002. The Howard government's response was, in essence, to ignore the allegations. They were never disclosed to the Australian public. They were not investigated with any rigour, enthusiasm or diligence. And the Government maintained it had no knowledge Habib had even been in Egypt. Then Foreign Minister Alexander Downer was reiterating this position as recently as 2005, some three years after the report.⁵⁰ Once more, the governmental pattern was one of demonisation. Even after ignoring several warning signs of Habib's torture,

40. *Migration Act 1958* (Cth), s 501(6)(b).
41. [2001] FCA 1552.

42. *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 (21 August 2007), [132]. See also [134]. This contrasts with the position of Spender J at first instance, who found it was possible that an application of the correct test may not have led Andrews to a different decision: *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 (21 August 2007), [261].

43. *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203 (21 December 2007), [132]. See also [134]. This contrasts with the position of Spender J at first instance, who found it was possible that an application of the correct test may not have led Andrews to a different decision: *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 (21 August 2007), [261].

44. 'Interview on ABC News Radio', *Rolling News (Early AM)*, ABC News Radio. Transcript available at http://www.minister.immi.gov.au/media/media-releases/2007/ka_transcript_0732.html, at 2 December 2007.

45. Hedley Thomas, 'Secret Haneef plan exposed', *The Australian* (Sydney), 2 November 2007. Available at <http://www.theaustralian.news.com.au/story/0,25197,22688973-601,00.html>, at 19 December 2007.

46. 'Andrews reveals reasons for Haneef visa cancellation', *The 7.30 Report*, ABC Television, 31 July 2007. Transcript available at <http://www.abc.net.au/7.30/content/2007/s1993449.htm>, at 19 December 2007.

47. 'Haneef interview transcript released', *ABC News*, 22 August 2007. Available at <http://www.abc.net.au/news/stories/2997/98/22/2012198.htm>, at 19 December 2007.

48. Amrit Dhillon, 'Australian authorities victimised me: Haneef', *The Age* (Melbourne), 30 July 2007. Available at <http://www.theage.com.au/articles/2007/07/30/118564775747.html>, at 19 December 2007.

49. Sarah Smiles, and Cosima Marriner, 'PM defiant: no visa and no apology', *The Age* (Melbourne), 31 July 2007. Available at <http://www.theage.com.au/articles/2007/07/30/1185647828688.html>, consulted 19 December 2007.

... counter-terrorism is discriminatory; ... it targets certain categories of people ... it creates an environment that drives further alienation, thereby increasing the support base of those who choose violence, and consequently, the scope of radicalisation.

and even after Habib was returned to Australia without being charged, the federal government continued to talk as if he was guilty. Then Attorney-General Philip Ruddock proclaimed that he would consider confiscating any money Habib might make selling his story to the media under proceeds-of-crime legislation.⁵¹ Given that Habib had not even been charged with a crime, much less convicted, it would seem a tall order for Ruddock to confiscate any such money. It would require the Government to establish on the balance of probabilities that Habib had committed a crime, which implies a phantom trial where no one else was prepared to prosecute a real one. It is hard to believe the government would go through such contortions simply to deny Habib a few thousand dollars. Rather, this carries the whiff of ulterior motive. The intention could not have been to silence Habib, since nothing could prevent him from speaking publicly, even if he could be prevented from profiting from it. We may speculate with some justification that the greater imperative here was to ensure that Habib remained a terrorist above all else in the public imagination, rather than a man who had been denied due process. The implicit message in Ruddock's discourse, particularly as likely to be understood by the general audience, was that Habib remains equivalent to a convicted criminal; that he is a guilty man.

This sketch, from Haneef to Habib, seems to capture the thrust of the federal government's counter-terrorism instincts: suspects are to be demonised, their formal innocence never to be acknowledged explicitly, even if charges have been dropped or never laid. Suggestions of mistreatment are to be ignored, downplayed or even denied. Attempts are to be made to ensure suspects remain incarcerated, with little regard for the circumstances of any such detention. Perhaps Australia's recent change of government will yield a different course. It is true that Prime Minister Kevin Rudd is planning a judicial inquiry into the Haneef affair.⁵² But such oppositional resolve only emerged once the full disaster was undeniably manifest. Even as Kevin Andrews suspiciously cancelled Haneef's visa, Labor found itself giving 'in principle support for the decision'.⁵³ Labor's initial instincts indicate that the Australian political discourse on terrorism has followed a strict orthodoxy. Draconian legislative measures and aggressive posturing on terrorism have almost invariably been bipartisan.

Coupled with the apparent disposition of law enforcement and intelligence agencies, the widespread imperative seems easy enough to deduce. In short, we get tough, perhaps even indiscriminately so. And we do

so, on the pretext of being better safe than sorry. All of which naturally raises a question: can such an approach properly be described as safe?

Counter-productive counter-terrorism?

There is, of course, nothing new in the observation that the state and its organs tend to respond to the threat of terrorism in draconian ways. Moreover, it is a mistake to assume such responses are the preserve of dictatorial regimes. Confronted with the terrorism of the Irish Republican Army (IRA), the British Government enacted the *Prevention of Terrorism Act 1974* (UK), which the then Home Secretary Roy Jenkins was honest enough to admit contained 'draconian' powers that, '[i]n combination' were 'unprecedented in peacetime'.⁵⁴ Some of its provisions we might now find familiar. Part I proscribed the IRA and made membership an offence attracting up to five years' imprisonment. Part III empowered police to arrest and detain a person without charge for questioning for up to 48 hours. A further five days could be sought from the Home Secretary, who could issue a Detention Order for the purpose.

In keeping with the logic of such legislation, its powers found swift and frequent use. Some 489 people were detained under the legislation in its first four months, only sixteen of whom were ultimately charged with criminal offences.⁵⁵ It is also clear, thanks to Paddy Hillyard's thorough study, that much of the Act's implementation was sharply belligerent. Hillyard examined the experiences of 115 people who were detained or arrested in Britain between 1978 and 1991, with disturbing results.⁵⁶ One man tells of police breaking into his house with a hammer before holding a gun to the back of his neck, and throwing him on the bed and against the wall.⁵⁷ A woman recounts how police forced her to strip naked while she had 'taken [her] period', and one officer 'put his finger in [her] back passage'.⁵⁸ Both these people were released without charge; the man after ten hours' detention, the woman after 24.

Hillyard's observations are hauntingly familiar. First, he observes, this legislation means 'certain categories of people' are drawn into the criminal justice system simply because of their status and irrespective of their behaviour.⁵⁹ Certainly this is the perception many Muslims have of Australia's approach to counter-terrorism in Australia,⁶⁰ an impression that could only be fortified by the Haneef episode. Secondly, Hillyard argues such legislation has a life of its own, explaining

50. Tom Allard, 'Ministers sent report on Habib abuse', *The Age* (Melbourne), 1 December 2007. Available at <http://www.theage.com.au/articles/2007/11/30/1106394625496.html>, at 19 December 2007.

51. 'Mamdouh Habib released from Guantanamo Bay', *The 7.30 Report*, ABC Television, 27 January 2005. Transcript available at <http://www.abc.net.au/7.30/content/2005/s1290923.htm>, at 29 February 2008.

52. Hedley Thomas, 'Rudd to set up Haneef inquiry', *The Australian* (Sydney), 7 December 2007. Available at <http://www.theaustralian.news.com.au/story/0,25197,22882983-5001561,00.htm> at 22 December 2007.

53. 'Labor supports Haneef visa cancellation', *The Australian* (Sydney), 16 July 2007. Available at <http://www.theaustralian.news.com.au/story/0,25197,22083039-1702,00.html>, at 22 December 2007.

54. HC Debs, Vol 882, col 743, 28 November 1974, Mr Lyons.

55. Tony Bunyan, *The Political Police in Britain* (2007), 54.

56. Paddy Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (1993).

57. *Ibid.* 124.

58. *Ibid.* 158–159.

59. *Ibid.* 260 (emphasis in original).

60. See Sharon Pickering et al, *Counter-Terrorism Policing and Culturally Diverse Communities: Final Report 2007* (2007), 110–111.

that 'different procedures have helped create a very distinct culture and atmosphere around a [*Prevention of Terrorism Act*] arrest compared to an arrest under [the *Police and Criminal Evidence Act 1984* (UK)].'⁶¹ And surely, even the most cursory survey of the media and public hysteria that surrounds almost any counter-terrorism operation in Australia, and particularly the arrests and charges of seventeen men under Operation Pendennis in November 2005, must reveal that the same is undeniably true in the Australian experience.

But it is Hillyard's conclusion that the *Prevention of Terrorism Acts*, rather than *diminishing* the terror threat, only *exacerbated* it, which must give us pause. In some ways it follows intuitively from the first two observations. If an entire community feels targeted, and the counter-terrorism landscape is so emotively intensified, alienation must surely follow — which provides fertile ground for radicalisation. Indeed, in the case of the IRA, what began as a peaceful civil rights campaign in the mid-1960s erupted into a violent campaign from the 1970s after the British Government had responded with state repression.⁶² That repression took violent forms, such as incidents where British security forces shot down civilians, but perhaps the most potent factor was the introduction of an internment regime (directed mainly at Catholics) in August 1971, after which 'many peaceful protestors turned to political violence'.⁶³ Internment, it seems, was a seminal development. It created an environment in which many saw the resort to violence as a more effective option than non-violent forms of activism.⁶⁴

In this regard, the case of the IRA is far from unique. The Spanish Government of Felipe Gonzalez has a similar story to tell of its experience with Basque separatist terrorism in the 1980s and 1990s, where it resorted to the aggressive use of expanded powers, only to reach a familiar result:

a series of poorly planned and targeted operations by an over-zealous security apparatus that marginalised moderate Basques and inclined some to look more favourably on violent factions within the separatist movement.

The French experience in 1950s Algeria carries the same lesson, as does that of the Italian Government in the 1970s against the Red Brigades, and Peru's Fujimori government against the Sendero Luminoso and Tupac Amaru Revolutionary Movement in the 1990s.⁶⁵ This phenomenon, it seems, is overwhelmingly the norm, as David Wright-Neville observes:

In the history of modern terrorism — from the Stern Gang in the 1930s and 1940s to the Islamist fanaticism of al Qaeda today — there are very few examples of terrorist groups whose embrace of violence has been diluted successfully by enhanced state security powers. In fact it is the contrary that is often the case. History suggests that in paring back rights and shrinking the public sphere through hostile discourses and racial stereotyping more often than not prove to be counter-productive. In cases where these strategies have been used in the past, the net result has usually been the further marginalisation of critical communities and the inadvertent fostering of more operationally friendly environments for terrorists.⁶⁶

There are reasons for this. Repressive responses often serve to enhance the power of terrorist narratives, which regularly assert the irredeemable evil of the target and the righteousness of their violent campaign against it. They also lend an inadvertent prestige to militant groups, declaring to the world that they are strong enough to make the target society frightened and panicked. Militants therefore appear effective, and potentially inspiring.⁶⁷ This is why provocation remains one of the most basic terrorist strategies: induce the enemy to respond disproportionately, thereby creating a radicalised environment and a surge in support.⁶⁸

What, then, can we expect to be the outcome of the previous federal government's 'better safe than sorry' approach? To be sure, it has not replicated the past repression of the French, British or Spanish, but that is ultimately a matter of degree. The principal lesson of history is that Australia's approach to date is probably not 'safe' at all, and is more likely its opposite. Here, the Haneef episode may be uniquely counter-productive. This was not a man who made his way to a training camp in Afghanistan or Pakistan. This was a man whose principally suspicious act seems to have been to give a mobile phone SIM card to a relative. This is something almost any Australian can imagine themselves doing. We must urgently ask: how will his experience be internalised by an audience of young Australian Muslims who can effortlessly look at Haneef and see a reflection of themselves? The most potent feature of Haneef is the frightening ordinariness of his conduct, contrasted with the extraordinary manner of his treatment.

This can only buttress the perception, identified in the British context by Hillyard, that counter-terrorism is discriminatory; that it targets certain categories of people. That it creates an environment that drives further alienation, thereby increasing the support base of those who choose violence, and consequently, the scope of radicalisation. And predictably enough, these are, in an embryonic form, the kinds of dynamics identified among Victorian Muslims in the recent research of Pickering, Wright-Neville, McCulloch and Lentini.⁶⁹

If there is a clear historical lesson to be gleaned, it is that counter-terrorism strategies must be carefully calibrated: firm where necessary but never excessive; non-discriminatory, and never politicised. Sadly, it seems the opposite best describes much Australian counter-terrorism. The Ul-Haque case and others like it demonstrate a failure to appreciate the dangers of misapplied, over-zealous counter-terrorism. The Haneef saga points to an appalling willingness to politicise the terror threat, from which it would be naive simply to assume the new Labor government will necessarily be immune. The common thread is an almost axiomatic aggression with little understanding, or perhaps even concern, at how this might be horribly self-destructive.

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61. Hillyard, above n 56, 261.

62. Robert W White, 'From Peaceful Protest to Guerrilla War: Micromobilization of the Provisional Irish Republican Army', (1989) 94(6) *American Journal of Sociology* 1277–1302, 1282.

63. *Ibid* 1288–1289.

64. *Ibid* 1294.

65. David Wright-Neville, above n 7, 59–60.

66. *Ibid* 59.

67. Wright-Neville, above n 7, 64, 75.

68. See Andrew H Kydd, and Barbara Walter, 'The Strategies of Terrorism' (2006) 31(1) *International Security* 49–80, 4–55.

69. Pickering, above n 60, 104–114.