

## GATHERED INTELLIGENCE OR ANTIPODEAN EXCEPTIONALISM?: SECURING THE DEVELOPMENT OF ASIO'S DETENTION AND QUESTIONING REGIME

### ABSTRACT

This article takes as its central theme the idea that in developing the Australian counter-terrorism response of the ASIO questioning and detention regime,<sup>1</sup> distinctive, identifiable characteristics have emerged in the Government approach to international and comparative examples necessarily referred and responded to as justifying that development. These characteristics may be conveniently described as the Australianisation of international and comparative counter-terrorism examples, or selective internationalism, and these features are variously manifested in the areas examined in this article.

### I. INTRODUCTION

**T**he article commences with an outline of the essentials of this Australianised selective internationalism approach. There follows a summary of the detention and questioning warrant provisions under Division 3, Part III of the *ASIO Act 1979* (Cth), highlighting the distinctive characteristic of the legislation, the potential detention of innocent persons thought to be of intelligence value. That unique feature of the Australian legislation is both reflective of and critical to understanding and rationalising the selective internationalism in the Australianisation process.

A contextual overview follows of key factors facilitating this selectivity. The absence of a bill of rights differentiating limits and approaches from other

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1 As found in Division 3, Part III of the Australian Security Intelligence Organisation Act 1979 (Cth). In contrast, the Anti-Terrorism Act (No.2) 2005 (Cth) implements a regime of preventative detention and does not implement an intelligence gathering questioning and detention regime. This is confirmed by the general prohibition on questioning by police and ASIO in Criminal Code Act 1995 (Cth) s.105.42, inserted by the Anti-Terrorism Act (No 2) 2005 (Cth) sch 4.

comparable common law democracies, along with illustrative examples from the United Kingdom and Canada, demonstrates the legal and political constraints invoked in counter-terrorism legislation by bills of rights. The material of Australian responses to the United Nations human rights system and the Australian government's preferred model of human rights are included to facilitate understanding of the context in which the distinctively Australian intelligence gathering mechanism has evolved.

Following this survey of the context and factors facilitating selective internationalism, consideration is made of some key features and manifestations of selective internationalism in developing a counter-terrorism questioning and detention regime, thereby providing insights into this Australianisation process.

This material is organised and developed through a series of detailed themes, displaying the breadth and versatility of the Australianised selective internationalism application: acknowledging overseas legislation, differentiating the purposes of Australian and overseas legislation, claimed conformity of Australian legislation with international comparative examples, claimed superiority of Australian legislation over the legislation of other jurisdictions, asserted failings in the overseas jurisdictions in the claimed superiority of the Australian legislation, advocacy of French and other systems of extended detention, inadequate exemptions for legal advice in association offences for international redress, the role of a sunset clause in periodic review of the powers, and asserted compliance with international human rights obligations and implementation of Security Council Resolution 1373.

These examples demonstrate how the development of ASIO questioning and detention powers has assumed a unique format, through interacting and engaging with international examples and approaches to create executive-orientated legislative objectives and consequences. Such a growing concentration under the mantle of counter-terrorism is and will produce further transformations in assumptions of liberty, the precedence of intelligence gathering and in the characteristics and manifestations of Australian democracy.

## II. EXPLAINING SELECTIVE INTERNATIONALISM IN THE AUSTRALIAN CONTEXT

The development of the ASIO intelligence gathering detention and questioning powers has followed a pattern readily adopting and extending enabling measures whilst distinguishing, resisting or rejecting measures promoting greater accountability and the protection of human rights. In understanding that development, selectivity, re-interpretation and re-conception of international and comparative examples are prominent features. This involves a selective and

occasionally inconsistent usage of international and comparative examples, to extend the reach and strength of executive power whilst declining from those same international and comparative examples restraints upon power which reflect human rights principles. This process may be described as the Australianisation of international and comparative counter-terrorism examples – and more conveniently labelled as selective internationalism. It has emerged as a recognisable, if loose, *modus operandi* or methodology to advance and justify the relevant powers. It is adaptable and flexible towards that particular end.

Reference to international and comparative examples is used to defend against and deny claims that the Australian legislation forms an excessive response when compared to counter-terrorism legislation in common law democracies. That defence and denial similarly ignores the influence of bills of rights in those common law jurisdictions upon the drafting of counter-terrorism legislation and the legislative environment so created. It also diverts attention from both an incremental concentration of executive power, a greatly enlarged discretion in how such executive power is to be exercised, and the increasing fragility of democratic assumptions and expectations occasioned by novel counter-terrorism laws such as the detention and questioning powers.

This Australianisation process is distinctive — both in its taking exception to substantive restraints upon executive power and in providing an exceptional model of detention and questioning distinctive from other common law democracies. This Australianisation is more readily comprehended by first examining the legal influences and context contributing to its emergence, and subsequently considering the peculiarities of several illustrative examples where selective internationalism has emerged.

The starting point for an examination of the above considerations is to outline the distinctive features of the Australian questioning and detention regime under Division 3, Part III of the *ASIO Act 1979* (Cth).

### III. DISTINCTIVE CHARACTERISTICS OF THE LEGISLATION: AN OUTLINE OF DIVISION 3, PART III OF THE *ASIO ACT 1979* (Cth)

The distinctive characteristic of this legislation,<sup>2</sup> in contrast to comparable common law jurisdictions, is that it provides for the detention of non-suspect citizens who may simply be thought to have information about terrorism offences,<sup>3</sup> such detention conditional upon certain grounds under a warrant process.<sup>4</sup> In the case of a detention and questioning warrant issued under the legislation, it must authorise the named person to be taken into custody immediately by a police officer, brought before a prescribed authority immediately for questioning under the warrant and detained under arrangements made by a police officer for the questioning period.<sup>5</sup>

The regime provides for a maximum of 24 hours of questioning in three eight hour blocks of questioning in the presence of the prescribed authority. Following each cumulation of eight hours of questioning, the prescribed authority, on application of

<sup>2</sup> A summary of the questioning and detention provisions under div 3 of pt III of the *ASIO Act 1979* (Cth) is provided in the Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers-Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005), 2–3 (hereafter Joint Parliamentary Committee 2005 Report). See also the summary of the provisions in Greg Carne, "'Brigitte And The French Connection: Security Carte Blanche Or A La Carte'" (2004) 9 *Deakin Law Review* 573, 582–91; Michael Head, 'Counter-Terrorism' Laws: A Threat To Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666, 677–80; Michael Head, 'Another Threat to Democratic Rights ASIO detentions cloaked in secrecy' (2003) 29 *Alternative Law Journal* 127, 128–9; and Christopher Michaelsen "'Antiterrorism Legislation in Australia: A Proportionate Response to the Terrorist Threat'" (2005) 28 *Studies in Conflict and Terrorism* 321, 325–8.

<sup>3</sup> *ASIO Act 1979* (Cth) s 34F(4)(a) 'that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence' and (b) 'that relying on other methods of collecting that intelligence would be ineffective'. It should be noted that "amendments to the *Criminal Code 1995* have increased the number and type of 'terrorism offences' (including ancillary offences), which have effectively extended ASIO's questioning and detention powers beyond that conceived in the original legislation introduced in 2002": Joint Parliamentary Committee 2005 Report, 33.

<sup>4</sup> *ASIO Act 1979* (Cth) s 34F(4)(d) 'that there are reasonable grounds for believing that if the person is not immediately taken into custody and detained, the person (i) may alert a person involved in a terrorism offence that the offence is being investigated; or (ii) may not appear before the prescribed authority; or (iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce'.

<sup>5</sup> *ASIO Act 1979* (Cth) s 34G (3).

a person exercising authority under the warrant, may only permit the questioning to continue if satisfied of certain conditions.<sup>6</sup> Such questioning may take place during a detention of up to 168 hours,<sup>7</sup> with the capacity to obtain second and subsequent detention warrants.<sup>8</sup>

Detention can fairly be described as incommunicado as the detainee, not suspected of any terrorism offence but thought to have relevant information, may disappear from the community for one week — the detainee has no enforceable right to notify family members or employers of one's whereabouts,<sup>9</sup> there being only discretionary communication<sup>10</sup> which is subject to a range of contingencies.<sup>11</sup> This nature of the detention is subsequently reinforced by offences prohibiting information disclosure<sup>12</sup> before the expiry of a warrant<sup>13</sup> and in the two years after the expiry of a warrant.<sup>14</sup>

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<sup>6</sup> That '(a) there are reasonable grounds for believing that permitting the continuation will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and (b) persons exercising authority under the warrant conducted the questioning of the person properly and without delay in the period mentioned in that subsection': *ASIO Act 1979* (Cth) s 34R(4)(a) and (b).

<sup>7</sup> *ASIO Act 1979* (Cth) s 34 S.

<sup>8</sup> *ASIO Act 1979* (Cth) s 34G(1)(b), s 34G(2)(a),(b)(i) and (ii). On the issue of potential ease of obtaining a second or subsequent warrant, following the rejection of the Law Council of Australia's proposals, see Duncan Kerr, 'Australia's Legislative Response To Terrorism: Strengthening arbitrary executive power at the expense of the rule of law' (2004) 29 *Alternative Law Journal* 131, 132–3.

<sup>9</sup> *ASIO Act 1979* (Cth) s 34K (10).

<sup>10</sup> *ASIO Act 1979* (Cth) s 34K (11).

<sup>11</sup> *ASIO Act 1979* (Cth) s 34G(3)(b), s 34G (5), ss 34K(1)(d) and 34K (2).

<sup>12</sup> Commentators have highlighted the particularly adverse impact on democratic accountability and control over the operation of the questioning and detention powers through media reporting and public debate with the introduction of these measures in 2003 by the *ASIO Legislation Amendment Act 2003* (Cth): see Joo-Cheong Tham and Jude McCulloch, 'Secrecy, Silence and State Terror' (2005) 77 *Arena* (June–July) 46; Michael Head, 'Another Threat To Democratic Right ASIO detentions cloaked in secrecy' (2004) 29 *Alternative Law Journal* 127, 127–8; Michael Head, 'ASIO, Secrecy and Lack of Accountability' (2005) 11 *E-Law Murdoch University Electronic Journal of Law*, 1 [16]–[20]. The seriousness of consequences of these amendments for the functioning of Australian democracy led the Joint Parliamentary Committee to recommend a reduction in penalty for unauthorised disclosure of operational information, that the term "operational information" be more closely defined, that consideration be given to amendments so that secrecy provisions affecting the questioning only warrants be revised to allow for disclosure of the existence of the warrant and that consideration be given to shifting the determination of the need for greater non-disclosure to the prescribed authority: Joint Parliamentary

The defining and distinguishing feature of the Australian questioning and detention provisions is that other comparable Anglophone democracies such as the United Kingdom,<sup>15</sup> Canada,<sup>16</sup> New Zealand<sup>17</sup> and the United States<sup>18</sup> have not legislated for incommunicado detention of non-suspect citizens who may simply be thought to have information about terrorism offences.<sup>19</sup>

This significant difference demands attention and deserves an explanation for several reasons. First is the contradiction or inconsistency in rejecting the legislated limits of international comparative examples in similar jurisdictions in developing an intelligence gathering mechanism for non suspects as part of the international war on terrorism. Second is that the breaching of the threshold enabling detention of non suspect persons signals a significant transformation in the relationship between the citizen and the state,<sup>20</sup> creating adverse long term implications for the nature of

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Committee 2005 Report, 87 (Recommendation 15), 89 (Recommendation 16) and 94 (Recommendation 17).

<sup>13</sup> *ASIO Act 1979* (Cth) s 34ZS(1).

<sup>14</sup> *ASIO Act 1979* (Cth) s 34ZS(2).

<sup>15</sup> *Terrorism Act 2000* (UK) as amended by the *Anti-Terrorism, Crime and Security Act 2001* (UK) and the *Terrorism Act 2006* (UK).

<sup>16</sup> *Anti-Terrorism Act 2001* (Canada) Act No 41 of 2001.

<sup>17</sup> *Terrorism Suppression Act 2002* (NZ).

<sup>18</sup> *USA Patriot Act 2001* Public Law No 107–56.

<sup>19</sup> The reach of the div 3 of pt III of the *ASIO Act 1979* (Cth) to non-suspects means these intelligence gathering powers exceed what is available in comparable common law countries: see George Williams, ‘Australian Values and the War Against Terrorism’ (2003) 26 *University of New South Wales Law Journal* 191, 197; George Williams, ‘One Year On: Australia’s legal response to September 11’ (2002) 27 *Alternative Law Journal* 212, 215; Michaelsen, “‘above n 2, 321, 326, 329; Carne, above n2, 604’”.

<sup>20</sup> In the sense that reasonable suspicion of criminal activity is no longer a threshold requirement conditioning detention or other invasive response — a further recent example is the capacity to intercept “B-Party” communications, namely persons who unconsciously or inadvertently have communicated with someone suspected of a crime or being a threat to national security, under the *Telecommunications (Interception) Amendment Act 2006* (Cth). See George Williams, ‘New law frees spy agencies to snoop on the innocent’ *The Age* (Melbourne), 3 April 2006, ?? and Andrew Lynch, ‘Hasty law-making diminishes public respect for the law itself’ *Canberra Times* (Canberra) 3 April 2006 ??. Similarly, the predictive and preparatory “reasonable grounds to suspect” threshold for the application and the making of a preventative detention order in relation to a terrorist act are considerably lower than the reasonable grounds for belief providing for arrest for a terrorism offence: see *Criminal Code Act 1995* (Cth), s 105.4(4) inserted by *Anti-Terrorism Act (No 2) 2005* (Cth), sch 4, contrasted with s 3W of the *Crimes Act 1914* (Cth).

values, practices and institutions of Australian democracy,<sup>21</sup> the very subject matter of primary defence against international terrorism. A further reason is that in developing and applying this Australianised approach, the limits upon an incremental conferral of further powers and erosion of rights, following Government control of the Senate after July 1, 2005, are merely constitutional, rather than political, in nature.<sup>22</sup>

#### IV. AN OVERVIEW OF THE FACTORS FACILITATING SELECTIVE INTERNATIONALISM IN AN AUSTRALIAN CONTEXT

##### *A. Setting outer limits and informing a political culture: the absence of a bill of rights*

It is no coincidence that the presence of a bill of rights in the United Kingdom, Canada, New Zealand and the United States has created different operating parameters and political constraints upon legislative responses to terrorism. In those jurisdictions legislative drafters and parliaments must address, reconcile and integrate issues of national security and civil and political rights in counter-terrorism measures within a human rights framework prescribed by a central constitutional or quasi-constitutional document. The most concrete effect from a bill of rights in relation to counter-terrorism legislative responses is restraining extreme, spontaneous and serial legislative responses and in promoting accountability and justification, particularly when departure is contemplated from international human rights standards.<sup>23</sup>

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<sup>21</sup> For example, serious public accountability issues when the mandate of a secretive intelligence gathering organisation is extended to incorporate police like powers of detention and interrogation: see Williams, 'One Year On' 'above n 19 212, 214–15; Jenny Hocking, 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49 *Australian Journal of Politics and History* 355, esp 356–8. For broader issues of maintaining liberal democratic characteristics of the Australian polity when subject to counter-terrorism law reform, see generally Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and The Threat to Democracy* (2004).

<sup>22</sup> Indeed, the adopted process now appears, reflecting enactment of the sedition offence provisions in sch 7 of the *Anti-Terrorism Act (No 2) 2005* (Cth) and the *Telecommunications (Interception) Amendment Act 2006* (Cth) to pass counter-terrorism legislation rapidly, with a concessional and discretionary view to amendments later: see Andrew Lynch, 'Hasty law-making diminishes public respect for the law itself' *Canberra Times* (Canberra) 3 April 2006.

<sup>23</sup> For further discussion on the role of a bill of rights in influencing counter-terrorism laws, see George Williams, 'National Security, terrorism and Bills of Rights' (2003) 8 *Australian Journal of Human Rights* 263, 269–70; Angela Ward, 'Checks

In the Australian context, similar points were highlighted in the submission of the ACT government to the Joint Parliamentary Committee on ASIO, ASIS and DSD 2005 Review of the Australian Security Intelligence Organisation questioning and detention powers:

The lack of a national Bill of Rights in Australia, means that the opportunity to test the compatibility of Division 3 against internationally accepted minimum human rights standards is seriously limited.

In the Australian Capital Territory such important questions of legal policy must be developed in light of the *ACT Human Rights Act 2004* (HRA) which reflects the human rights standards set by the International Covenant on Civil and Political Rights (ICCPR). The HRA imposes a discipline on the ACT Executive to adopt a rational and proportionate approach to limitations on fundamental civil and political rights. By contrast, it does not appear that the development of this Commonwealth legislation was informed by a proper analysis of the ICCPR. Australia has been a party to the Covenant for over 30 years. In the absence of a national Bill of Rights, the international human rights standards of the ICCPR should play a central role as a benchmark of good law and policy.

In my view, the legislation imposes excessive restrictions on fundamental rights to liberty, freedom of expression and access to legal advice and falls short of the ICCPR's standards.<sup>24</sup>

The lack of a bill of rights makes it far more difficult to elevate critical issues, such as the breaching of the non-suspect threshold to personal liberty by the questioning and detention powers, to a prominent place in public debate and review of the legislation by parliamentary committees. It also fosters a lack of legitimacy and insufficient legal literacy about human rights issues at the intersection with counter-terrorism issues of a type that would effectively raise serious questions and attention concerning such legislation. Similarly, there is no judicially instigated reflection and review of laws by the executive and legislature following a finding of incompatibility with human rights principles that a bill of rights mechanism prompts.

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Balances' (2005) 68 *Precedent* 12, 14; Jo Kummow 'Countering Terrorism and Protecting Human Rights' (2004) 78 (12) *Law Institute Journal* 66; Christopher Michaelsen, 'International Human Rights on Trial — The United Kingdom's and Australia's Legal Response to 9/11' (2003) 25 *Sydney Law Review* 275.

<sup>24</sup> Submission of ACT Chief Minister Jon Stanhope to Parliamentary Joint Committee on ASIO, ASIS and DSD Review of ASIO Questioning and Detention Powers, Submission No 93 (12 April 2005).



All of these factors are relevant in providing conditions conducive to this process of selective internationalisation, more so because the interpretation and articulation of a bill of rights itself draws upon comparative examples and international jurisprudence. Such selective internationalism is also enabled by a lack of expertise surrounding, and familiarity with, bills of rights — in other words, a relative ignorance of the interaction of bills of rights in comparable legal systems with counter terrorism laws. Such issues surrounding a bill of rights are further complicated and compounded when claims are made that the Australian questioning and detention regime is in accordance with, as well as influenced by, overseas models,<sup>25</sup> with the influence of bill of rights often unarticulated or ignored.

For present purposes however, two examples from comparable overseas jurisdictions demonstrate the invocation of legal and political restraints on counter-terrorism matters emerging from bills of rights, of a kind simply absent in Australia.

B. *United Kingdom: House of Lords finding of incompatibility in A and others v Secretary of State for the Home Department and subsequent political developments*

Debate in the United Kingdom concerning the *Prevention of Terrorism Act* (2005) (UK) was introduced after the House of Lords' findings in *A and others v Secretary of State for the Home Department*<sup>26</sup> about the indeterminate detention of foreign nationals under the *Anti-Terrorism, Crime and Security Act 2001* (UK). The House of Lords found provisions of this legislation incompatible with the *Human Rights Act 1998* (UK),<sup>27</sup> on the basis of it being a disproportionate response,<sup>28</sup>

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<sup>25</sup> This aspect is the subject of separate analysis and discussion under later headings “Dealing with and responding to overseas legislation”, “Acknowledging overseas legislation”, “Differentiating the purposes of the Australian legislation and overseas legislation”, “Claiming conformity of Australian legislation with international comparative examples” and “Claiming superiority of the Australian model when asserting failings in overseas jurisdictions”.

<sup>26</sup> [2005] 2 WLR 87. For some observations on the House of Lords decision, see Michael Kirby, ‘National Security: Proportionality, Restraint and Commonsense’ (Paper presented at the Australian Law Reform Commission National Security Law Conference, Federal Court of Australia, 12 March 2005).

<sup>27</sup> [2005] 2 WLR 87 per Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Carswell. Lord Walker of Gestingthorpe dissented.

<sup>28</sup> Article 15 of the *European Convention on Human Rights* (1) ‘In time of war or other public emergency threatening the life of the nation the High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law’. See especially Lord Bingham of Cornhill [2005] 2 WLR 87, 106–15, Lord Hope of Craighead

discriminatory against foreign nationals<sup>29</sup> and infringing on the right to liberty and security of the person.<sup>30</sup>

In response to the House of Lords findings, the United Kingdom government introduced a system of control orders, applicable to both nationals and non-nationals. The *Prevention of Terrorism Act 2005* (UK) provides for control orders over persons for whom there are reasonable grounds for suspecting are or have been involved in terrorism related activity. Debate largely concerned the provision of a sunset clause upon the legislation.

The House of Lords (in its legislative capacity) insisted four times on a sunset clause which would have provided for the *Prevention of Terrorism Act 2005* to expire after eight months. The final version of the legislation allows for the expiration of the control order scheme at the end of 12 months from the day on which the Act is passed, subject to the Home Secretary being able to order by statutory instrument the continuation of the legislation for a period not exceeding a year.<sup>31</sup> That order is in turn subject to an obligation upon the Home Secretary to consult with various persons<sup>32</sup> and that a draft of the order has been placed before

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[2005] 2 WLR 87, 145, Lord Scott of Foscote [2005] 2 WLR 87, 151–52 and Lord Rodger of Earlsferry [2005] 2 WLR 87, 156.

<sup>29</sup> Article 14 of the *European Convention on Human Rights* ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’. See especially Lord Bingham of Cornhill [2005] 2 WLR 87, 115–27, Lord Nicholls of Birkenhead [2005] 2 WLR 87, 131–2, Lord Hope of Craighead [2005] 2 WLR 87, 136, 145–7, Lord Scott of Foscote [2005] 2 WLR 87, 152–3, Lord Rodger of Earlsferry [2005] 2 WLR 87, 156–7 and 163 and Baroness Hale of Richmond [2005] 2 WLR 177–8.

<sup>30</sup> Article 5 of the *European Convention on Human Rights* (1) ‘Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so...’.

<sup>31</sup> See s 13(2)(c) *Prevention of Terrorism Act 2005* (UK).

<sup>32</sup> Consultation involving the independent reviewer, the Intelligence Services Commissioner and the Director-General of the Security Services: see s 13(3)(a),(b) and (c) of the *Prevention of Terrorism Act 2005* (UK).

Parliament and approved by resolution of each House,<sup>33</sup> save by reasons of urgency where an alternative procedure applies.<sup>34</sup>

The Home Secretary made concessions in the form of an independent reviewer to examine and report upon the effectiveness of the *Prevention of Terrorism* legislation — including, at that stage, that a new draft counter-terrorism bill be published and be subjected to full pre-legislative scrutiny, prior to its introduction in 2006, informed by the report of the independent reviewer and lengthy parliamentary scrutiny.<sup>35</sup> Following the July 2005 London bombings, the UK Government introduced the *Terrorism Bill 2005* (UK) which included provision for yearly review of the legislation and a report to the Home Secretary and the laying of a copy of the report before Parliament.<sup>36</sup> Given the changed circumstances, Lord Carlile, the independent reviewer, produced an October 2005 report on the *Terrorism Bill 2005* (UK), with explanatory comments in the opening paragraphs of that report.<sup>37</sup> The *Terrorism Bill 2005* (UK) received Royal Assent as the *Terrorism*

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<sup>33</sup> See *Prevention of Terrorism Act 2005* (UK) s 13(4).

<sup>34</sup> See *Prevention of Terrorism Act 2005* (UK) s 13(6). Section 13(1) of the *Prevention of Terrorism Act 2005* (UK) provides that ‘Except so far as otherwise provided under this section, sections 1 to 9 (dealing with control orders) expire at the end of the period of 12 months beginning with the day on which this Act is passed’. Section 13(2) allows the Home Secretary to make an order by statutory instrument enabling revival of sections 1 to 9 for a period not exceeding one year or for the sections to continue in force from the time they would otherwise expire for a period not exceeding one year. Section 13(4) requires that the making of a Section 13(2) order by the Home Secretary must be preceded by a draft being laid before Parliament and approved by a resolution of each House.

<sup>35</sup> Required by the *Prevention of Terrorism Act 2005* s 14(5), and the report “must contain” the reviewer’s opinion on ‘(a) the implications for the operation of this Act of any proposal made by the Secretary of State for the amendment of the law relating to terrorism’.

<sup>36</sup> *Terrorism Bill 2005* (UK) s 36(1)–(6) Review of terrorism legislation. The *Terrorism Bill 2005* (UK) was amended in Committee in the House of Lords on 20 December 2005.

<sup>37</sup> See paras 2, 6 and 9 of the report: ‘Proposals by Her Majesty’s Government For Changes To The Laws Against Terrorism’ Report by the Independent Reviewer Lord Carlile of Berriew QC: ‘In the normal course of events, in early 2006 I should have prepared a single report as independent reviewer. This would have been published in the same way as my other reports, on the Terrorism Act 2000 as amended....The London occurrences of July 2005 rightly and inevitably catalysed an earlier examination of potential additional legislation than had been envisaged at the time of the enactment of the Prevention of Terrorism Act 2005. The government indicated its intention to legislate very early in the resumed Parliamentary session commencing on 10<sup>th</sup> October 2005. Consultation followed between the Home Secretary and the shadow spokespersons of the main Opposition parties...Given that new legislation has now been drafted and is intended to be in force before the routine publication of

*Act 2006* (UK), enacting the procedure of yearly reviews by an independent reviewer.<sup>38</sup>

C. *Canadian legislation, “Charter proofing” and the challenge to the investigatory hearings mechanism in the Criminal Code*

Similarly, the positive influences of a bill of rights upon counter-terrorism legislation can be seen in the instance of the influence of the *Canadian Charter of Rights and Freedoms* over the provisions and constitutionality of the Canadian terrorism legislation, the *Anti-Terrorism Act*.

The first of these influences is seen in the apparent attempt to “Charter proof” the legislation, that is, to draft the legislation with particular safeguards so as to maintain consistency with *Charter* principles. The Canadian Attorney-General, Irwin Cotler, preferred to describe the legislation as ‘pre-tested’ under the *Charter*:

This does not mean that the legislation is ‘Charter-proof’ as much as it means that the legislation is Charter bound. In a word, the legislation is not immune from a Charter challenge, and any limitation on a Charter right will have to comport with the requirements of Section 1 and the proportionality test as developed by the courts ...<sup>39</sup>

In turn, this proportionality test means that the legislation must pass both a necessity criterion — that the legislation exhibits a substantial and pressing objective — as well as a remedial criterion.<sup>40</sup> In a variety of articles, the Canadian legislation has been consistently critiqued from the perspective of its asserted compliance with *Charter* rights and the legitimacy and consequences of *Charter*-

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my first report under section 14, it would have been absurd for me to wait until early next year to prepare my report on government proposals. Therefore, having received the draft Terrorism Bill 2005, I have decided to prepare this short additional report to be published prior to the Parliamentary debates on that Bill. I hope that it will assist in informing the debate’.

<sup>38</sup> *Terrorism Act 2006* (UK) s 36 (1) to (6).

<sup>39</sup> Irwin Cotler ‘Thinking Outside the Box: Foundation Principles for a Counter-Terrorism Law and Policy’ in Ronald Daniels, Patrick Macklem and Kent Roach (eds) *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001), 120.

<sup>40</sup> Cotler, above n 39, 115. The remedial means part of the proportionality test requires that “there be a rational basis for the remedy tailored specifically to the objective; that the remedy intrude upon Charter rights as little as possible (the minimum impairment component of the proportionality test); and that the effect or cost of the legislation, particularly in its impact on our civil liberties, not outweigh its purposive and remedial character”: Cotler, above n 39, 115.

proofing the legislation.<sup>41</sup> The concept of Charter-proofing essentially means the routine drafting of legislation for deliberate, but basic conformity with the jurisprudentially expounded sections of the *Canadian Charter of Rights and Freedoms*, regardless of other contrary and contesting public policy issues surrounding the legislation—such as its efficacy, desirability or necessity, or an Executive ability to use the concept to publicly rationalise and justify controversial measures infringing civil liberties. Whilst Charter-proofing's frame of reference does encourage rights applications, such minimalism has also prompted some trenchant criticism.<sup>42</sup>

Such criticism in the context of Australia is of course relative — the drafting and passage of Canadian counter-terrorism legislation in contrast being tested against minimal constitutional human rights standards, which in turn provide a further foundation for constitutional review. That basic obligation and cultural influence is

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<sup>41</sup> See, for example, Jeremy Millard, 'Investigative Hearings under the *Anti-Terrorism Act*' (2002) 60 *University of Toronto Faculty of Law Review* 79; W Wesley Pue, 'The War on Terror: Constitutional Governance in a State of Permanent Warfare?' (2003) 41 *Osgoode Hall Law Journal* 267, 286–7; Stanley Cohen, 'Safeguards in and Justifications for Canada's New Anti-Terrorism Act' (2002) 14 *National Journal of Constitutional Law* 99, 101; Kent Roach, 'The Dangers of a Charter-Proof and Crime Based Response to Terrorism' in Ronald Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom Essays on Canada's Anti-Terrorism Bill* (2001) 132 esp 133–8.

<sup>42</sup> See Roach, "'above n 41, 132: 'The first danger is that citizens and elected representatives may be too quick to accept as wise or necessary what the government's lawyers conclude is permissible to do...Charter-proofing is now an entrenched part of the legislative process in Canada, but it presents dangers especially if governments become more concerned about avoiding invalidity of legislation under the Charter than living up to its broader purposes and spirit. Charter-proofing can be a matter of shrewdly predicting what courts will be prepared to do. Concerns exist, however, that courts, especially on sensitive matters such as security, will be reluctant to strike legislation down'. See also W Wesley Pue, 'The War on Terror: Constitutional Governance in a State of Permanent Warfare?' (2003) 41 *Osgoode Hall Law Journal* 267, 286–7: 'In Canadian political discourse, seemingly offensive measures are rendered more widely acceptable than might otherwise be the case if they are credibly said to be consistent with the Canadian Charter of Rights and Freedoms. During debate on the Anti-Terrorism Act, the Charter was used effectively, though misleadingly, as a pivot point for ministerial media spin. "Charter-proofing", however, is a minimal attainment. It confuses one piece of evidence regarding fundamental constitutional principles (the Charter) for the whole and mistakes formal constitutional compliance with legislative wisdom. To predict a bill will survive Charter scrutiny implies nothing about the ways police officers will use it, nothing about the effectiveness of the bill in relation to its desired ends, and little about its consonance with larger principles of constitutionalism'.

absent in the Australian legislative process, allowing significantly greater latitude for concentrated executive power to manifest itself in counter-terrorism legislation.

The Canadian legislative approach highlights a second influence, namely the systematic manner in which the constitutionality of the counter-terrorism investigative hearings mechanism was conducted in *Re Application under s 83.28 of the Criminal Code*<sup>43</sup> and *Re Vancouver Sun*.<sup>44</sup> A majority of the Canadian Supreme Court upheld the constitutionality of the investigative hearings mechanism as consistent with the *Charter*.<sup>45</sup> That process involved detailed consideration of whether the legislation infringed s 7 of the *Charter* (right against self-incrimination) and if so, whether the infringement was a reasonable limit, prescribed by law, as can be demonstrably justified in a free and democratic society under s 1 of the *Charter*; secondly, whether the legislation infringed the principles of judicial independence and impartiality guaranteed under s 11(d) of the *Charter* and if so, whether the infringement was a reasonable limit, prescribed by law, as can be demonstrably justified in a free and democratic society under s 1 of the *Charter*; and thirdly, whether the legislation interfered with the principles of independence and impartiality established by the *Preamble* to the *Constitution Act 1867*.

Again, the absence of an Australian bill of rights means that there is no obligation for the executive and for legislative drafters to test proposed measures against fundamental human rights standards. The executive is therefore empowered with greater legislative reach and a broader array of legislative options. In political terms, that eases the possibility of serial legislative reform, incrementally eroding civil and political rights by touching upon community fear. Similarly, there is no comparably rights-orientated framework in which constitutional review of the legislation for consistency with human rights can be conducted.

#### D. Australian responses to the UN Human Rights system

In understanding the Australian legislation through the context of the absence of a bill of rights, further appreciation of its character arises from the context of Australia's engagement in human rights obligations within the framework of the UN treaty committee system in recent years. As Australia is a party to the major UN human rights treaties with individual communications processes to treaty committees, such as the Human Rights Committee (HRC), the Committee on the Elimination of Racial Discrimination (CERD) and the Committee Against Torture

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<sup>43</sup> [2004] 2 SCR 248.

<sup>44</sup> [2004] 2 SCR 332.

<sup>45</sup> See *Re Application under s 83.28 of the Criminal Code* [2004] 2 SCR 248, paras 25–54 per McLaughlin CJ, Iacobucci, Major and Arbour JJ. Binnie, LeBel and Fish JJ dissented.

(CAT), this provides an important medium for comprehending the context in which the Australian legislation has emerged. Apart from circumstantial evidentiary corroboration of the pursuit of particular attitudes and policies that such materials provide, there is also the practical dimension of possible access to the individual communications process to the UN Committees that persons subject to questioning and detention warrants may invoke.

In broad terms, the Australian approach within the last few years has been to register major dissatisfaction with the UN Human rights treaty system<sup>46</sup> and to pursue a range of detailed initiatives to have that system reformed.<sup>47</sup>

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<sup>46</sup> See Minister for Foreign Affairs Press Releases: “Government to Review UN Treaty Committees”, 24–30 March 2000; “Improving the Effectiveness of United Nations Committees” 29 August 2000; “Australian Initiative to Improve the Effectiveness of the UN Treaty Committees” 5 April 2001; “Australia’s Criticisms of the UN Human Rights Committee System Validated by New Report” 21 May 2001; “UN Report Has No Credibility” 22 March 2002; “Australia Elected Chair of UN Commission on Human Rights” 20 January 2004; “Progress Made to Reform UN Treaty Bodies” 9 March 2006; Hilary Charlesworth and Penelope Matthew, ‘A response to the government’s human rights treaty review’ *The Age* (Melbourne) 12 September 2000 ??; Elizabeth Evatt, ‘How Australia “Supports” the United Nations Human Rights Treaty System’ (2001) 12 *Public Law Review* 3; Dianne Otto, ‘From “reluctance” to “exceptionalism”: the Australian approach to the domestic implementation of human rights’ (2001) 26 *Alternative Law Journal* 219; David Kinley and Penny Martin, ‘International Human Rights at Home: Addressing the Politics of Denial’ (2002) 26 *Melbourne University Law Review* 466.

<sup>47</sup> See Joint Media Release Minister for Foreign Affairs, Attorney General and Minister for Immigration and Multicultural Affairs “Australian Initiative to Improve the Effectiveness of the UN Treaty Committees” 5 April 2001: “Australia will pursue a range of measures aimed at making the United Nations Treaty Committee system more efficient and workable and to increase the momentum for their reform...A high-level diplomatic initiative with Ministerial leadership is a key outcome of a review of the treaty committee system...While this will be a long term commitment, the Australian initiative also seeks outcomes that are practical, achievable and of immediate demonstrable benefit to the committee system and the cause of international human rights”; Minister for Foreign Affairs Media Releases: “Australia Elected Chair of UN Commission on Human Rights” 20 January 2004: “Over the past few years, Australia has worked hard to strengthen and improve the operation of the United Nations human rights machinery. The major focus of this work has been the Government’s treaty body reform initiative announced in 2000. Australia has already hosted three workshops in Geneva to promote treaty body reform”; “Australian Re-elected to UN Human Rights Committee” 12 September 2004: “As Chair of the Commission on Human Rights, Australia strives to improve and strengthen the operation of the UN’s human rights machinery, and promote focused and effective consideration of human rights issues”; “Progress Made to Reform UN

Indicative of that dissatisfaction and signalling a harder policy edge was the observation within the ministerial statement that:

“Within the framework of Australia’s continuing commitment to international human rights standards and monitoring, the Government will adopt a more robust and strategic approach to Australia’s interaction with the treaty committee system both to maximise positive outcomes for Australia and enhance the effectiveness of the system in general”.<sup>48</sup>

The new approach has manifested itself in appearances before UN treaty body committees<sup>49</sup> in the presentation of Australia’s states party reports, making for a distinctive methodology.<sup>50</sup>

The importance of these developments is again in the contextual and attitudinal indications provided, particularly as key rights in the *International Covenant of Civil and Political Rights*, *Convention Against Torture* and *Convention on the Elimination of Racial Discrimination*, the relevant treaties for the states parties

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Treaty Bodies” 9 March 2006: “The importance of treaty body reform is now widely accepted by UN member states, the UN Secretary-General, the High Commissioner for Human Rights and her office, and increasingly by members of the treaty bodies themselves. In addition, at the 2005 UN Summit, world leaders resolved to improve the effectiveness of these bodies”.

<sup>48</sup> “Improving the Effectiveness of United Nations Committees” 29 August 2000.

<sup>49</sup> Namely the Human Rights Committee, the Committee for the Elimination of Racial Discrimination and the Committee Against Torture and the individual communication and reporting procedures respectively under the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of Racial Discrimination* and the *Convention Against Torture*.

<sup>50</sup> This distinctive methodology reflects key principles in the Joint Ministerial Statement “Improving the Effectiveness of United Nations Committees”, including the observation in the body of the text above and the fact that “reporting to and representation at treaty committees be based on a more economical and selective approach where appropriate”. It is no coincidence that this new approach has firstly become evident in 2005 in submitting periodic reports to and meeting with the CERD Committee, as this Committee attracted the greatest Government censure: see Attorney General Williams “Article on the United Nations Committee on the Elimination of all forms of Racial Discrimination”, 29 March 2000. See especially Committee On The Elimination Of Racial Discrimination Sixty Sixth Session Consideration of Reports, Comments and Information Submitted by States Parties Under Article 9 of the Convention 1 March 2005 UN Document CERD/C/SR/1685 comments of Mike Smith, leader of the Australian delegation at paras 1–9 and later at para 61, Mr Pillai at paras 10–14, Mr Alves at para 35 and Mr de Goutees at para 39. A similar, but perhaps slightly less reactive approach can be expected in Australia’s upcoming Fifth Report to the Human Rights Committee under the *International Covenant on Civil and Political Rights*.



reports, are engaged, challenged and impinged upon by the Australian questioning and detention legislation.<sup>51</sup> On each occasion when the issue of compliance with international human rights obligations has been raised in relation to the questioning and detention laws, the official Australian response has been to confirm international law compliance, with minimal information provided to support that claim.<sup>52</sup>

#### E. *The Australian government's preferred model of human rights*

Australia's critical and sceptical approaches to the UN human rights treaty committee system logically brings us to the Government's preferred human rights model, set out in a comprehensive document released in December 2004 and intended to be submitted as part of Australia's reporting to the UN committee

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<sup>51</sup> International human rights considerations were raised in submissions to 2002 Parliamentary Committee hearings into the *ASIO Legislation Amendment (Terrorism) Act 2002* (Cth). See in particular those submissions referred to in the Senate Legal and Constitutional References Committee report *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* Canberra: The Senate, 2002, namely Amnesty International (Submission 136), Australian Lawyers for Human Rights (Submission 177), International Commission of Jurists (Submission 237), Federation of Community Legal Centres (Vic) (Submission 243), Law Institute of Victoria Inc (Submission 294) and the Law Council of Australia (Submission 299) and discussion in the report at pages 27–29, 52, 79–80, 103, 120 and 132; those submissions listed in the Parliamentary Joint Committee on ASIO, ASIS and DSD *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* Canberra; Parliament of Commonwealth of Australia 2002, namely the Castan Centre for Human Rights Law (Submission 111), International Commission of Jurists (Submission 120) and Amnesty International (Submissions 140 and 145) and discussion in the report at pages 22–23. See also submissions to the 2005 Parliamentary Joint Committee on ASIO, ASIS and DSD review *ASIO's Questioning and Detention Powers Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979*, particularly International Commission of Jurists (Submission 60), Castan Centre for Human Rights Law (Submission 75), Amnesty International Australia (Submission 81), Human Rights and Equal Opportunity Commission (Submission 85) and Chief Minister ACT Government (Submission 93) and discussion in the report at pp 28–29 and 53–54.

<sup>52</sup> See the later discussion under the heading “Asserted compliance with international human rights obligations and the implementation of Security Council Resolution 1373”.

system, *Australia's National Framework For Human Rights National Action Plan*.<sup>53</sup>

The document gives considerable emphasis to the role of representative and responsible government and Parliamentary institutions as the most effective mechanisms for the protection of human rights, with this emphasis being particularly illuminating in the context of counter-terrorism questioning and detention legislation. Some relevant examples from the document are:

*Australia's robust system of human rights protection* — The central features of our constitutional system are the doctrines of “responsible government” under which the Executive is accountable to the Parliament and the Parliament to the people...In addition, a network of parliamentary committees exists, with specific responsibilities to review various spheres of government activity and legislation.<sup>54</sup>

*Promoting a strong free democracy* - Australia has one of the most effective representative democracies in the world. The Government considers that Australia's federal structure, independent judiciary and robust representative parliamentary institutions play an integral role in protecting human rights and provide a bulwark against abuses of power and denials of fundamental freedoms.<sup>55</sup>

*Representative government* — Members of the Australian community can also play an active role in representative democracy by making submissions to Australian, State and Territory parliamentary committees, which examine issues of public concern or proposed legislation.<sup>56</sup>

*Enhancing the effectiveness of national security* - Efforts to achieve national security must not jeopardise basic human rights...Australia's democratic traditions and processes are its greatest ally and greatest strength in the war on terror. These traditions and processes are the tools that will help combat terrorism and protect and preserve our human rights.<sup>57</sup>

Such reliance upon classic parliamentary doctrines and institutions is, in the context of national security questioning and detention powers, highly problematic. Substantial inadequacies in accountability include the often cited, bipartisan ministerial response of not commenting on matters of national security (in this

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<sup>53</sup> *Australia's National Framework For Human Rights National Action Plan* Canberra: Attorney-General's Department, 2005.

<sup>54</sup> At pp 5–6.

<sup>55</sup> At p 8.

<sup>56</sup> At p 71.

<sup>57</sup> At pp 21–22.

instance, questioning and detention warrants, providing further dimensions to the prohibitions on primary and secondary disclosure of warrant<sup>58</sup> and operational information,<sup>59</sup> instituted by the *ASIO Legislation Amendment Act 2003* (Cth),<sup>60</sup> not commenting upon “operational matters” (as defined by the commentator, the Commonwealth Attorney-General) and the use of the Glomar response<sup>61</sup> “to neither confirm nor deny” matters relating to national security. The Attorney-General is then able to become the sole source of authorised public disclosures of information on the operation of the warrants, thereby able to control debate and accountability through selective release of information and invoke “operational matters” as a rationalisation for declining further disclosure.

A further related example of the distinctive problems emerging from the responsible government aspect of this preferred human rights model, as applied to the detention and questioning powers, has been the ministerial warrant thresholds for the seeking of a warrant under s 34D of the *ASIO Act 1979* (Cth). Ministerial responsibility, in the sense of having to personally be satisfied of preconditions in relation to the questioning and detention warrant powers, has in fact been criticised by the Attorney-General. It was suggested by the Attorney-General that a decision not to request a particular detention and questioning warrant in relation to a foreign

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<sup>58</sup> The Joint Parliamentary Committee recommended that ‘consideration be given to amending the Act so that the secrecy provisions affecting questioning –only warrants be revised to allow for disclosure of the existence of the warrant’: Joint Parliamentary Committee 2005 Report, 94 (Recommendation 17).

<sup>59</sup> The problems for public accountability and scrutiny arising from the two year prohibition under the then s 34VAA (now s 34ZS of the *ASIO Act 1979* (Cth) of release of operational information, broadly defined, without authorisation, are canvassed in the Joint Parliamentary Committee 2005 Report, 84–88. The Committee recommended “that the term ‘operational information’ be reconsidered to reflect more clearly the operational concerns and needs of ASIO. In particular, consideration be given to redefining the then s 34VAA(5): Joint Parliamentary Committee 2005 Report, 89 (Recommendation 16).

<sup>60</sup> Extensive provisions prohibit the disclosure of information relating to warrants and questioning both before the expiry of the warrant (*ASIO Act 1979* (Cth) s 34ZS (1)(a)–(f)) and in the two years after the expiry of the warrant (*ASIO Act 1979* (Cth) s 34ZS (2)(a)–(f)).

<sup>61</sup> The Glomar response originates from the United States case of *Military Audit Project v Casey* 656 F 2d 724 (1981) and was a judicial development upon the exemption provisions of *Title 5 United States Code* s 552(b) (The United States *Freedom of Information Act*). It has been developed and applied in a number of cases including *Phillipi v Central Intelligence Agency* 655 F 2d 1325 (1981), *Asfar v Department of State* 702 F 2d 1125 (1983) and *Hunt v Central Intelligence Agency* 981 F 2d 1116 (1992).

national was based on difficulties in satisfying the necessary legal criteria<sup>62</sup> for the warrant request to proceed to the issuing authority, adverse international comparisons being drawn with ability to detain under the French system.<sup>63</sup>

In contrast, the warrant procedure, including the warrant threshold requirements for ministerial approval,<sup>64</sup> were earlier portrayed as a significant and strict preliminary safeguard<sup>65</sup> of a kind that conforms to the preferred representative and responsible government model of human rights protection. Indeed, that observation is strengthened by the fact that the procedures complained of by the Attorney-General are in the exact form as drafted by the Government as appeared in the original version of the *Australian Security Intelligence Organisation Amendment*

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<sup>62</sup> See House of Representatives *Hansard* 3 November 2003 21727–21728, 21729 (Hon P Ruddock) and National Nine Network ‘Interview: Philip Ruddock’ *Sunday Program*, 2 November 2003.

<sup>63</sup> See ABC Television, ‘Intelligence delay has Ruddock asking questions’ *Lateline*, 27 October 2003: ‘But what you do have is an example here of broader powers that an intelligence agency in a developed Western country — namely France — has in relation to being able to detain and question people’ and ‘New anti-terrorism laws too cumbersome: Ruddock’ ABC News Online, 10 November 2003. This matter is discussed in greater detail under the heading “Advocacy of the French and other systems of extended detention”.

<sup>64</sup> See *ASIO Act 1979* (Cth) s 34C(3)(a), (b) and (c).

<sup>65</sup> See Attorney-General’s Press Release 21 March 2002 “ASIO Legislation Amendment Bill Introduced” and House of Representatives *Hansard* 20 March 2003 13172. See also Philip Ruddock, ‘The Commonwealth Response to September 11: The Rule of Law and National Security’, Speech at Gilbert and Tobin Centre of Public Law — National Forum on the War on Terrorism and the Rule of Law, New South Wales Parliament House, 10 November 2003. The strictness of that safeguard is a contestable proposition, however, as the issuing authority for the warrant has narrower grounds for satisfaction for issue of the warrant than the Attorney-General, including no requirement “that the issuing authority take account of the efficacy of relying on other methods of collecting the intelligence...Nor is there any requirement that the issuing authority be satisfied of the additional grounds necessary to trigger a warrant for detention”(as distinct from a questioning only warrant): Joint Parliamentary Committee 2005 Report, 35. The Committee recommended “That the issuing authority be required to be satisfied that other methods of intelligence gathering would not be effective”: Joint Parliamentary Committee 2005 Report, 37 (Recommendation 1). That recommendation was explicitly rejected by the Government: see Parliamentary Joint Committee on Intelligence and Security Report on the operation, effectiveness and implications of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* Government response — March 2006. For further commentary challenging the warrant process as a “strict safeguard” see Sarah Pritchard, ‘The counter-terrorism Bills’ 2002 (Winter) *Bar News: Journal of the NSW Bar Association* 10, 15 and Michael Head, “‘Counter-Terrorism’ Laws: A Threat To Political Freedom, Civil Liberties and Constitutional Rights’, above n 2, 678.

(*Terrorism*) Bill, introduced into the House of Representatives on 21 March 2002.<sup>66</sup> The same clause made its way into the final version of the amending legislation, surviving the many amendments made to the bill in the Senate.<sup>67</sup>

Interestingly, the preventative detention legislation,<sup>68</sup> avoids that aspect of ministerial control over the warrant issuing process altogether, whilst the control orders<sup>69</sup> aspect of the legislation only provides a request for a simple consent of the Attorney-General<sup>70</sup> to the making of an application before an issuing Court. The legislation is drafted so that satisfaction of the criteria is the responsibility of a senior Australian Federal Police (AFP) member<sup>71</sup> and the issuing Court.<sup>72</sup> Accordingly, there is no direct ministerial responsibility for satisfaction of the criteria<sup>73</sup> — so that under the government’s prevailing system of ministerial responsibility, the Attorney-General will never be responsible for actions relating to the issue of a control order.

The above matters provide some strong background and contextual factors in the development and continuing evolution of a distinctively Australian counter-terrorism intelligence gathering mechanism. That development and evolution is decidedly executive in orientation, conferring considerable discretion, characteristics strengthened by increasing levels of legislated secrecy surrounding the operation of powers.<sup>74</sup> The rhetoric of representative and responsible government, articulated as the preferred mechanism for the protection of human rights, actually lends itself in a national security context to the increase of executive power, a further transformation of relations between the arms of government and the citizenry.

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<sup>66</sup> See Attorney-General’s Media Release “ASIO Legislation Amendment Bill Introduced” 21 March 2002.

<sup>67</sup> See House of Representatives *Hansard* 3 November 2003, 21731 and 4 November 2003, 21854.

<sup>68</sup> *Anti-Terrorism Act (No 2) 2005* (Cth) div 105.

<sup>69</sup> *Anti-Terrorism Act (No 2) 2005* (Cth) div 104.

<sup>70</sup> *Anti-Terrorism Act (No 2) 2005* (Cth) sch 4 s 104.2 (1) to (5) and s 104.3.

<sup>71</sup> *Anti-Terrorism Act (No 2) 2005* (Cth) sch 4 s 104.2 (2).

<sup>72</sup> *Anti-Terrorism Act (No 2) 2005* (Cth) sch 4 s 104.3 and s 104.4.

<sup>73</sup> *Anti-Terrorism Act (No 2) 2005* (Cth) sch 4 s 104.2 (4), whilst reflecting the requirement of the Attorney-General’s written consent as a pre-requisite for requesting an interim control order (s 104.2 (1)), states that ‘The Attorney-General’s consent may be made subject to changes being made to the draft request (including the draft of the interim control order to be requested).’.

<sup>74</sup> See *ASIO Act 1979* (Cth) s 34ZS(1)(a) to (f) and s 34ZS(2)(a) to (f). The *Anti-Terrorism (No 2) Act 2005* (Cth) similarly includes disclosure offences relating to preventative detention, to a range of persons: the detainee (s 105.41 (1)), lawyers (s 105.41(2)), parent/guardian (s 105.41(3)), interpreters (s 105.41(5)), disclosure recipients (s 105.41(6)) and monitors (s 105.41 (7)).

In the absence of a bill of rights and its cultivation of rights literacy, culture and a structured analysis of proposed legislation, as well as exploration and testing of policy options, a much greater scope exists for politically advantageous and partisan applications for counter-terrorism law reform. From the inception of substantial and ongoing counter-terrorism legislative reform from September 11, 2001 to June 30, 2005, Opposition and minor party control of the Senate meant those types of political applications have been partly constrained by the hearings and investigative reports of the Senate Legal and Constitutional Legislation<sup>75</sup> and References<sup>76</sup> Committees and the Joint Parliamentary Committee on ASIO, ASIS and DSD<sup>77</sup> and the impact upon legislative amendments that the investigations and reports of those Committees were able to produce.

Having surveyed the context and factors facilitating this selective internationalism, it is apposite to consider some of its key features and manifestations, cultivated by the Government and the Attorney-General's department in developing a counter-terrorism questioning and detention regime. The starting point is by examining examples from parliamentary processes of this selective internationalisation of material, especially as the system of representative and responsible government is cited as the government's preferred and effective human rights model. The extravagance of this claim and the vulnerabilities of the model in its failure to integrate civil and political rights with counter-terrorism responses are apparent. Other significant examples of selective internationalism in developing this counter-terrorism questioning and detention regime will also be explored.

## V. SELECTIVE INTERNATIONALISM AT WORK: REASONS AND EXPLANATIONS FOR THE AUSTRALIAN MODEL

### A. *Dealing with and responding to overseas legislation*

There has never been a sufficient or coherent explanation as to why the critically defining feature of the Australian model, namely the capacity to question non suspect persons who may be thought to have information about terrorism offences through a process of secret, incommunicado detention, was necessary in Australia

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<sup>75</sup> Senate Legal and Constitutional Legislation Committee *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* Canberra: Parliament of the Commonwealth of Australia, June 2002.

<sup>76</sup> Senate Legal and Constitutional References Committee *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* Canberra: The Senate, December 2002.

<sup>77</sup> Parliamentary Joint Committee on ASIO, ASIS and DSD *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* Canberra: Parliament of the Commonwealth of Australia, May 2002.

when it was not invoked or implemented in other comparable jurisdictions.<sup>78</sup> The material emerging from Parliamentary Committee examinations of the then bill provides strong insights into this Australianisation process. Overseas examples are acknowledged and referred to in scrutinising the bill, but such examples are rationalised as inappropriate and irrelevant and distinguished from the Australian detention and questioning provisions.

### B. *Acknowledging overseas legislation*

The starting point is an acknowledgment that overseas legislation was referred to in the preparation of the Australian legislation.<sup>79</sup> Such an acknowledgement is an essential step in reconciling the fact that the Australian legislation is different and exceeds in scope the international examples and that little, if anything, is modelled in the drafting upon those more rights sensitive international examples. Such considerations are evident in the following exchanges:

Senator Bolkus (Chair) The legislation that the government has put before the parliament is distinctly different from legislation in other jurisdictions, such as the UK, USA, Canada and so on. Can you tell us whether those models were considered and why, for instance, some of them were not embraced by the government?

Mr Hollard. The major cornerstones of consideration were the obvious culprits — the United Kingdom, the United States, Canada and New Zealand.

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<sup>78</sup> For discussion on the general point of a failure of the Government to solidly articulate and substantiate a case for the far reaching questioning and detention powers, see Ian Barker, 'Human Rights in an age of counter-terrorism' (2005) 26 *Australian Bar Review* 267, 269–70, and in the context of a lack of publicly available risk assessment of terrorism as a foundation for the drafting of terrorism provisions, see Michaelsen, "above n 2, 329–34, under the heading "Assessing the Risk of a Terrorism Attack in Australia". A distinctive argument about the timing and circumstances of Australia becoming an al-Qaida target is made by Dennis Richardson in 'The Global Nature of Terrorism' (2004) 16(4) *The Sydney Papers* 125, 128–31.

<sup>79</sup> See Joint Parliamentary Committee on ASIO, ASIS and DSD Hansard 30 April 2002, 25: "In preparing the legislation we did have regard to legislation in the UK, Canada, the US and — although I am not sure — New Zealand". See also Joint Parliamentary Committee on ASIO, ASIS and DSD Hansard 2 May 2002, 225 'For the benefit of the Committee, we have prepared a matrix that shows the UK provisions, the Australian provisions, the Canadian provisions and the US provisions, which we think might assist the committee in its deliberations'. This document was accepted as Submission 146. See also Minister for Justice, Senator Chris Elison, Senate Hansard 10 December 2002, 7632: 'Relevant legislation from the United Kingdom, Canada and the United States was considered when drafting this bill'.

The legislation from those jurisdictions was in fact considered in the drafting of this legislation...<sup>80</sup>

Senator Bolkus (Chair). I note that the UK changed its law in 2001 and Canada changed its laws in 2002. Neither jurisdiction goes as far as you are proposing to go in terms of this legislation's capacity to detain people...for a length of time on the basis that they may know something. A deliberate decision must have been taken by those jurisdictions not to go down the road that Australia is going down. Why do we feel that there is a greater need in Australia to do what is proposed here?

Mr Hollard. Why they have not gone down that path I do not know; I am not in a position to say and I do not know whether any of my colleagues are in a position to say....As I say, why they have not chosen to go down a similar path and look at this prevention and what agencies might do beforehand I do not know. I just cannot answer that question.<sup>81</sup>

Glimpses of other rationales or claims for rejecting the overseas models do appear. These include anticipatory and preventative intelligence gathering and the 'fact that nobody had done it before I do not think we saw as a barrier to what we should or should not do'.<sup>82</sup> The latter comment is particularly revealing as it reflects an open ended legislative canvas and without a bill of rights, a methodology apparently unconstrained by rights indicators such as justification, proportionality and necessity.<sup>83</sup>

### *C. Differentiating the purposes of the Australian legislation and overseas legislation*

Most illuminating are the persistent arguments attempting to render irrelevant and inappropriate critical comparisons and alternatives to the Australian questioning and detention regime. The most prominent of these arguments has been the differentiation of the Australian legislation, characterised as for an intelligence gathering purpose, in contrast to the United Kingdom and Canadian legislation,

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<sup>80</sup> Senate Legal and Constitutional References Committee Hansard 12 November 2002, 3.

<sup>81</sup> Senate Legal and Constitutional References Committee Hansard 12 November 2002, 3–4.

<sup>82</sup> Senate Legal and Constitutional References Committee Hansard 12 November 2002, 3.

<sup>83</sup> A similarly utilitarian attitude is also revealed in other evidence: see Joint Parliamentary Committee on ASIO, ASIS and DSD *Hansard* 19 May 2005, 4 'The legislation that was initially introduced into the parliament with our support and advice was much simpler and was, of course, tougher' (Mr Richardson, Director-General, ASIO).



characterised as for a criminal law investigation and prosecution purpose.<sup>84</sup> Close examination reveals this argument as primarily one of selective convenience, given the workings of the respective United Kingdom<sup>85</sup> and Canadian<sup>86</sup> legislation.

Certainly, the Canadian investigative hearings mechanism, although located within the *Canadian Criminal Code*, cannot be accurately described as criminal investigation legislation. Instead, a judicially conducted investigative hearing, with attendance, not detention, requirements created.<sup>87</sup> There is both derivative and direct use immunity regarding information obtained under the obligation to answer questions,<sup>88</sup> rendering the information gleaned from the hearing inadmissible in a criminal prosecution. A person has the right to retain and instruct counsel at any stage of the proceedings.<sup>89</sup> There is a qualitative difference between being under arrest and in custody and being required to attend. Arrest by warrant regarding the investigative hearing is permitted only in circumstances of evading service of the order, absconding, failure to attend or to remain in attendance.<sup>90</sup>

This differentiation of criminal law and intelligence gathering purposes in departmental evidence appeared directed towards rejecting more restricted intelligence gathering models from comparable jurisdictions, such as the United Kingdom and Canada. Such differentiation was also used to erroneously categorise, as a criminal law model, an alternative intelligence gathering proposal, based on the Canadian investigative hearing model under Part II. 1 of the Canadian Criminal Code, adapted for Australian constitutional circumstances.<sup>91</sup> This proposal was similar to the Canadian investigative hearing, but did not proceed from a criminal law model.<sup>92</sup> However, in sharp contrast and contradiction, the UK and Canadian

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<sup>84</sup> See, for example, Senate Legal and Constitutional References Committee *Hansard* 12 November 2002, 3–4.

<sup>85</sup> *Terrorism Act 2000* (UK): in fact, this legislation has been considered as the basis for preventative detention legislation in Australia, on the grounds of an existing capacity to arrest and hold suspected terrorists (see ss 40 and 41 of the Act) for a period of 14 days, as part of a criminal law investigative process. This 14 day period (increased from 7 days in 2003 by the *Criminal Justice Act* (2003 c 44) UK, pt 13 s 306(4)) was further increased to a maximum of 28 days by the *Terrorism Act 2006* (UK): See s 23(7) of the *Terrorism Act 2006* (UK).

<sup>86</sup> *Criminal Code* (Canada) pt II.1 Terrorism ss 83.01–83.33.

<sup>87</sup> See s 83.28 of *Criminal Code* (Canada).

<sup>88</sup> See s 83.28(10)(a) of *Criminal Code* (Canada).

<sup>89</sup> See s 83.28(11) of the *Criminal Code* (Canada).

<sup>90</sup> See s 83.29 of the *Criminal Code* (Canada).

<sup>91</sup> Senate Legal and Constitutional References Committee *Hansard* 18 November 2002, 107.

<sup>92</sup> See Submissions 24 and 24A to the Senate Legal and Constitutional References Committee Inquiry into the *Australian Security Intelligence Legislation (Terrorism)*

schemes were elsewhere invoked to argue that the detention procedures for non-suspects under the Australian legislation were not comparable with legislation used in Malaysia, Singapore and South Africa.<sup>93</sup>

Moreover, in the May 2005 hearings before the Joint Parliamentary Committee on ASIO, ASIS and DSD review of Part III of the *ASIO Act 1979* (Cth) questioning and detention provisions, the Attorney-General's department persisted with a similar appraisal of the Canadian investigative hearings mechanism and the limited circumstances of arrest attaching to that mechanism.<sup>94</sup>

D. *Claiming conformity of Australian legislation with international comparative examples*

An alternative argument, boldly asserted, is a claim of broad conformity and comparability of the Australian questioning and detention provisions with international comparative examples. This approach has gained increasing prominence. That the making of such a claim is inconsistent with and contradictory to the differentiating arguments from international comparative examples that were strenuously advanced and outlined above appears to matter little. As the Justice Minister, Senator Ellison asserted:

In relation to the question of international precedence, the government rejects any assertion that this legislation is out of step with international precedence. What we say is that, in developing this legislation, consideration has been given to the provisions in the United Kingdom, Canada and the United States. The UK Terrorism Act 2000, the Canadian Antiterrorism Act 2001 and this bill all provide that a person may be detained and questioned for up to 48 hours.<sup>95</sup>

This assertion casually dismisses a defining point of common law democracies, namely the right of innocent persons to proceed freely about their lawful business without the prospect of arrest and detention except on reasonable grounds of the

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*Amendment Bill* and witness submission Senate Legal and Constitutional References Committee *Hansard* 14 November 2002, 90–104.

<sup>93</sup> Senate Legal and Constitutional References Committee *Hansard* 18 November 2001, 120.

<sup>94</sup> Joint Parliamentary Committee on ASIO, ASIS and DSD *Hansard* 19 May 2005, 7. See also comments by HREOC on the Attorney-General's department submission, Joint Parliamentary Committee on ASIO, ASIS and DSD *Hansard* 20 May 2005, 21. Again, Section 83.28(4)(b) of the Canadian Criminal Code, referred to in the Attorney-General's department evidence relates to the power to question non suspect persons before an investigative hearing, and is not a power to detain. Such persons are required to remain in attendance at the hearing, but they are not detained.

<sup>95</sup> Senate *Hansard* 19 June 2003, 11767.

suspicion of the commission of a crime. It ignores the significant, and probably exponential, transformation in relations between the citizen and the state, through serial expansion of the definition of “terrorism offence”,<sup>96</sup> which forms the platform<sup>97</sup> for the operation of the Australian questioning and detention provisions.

That argument has been further refined in casual, corrosive ways in circumstances emerging from the 2005 Joint Parliamentary Committee on ASIO ASIS and DSD’s review of Part III of the *ASIO Act 1979* (Cth).<sup>98</sup> In a supplementary submission to the Committee,<sup>99</sup> the Attorney-General’s department pursued the broad conformity and comparability argument of the Australian legislation to international comparative examples, within a claimed holistic frame of reference.<sup>100</sup> Once again, the process of Australianisation of international comparative examples is apparent,

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<sup>96</sup> See *Criminal Code* (Cth) s 101.2 (Providing or receiving training connected with terrorist acts), s 101.4 (Possessing things connected with terrorist acts), s 101.5 (Collecting or making documents likely to facilitate terrorist acts), s 101.6 (other acts done in preparation for, or planning, terrorist acts), s 102.2 (Directing the activities of a terrorist organisation), s 102.3 (Membership of a terrorist organisation), s 102.4 (Recruiting for a terrorist organisation), s 102.5 (Training a terrorist organisation or receiving training from a terrorist organisation), s 102.6 (Getting funds to or from a terrorist organisation), s 102.7 (Providing support to a terrorist organisation), s 102.8 (Associating with terrorist organisations) and s 103.1 (Financing terrorism).

<sup>97</sup> See *ASIO Act 1979* (Cth) s 34F(4)(a): ‘The Minister may, by writing, consent to the making of the request, but only if the Minister is satisfied: (a) that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a *terrorism offence*.’ (emphasis added).

<sup>98</sup> The report of the Committee was tabled in Parliament on 30 November 2005: see Parliamentary Joint Committee on ASIO, ASIS and DSD *ASIO’s Questioning and Detention Powers Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* Canberra: Parliament of Commonwealth of Australia, 2005.

<sup>99</sup> Submission No 102 to Joint Parliamentary Committee on ASIO, ASIS and DSD Review of the operation, effectiveness and implications of div 3 of pt III in the *Australian Security Intelligence Organisation Act 1979*.

<sup>100</sup> ‘As we and ASIO noted in the public hearings, it is necessary to examine the whole suite of legislation that is in place and the surrounding circumstances’: Submission 102, above n 99, 13; ‘It is true that the detail of the legislation is different in different countries. This is not unusual, and it alone is not sufficient to say that the Australian legislation is therefore deficient or inadequate. In comparing legislation from different countries, it is important to take account of the context in which that legislation has arisen, its objectives and how the legislation is used in practice...In developing Division III of Part III of the ASIO Act, other countries’ legislation was taken into account but our legislation has been framed in a way to suit our environment and the purpose of intelligence-gathering in that environment’: Submission 102, above n 99, 18.

in an attempt to neutralise criticism that ASIO's questioning and detention regime is more severe than in like-minded countries, including the matter of non-suspects.<sup>101</sup>

E. *Claiming superiority of the Australian legislation over the legislation of other jurisdictions*

A further area of selective internationalism arises in relation to the claim of safeguards over the questioning and detention powers. That claim has been more recently aggrandised to a claim of superiority of the Australian system, asserted on the basis of the legislative detail of the Australian provisions.<sup>102</sup> That claim is fraught with difficulties. In general terms, there are in fact significant gaps in that "detail".

As has previously been argued, reliance upon a system of representative and responsible government as the preferred model of human rights protection is inherently problematic in national security matters.<sup>103</sup> That difficulty is compounded where there is a significant emphasis in the legislation upon extending executive power and discretions. In fact, the looseness of the Australian model, with its executive power and discretions heavily reliant upon assumptions of personal and institutional integrity<sup>104</sup> and personalised, verbal assurances that exceptional powers will be used responsibly and as a last resort,<sup>105</sup> means a considerable falling short of that "detail" claim.

<sup>101</sup> Submission 102, above n 99, 13.

<sup>102</sup> Submission 102, above n 99, 18 'The Australian legislation is specific and transparent, and has significant built-in accountability mechanisms and safeguards'. A number of adverse claims are also made about the lack of specificity in the Canadian legislation: see Submission 102, above n 99, 15–18.

<sup>103</sup> See the discussion under the heading "The Australian government's preferred model of human rights", above.

<sup>104</sup> See, for example, Senate Legal and Constitutional References Committee *Hansard* 12 November 2002, 21 and 18 November 2002, 125–6. Similar rationalisations were ventilated before the Senate Legal and Constitutional Legislation Committee inquiry into the *Anti-Terrorism Bill (No 2) 2005* (Cth): see Senate Legal and Constitutional Legislation Committee *Hansard* 14 November 2005, 38 and 18 November 2005, 27.

<sup>105</sup> The last resort criterion has been variously cited: see Senate Legal and Constitutional References Committee *Hansard* 18 November 2002, 125; House of Representatives *Hansard* 20 March 2003, 13172 and Attorney-General's Press Release 21 March 2002, "ASIO Legislation Amendment Bill Introduced". The "last resort" characterisation was also made of the ASIO questioning and detention regime in the Attorney-General's Department submissions: Submission to Parliamentary Joint Committee on ASIO, ASIS and DSD Review of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979 Questioning and Detention Powers*, 4 and 5 and Submission 290 A Attachment B, 8 to the November 2005

It is also somewhat ironic that the Attorney-General's department supplementary submission should praise the characteristics of the legislation<sup>106</sup> which the Government generally opposed and reached only as a reluctant "compromise"<sup>107</sup> and which the Attorney General has described as "too checked"<sup>108</sup> and "where possibly we have an outcome that is third or fourth best".<sup>109</sup>

Moreover, the existing detail and most safeguards only emerged from a lengthy process of parliamentary review, including committee review,<sup>110</sup> at a time when the Opposition and minor parties controlled the Senate. Indeed, the original bill, introduced in March 2002, was notorious for its poor legislative drafting<sup>111</sup> and its absence of safeguards.<sup>112</sup> It was then subjected to extensive, negotiated

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Senate Legal and Constitutional Committee Inquiry Into Provisions Of the Anti-Terrorism Bill (No 2) 2005.

<sup>106</sup> See, for example, Submission 102, above n 99, 18 "The Australian legislation is specific and transparent, and has significant built-in accountability mechanisms and safeguards. While detention is available, it is clear that it can only be used in circumstances that truly require it".

<sup>107</sup> See Attorney-General's Media Release 11 June 2003 "Compromise For The Sake Of National Security".

<sup>108</sup> Hon P Ruddock comments to ABC Radio reported in "Australian to Review Anti-terror Laws with Eye on Stronger Powers" 3 November 2003 <<http://sg.news.yahoo.com/031103/1/3fjdb.html>>

<sup>109</sup> Hon P Ruddock "The Commonwealth Response to September 11: The Rule of Law and National Security", Speech at Gilbert and Tobin Centre of Public Law — National Forum on the War on Terrorism and the Rule of Law, New South Wales Parliament House, 10 November 2003.

<sup>110</sup> See the reports of the three Parliamentary Committees on the *ASIO Legislation Amendment (Terrorism) Bill 2002* (Cth): Parliamentary Joint Committee on ASIO, ASIS and DSD *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*; Senate Legal and Constitutional Legislation Committee *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*; and Senate Legal and Constitutional References Committee *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*

<sup>111</sup> See comments of Senator Faulkner, Senate *Hansard* 17 June 2003, 11,669-11,670 .. Some examples of poor legislative drafting included the fact that the bill did not require that a person taken into custody pursuant to a warrant be brought before a prescribed authority immediately for questioning, enabling extended detention for the 28 day duration of the warrant, as well as the fact that no use immunity for information provided by detainees was provided under the bill, defeating the purpose of the legislated obligation to provide answers to questions.

<sup>112</sup> These difficulties included, but were not limited to, indefinite detention through rolling 48 hour warrants, no right of access to legal representation, no protocols governing the treatment of detainees, the detention of children of any age under the bill without knowledge of their parents or guardians and strip searches able to be conducted on children as young as ten years of age.

amendments, rather than beginning afresh with new legislation that systematically integrated human rights principles within this intelligence gathering mechanism. This means that some obvious drafting problems persist, challenging the claim that the Australian legislation has a superior system of checks and balances, but also that reliance upon representative and responsible government, produces the best mechanism of human rights protection in counter-terrorism situations.<sup>113</sup>

On this point of detail and comprehensiveness, the submission fails, in its own terms, to observe an important contextual matter. In the absence of a bill of rights, the Australian legislation must necessarily be *more* detailed if safeguards are to be incorporated. Other than what can be derived from an examination of constitutional powers and immunities, there is no external rights document with its resultant jurisprudence against which the drafting, enactment and operation of the provisions can be tested. The detail of the legislation suggests, if anything, in the absence of a bill of rights, an ad hoc process of amendment engrafting safeguards, instead of the bill's inception grounded in drafting conformity with international human rights standards increasingly referred to in comparable democracies such as the United Kingdom, Canada and New Zealand.

The claim about superiority through detail is contestable on another practical level. Loose and ambiguous legislative language persists — a point so at odds with the claimed superiority of the representative and responsible government model, where the critical nature of the rights and values at stake should allow little tolerance in getting the safeguards right. Such complacency may appear because the novelty of detention of non suspect persons has been diminished by repetition of the circumstances and conditions of the breach of a foundational principle of common law liberty<sup>114</sup> and the appearance of normality in the operation of the legislation<sup>115</sup> and restraint in its use.<sup>116</sup>

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<sup>113</sup> Refer to the extracts from *Australia's National Framework For Human Rights National Action Plan*, cited above, under the heading "The Australian government's preferred model of human rights".

<sup>114</sup> See Joint Parliamentary Committee on ASIO, ASIS and DSD Review of ASIO's questioning and detention powers *Hansard* 19 May 2005, 7, 13–14 and *Hansard* 20 May 2005, 16.

<sup>115</sup> See Joint Parliamentary Committee 2005 Report, 23–24. An interesting operational concern of the legislation was raised in the Joint Parliamentary Committee 2005 Report, about the possible overlap in intelligence gathering and policing purposes, in part arising from the fact that three people have been charged following use of questioning warrants: Joint Parliamentary Committee 2005 Report, 25. This concern is reinforced by the Committee's later recommendation that the issuing authority "be required to be satisfied that other methods of intelligence gathering would not be effective" on the basis that it "will also act as a strong safeguard against potential

Deficiencies in detail are clearly present in the legislation. There is no explicit right for a lawyer to be continuously present during questioning, the incommunicado elements of the scheme apparent by this failure to create this explicit right, as the legislation constantly refers to ‘contact’ with a lawyer, rather than a clear requirement or right of presence of that lawyer.<sup>117</sup> Significantly, s 34ZP(1) of the *ASIO Act 1979* (Cth) states ‘To avoid doubt, a person before a prescribed authority for questioning under a warrant issued under this Division may be questioned under the warrant in the absence of a lawyer of the person’s choice’. Such an ambivalent situation relating to the presence of legal representation should be contrasted with the right of presence of the Inspector General of Intelligence and Security under s 34P of the *ASIO Act 1979* (Cth).<sup>118</sup>

The right to have an independent lawyer present during questioning and a right of legal access at all times during detention is amongst the most effective safeguards against human rights abuses for the subject of a s 34F warrant. The presence of a legal representative practically enables access to the Federal Court or High Court under respectively ss 19(2) and 23 of the *Federal Court of Australia Act 1976* (Cth)

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misuse of coercive questioning powers in order to lay the groundwork for charge of false and misleading information, where the information is already known to the agency”: Joint Parliamentary Committee 2005 Report, 37.

<sup>116</sup> This point was made before the Joint Parliamentary Committee by arguing limited use of the then s 34C (now s 34D) *ASIO Act 1979* (Cth) procedure: see Joint Parliamentary Committee on ASIO, ASIS and DSD *Hansard* 19 May 2005, 3: “The questioning power has been utilised on eight separate occasions since the legislation was enacted in July 2003. The detention power has not yet been utilised. No individual between the ages of 16 and 18 years has yet been questioned and there has been no strip searching undertaken”. In contrast, however, it was revealed at the same inquiry that the Canadian investigative hearing mechanism (equivalent to the ASIO questioning power) has not been used by federal authorities and that there was only one identified instance of its use by a provincial authority; and that the preventative arrest power had not been used at all: see Submission 100 to Parliamentary Joint Committee on ASIO, ASIS and DSD Review of ASIO’s Questioning and Detention Powers 25 May 2005.

<sup>117</sup> The Joint Parliamentary Committee 2005 Report at 46–7 canvasses some of the issues relating to contact with a lawyer, recommending that the legislation ‘be amended to guarantee the right of a person subject to a questioning-only or questioning and detention warrant to have access to a lawyer and representation throughout the questioning process’: Joint Parliamentary Committee 2005 Report, 48. This recommendation does not appear to have been adopted: see *ASIO Legislation Amendment Act 2006* (Cth) sch 1 ss 34ZO and ZP and s 34E(3).

<sup>118</sup> Section 34P of the *ASIO Act 1979* (Cth) states that “To avoid doubt, for the purposes of performing functions under the *Inspector-General of Intelligence and Security Act 1986*, the Inspector-General of Intelligence and Security, or an APS employee assisting the Inspector-General, may be present at the questioning or taking into custody of a person under this Division”.

and s 75(v) of the *Commonwealth Constitution* and the *Judiciary Act 1903* (Cth), exercising the right confirmed to seek from a federal court a remedy relating to the warrant or treatment of the person in connection with the warrant in s 34J(5) of the *ASIO Act 1979* (Cth).

Furthermore, prohibitions on the legal adviser precluded that legal adviser from addressing the prescribed authority.<sup>119</sup> A legal representative for the person the subject of a s 34D warrant should be permitted to address the prescribed authority whenever a person exercising authority under the warrant requests of the prescribed authority permission for the questioning to continue at the 8 hour and 16 hour marks.<sup>120</sup> Similarly, the legal representative for the person the subject of a s 34D questioning only warrant should be permitted to address the prescribed authority whenever the prescribed authority intends to give a direction under s 34K(1) to detain that person.<sup>121</sup>

Similarly, the definition of “issuing authority” in s 34A of the *ASIO Act 1979* (Cth) should be tightened to remove an open-ended discretion in paragraph (b) to appoint by regulation a class of persons declared as issuing authorities. The confining of

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<sup>119</sup> See *ASIO Act 1979* (Cth) former s 34U(4). The Joint Parliamentary Committee 2005 Report at 51 discussed the desirability that a prescribed authority ‘hear submissions from the lawyer before discretions are exercised or when matters, such as the scope of a question, need to be addressed’, recommending ‘that subsection 34U(4) be amended and that individuals be entitled to make representations through their lawyer to the prescribed authority’: Joint Parliamentary Committee 2005 Report at 52 (Recommendation 5). The *ASIO Legislation Amendment Act 2006* (Cth) merely provided for a legal adviser to request an opportunity, during a break in questioning, to address the prescribed authority on a matter. The prescribed authority consequently controls both the timing of breaks and whether that opportunity will be afforded: see ss 34ZQ(7) and (8) of the *ASIO Legislation Amendment Act 2006* (Cth), reflecting the conclusion that ‘the Government agrees that the lawyer should be entitled to address, with the prescribed authority’s consent, the prescribed authority during time when questioning is not taking place (where the prescribed authority defers questioning to allow for procedural matters to be addressed)’: See Parliamentary Joint Committee on Intelligence and Security Report on the operation, effectiveness and implications of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979 Government response- March 2006* Recommendation 5, 2.

<sup>120</sup> This is not reflected in the purely discretionary arrangements of ss 34ZQ(7) and (8) of the *ASIO Act 1979* (Cth). Indeed, s 34ZQ(6) states that ‘The legal adviser must not intervene in questioning of the subject or address the prescribed authority before whom the subject is being questioned, except to request clarification of an ambiguous question’. Furthermore, s 34R(3) of the *ASIO Act 1979* (Cth) states that ‘Anyone exercising authority under the warrant may request the prescribed authority to permit the questioning to continue...The request may be made in the absence of ...(b) a legal adviser to that person’.

<sup>121</sup> See also s 34K(3) of the *ASIO Act 1979* (Cth).



issuing authorities to Federal judicial officers, acting in a personal capacity, provides an important safeguard in the warrant process. Accordingly, paragraph (b) should be amended so that the power to appoint another class of persons can only be invoked if there is a judicial finding as to the unconstitutionality of Federal judicial officers under paragraph (a) being appointed in a personal role as issuing authority, or a explicit ministerial determination, tabled in Parliament, of the number of available judicial officers willing to act as issuing authorities falling below a determined number and geographical distribution.

F. *Claiming superiority of the Australian model through asserting failures in overseas jurisdictions*

More specific flaws emerge in relation to the departmental approach to legislation of three countries criticised in the Attorney-General's department supplementary submission.<sup>122</sup> The approach here is distinctive — the asserted failings in the overseas legislation are contrasted with the claimed superiority of the Australian model, rather than as experiential material from which the Australian model might be improved and developed. Furthermore, it is not acknowledged that the cited case law from the international jurisdictions has contributed to reviewing human rights issues in relation to counter-terrorism laws.

A first example is found in the material witness provision of the United States Code,<sup>123</sup> which allows a judicial officer to order the arrest of a person whose testimony is material in a criminal proceeding where it is impracticable to secure the presence of the person by subpoena. This is cited as a claimed rebuttal to objections about the Australian legislative power to detain non-suspects. What is discounted is the different context of a grand jury criminal proceeding as against an intelligence gathering exercise — another example of the selective usage of the criminal law-intelligence gathering distinction. Similarly discounted<sup>124</sup> are the procedural protections for detained persons which are included elsewhere.<sup>125</sup> The illustrative case cited<sup>126</sup> supporting the claims surrounding detention of non-suspects is inconclusive as the US District Court vacated the material witness warrant upon notification of a Presidential Order declaring Padilla to be an enemy combatant and its withdrawal of the grand jury subpoena of Padilla.<sup>127</sup>

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<sup>122</sup> See Attorney-General's Department Supplementary Submission to Parliamentary Joint Committee on ASIO, ASIS and DSD Review of ASIO's questioning and detention powers 22 June 2005, Submission No 102, 13–18.

<sup>123</sup> Title 18, s 3144 USC. Submission 102, above n 122, 13–14.

<sup>124</sup> "Section 3144 does not specifically include any safeguards for the individuals detained": Submission 102, above n 122, 13.

<sup>125</sup> Title 18, s 3142 USC.

<sup>126</sup> *Rumsfeld v Padilla* 542 US 456 (2004).

<sup>127</sup> *Rumsfeld v Padilla* 542 US 456 (2004), 2715, fn 3.

Subsequently, the US Court of Appeals in *Padilla v Hanft*<sup>128</sup> found that the Congressional Authorization for the Use of Military Force provided the President with authorisation to designate a US citizen an enemy combatant and to authorise the Secretary of Defence to take him into military custody.<sup>129</sup> However, the emphasis in the US Courts in relation to enemy combatant designations has been to insist upon and uphold basic rule of law values. A subsequent attempt by the US Government to transfer Padilla to a civilian criminal jurisdiction,(with which Padilla agreed) including vacating the above decision in *Padilla v Hanft*<sup>130</sup> of 9 September 2005, was rejected by the US Court of Appeals on 21 December 2005, the Court expressing a number of concerns<sup>131</sup> that, if the application was granted, would undermine the rule of law and that the matter was properly to be decided by the US Supreme Court. The US Supreme Court, following filing in that Court by the Solicitor General of an application respecting the custody and transfer of Padilla to civilian criminal jurisdiction, subsequently granted the request.<sup>132</sup> The issue of a proper capacity for review of the classification of a citizen-detainee as an enemy combatant, mentioned in the September<sup>133</sup> and December<sup>134</sup> 2005 *Padilla* cases,

<sup>128</sup> *Padilla v Hanft* 423 F 3d 386 (2005).

<sup>129</sup> See *Padilla v Hanft* 423 F 3d 386 (2005) at 389: ‘The exceedingly important question before us is whether the President of the United States possesses the authority to detain militarily a citizen of this country who is closely associated with al Qaeda, an entity with which the United States is at war; who took up arms on behalf of that enemy and against our country in a foreign combat zone of that war; and who thereafter travelled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets. We conclude that the President does possess such authority pursuant to the Authorization for Use of Military Force Joint Resolution enacted by Congress in the wake of the attacks on the United States of September 11, 2001. Accordingly, the judgment of the district court is reversed’.

<sup>130</sup> *Padilla v Hanft* 423 F 3d 386 (2005).

<sup>131</sup> These concerns included a possible attempted avoidance of Supreme Court review of the basis of designation as an enemy combatant, the legal irrelevance in the present matter of disclosure of the circumstances surrounding receipt of information regarding Padilla’s plans: see *Padilla v Hanft* 423 F 3d 386 (2005) 586–7: ‘apart from the need to protect the appearance of regularity in the judicial process, we believe that the issue presented by the government’s appeal to this court and Padilla’s appeal to the Supreme Court is of sufficient national importance as to warrant consideration by the Supreme Court...On an issue of such surpassing importance, we believe that the rule of law is best served by maintaining on appeal the status quo in all respects and allowing Supreme Court consideration of the case in the ordinary course, rather than by an eleventh hour transfer and vacatur on grounds and under circumstances that would further a perception that dismissal may have been sought for the purpose of avoiding consideration by the Supreme Court’.

<sup>132</sup> 126 S CT 978 (Mem) 4 January 2006.

<sup>133</sup> See 423 F 3d 386, 391, 392, 393.

<sup>134</sup> See 432 F 3d 582

similarly reflects rule of law concerns and is set out in the US Supreme Court judgment of *Hamdi v Rumsfeld*.<sup>135</sup>

In relation to the United Kingdom, the intelligence gathering-criminal law distinction again becomes relevant as the claim made regarding detention might be seen as misleading.<sup>136</sup> The power of arrest, exercisable by a constable under Section 41 of the *Terrorism Act 2000* (UK),<sup>137</sup> is based on alleged infractions of the criminal law,<sup>138</sup> not on an anticipated intelligence gathering purpose or a purely preventative purpose. The threshold is in fact higher in the UK than for the Australian questioning and detention provisions because of the requirement of reasonable suspicion of criminal involvement in terrorism related activity.

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<sup>135</sup> *Hamdi v Rumsfeld* 542 US 507 (2004), 533–4: ‘We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker...At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict’; and at 542 US 507 (2004), 538: ‘There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner of war status under the Geneva Convention...In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved’.

<sup>136</sup> ‘It has also been suggested that our detention regime is harsher than that in the United Kingdom. But this suggestion ignores the fact that in the United Kingdom there is a power to detain for up to seven days. That power resides with the police. The decision making for detention is at a lower level than the decision making in Australia’: Submission 102, 14.

<sup>137</sup> ‘A constable may arrest without a warrant a person whom he reasonably suspects to be a terrorist’: *Terrorism Act 2000* (UK) s 41(1).

<sup>138</sup> (1) In this Part “terrorist” means a person who — (a) has committed an offence under any of sections 11, 12, 15 to 18, 54 and 56 to 63 or (b) is or has been concerned in the commission, preparation or instigation of acts of terrorism. (2) The reference in subsection (1)(b) to a person who has been concerned in the commission, preparation or instigation of acts of terrorism includes a reference to a person who has been, whether before or after the passing of this Act, concerned in the commission, preparation or instigation of acts of terrorism within the meaning given by section 1: *Terrorism Act 2000* (UK) s.40(1) and (2). S.34 (a) of the *Terrorism Act 2006* (UK) amends section 1(1)(b) of the *Terrorism Act 2000* (c.11) (under which actions and threats designed to influence a government may be terrorism) to include after “government”, “or an international governmental organisation”, thereby broadening the scope of the arrest power.

Similarly, the comments on the House of Lords decision in *A and others v Secretary of State for the Home Department*<sup>139</sup> ignores the fact that such judgments are not constitutionally binding in the Australian sense, with the retention of the doctrine of Parliamentary supremacy<sup>140</sup> and the capacity to make a declaration of incompatibility of the relevant legislation with the *Human Rights Act 1998* (UK).<sup>141</sup>

The system of control orders, introduced by the *Prevention of Terrorism Act 2005* (UK), is in fact the legislative response to the House of Lords decision — but it is not identified as such. In any event, comments about UK control orders as the basis for contesting the claim that the Australian detention and questioning regime is harsher than the UK are now of little relevance as the September 2005 COAG meeting settled upon the introduction of Australian control orders legislation.<sup>142</sup> Likewise, no mention is made of the capacity under the *Migration Act 1958* (Cth) to indefinitely detain aliens for the purpose of removal following the 2004 decisions of the High Court in *Al Khafaji*<sup>143</sup> and *Al Kateb*.<sup>144</sup> The new Australian legislation, the *Anti-Terrorism Act (No.2) 2005* (Cth), is in fact justified on a claimed precedence of the UK control orders legislation, but includes fewer and weaker safeguards and review mechanisms — as such, it is another confirmatory example of the practice of selective internationalism.

The scope for detention under the Canadian investigative hearings mechanism is again similarly mistaken in the departmental approach by pressing the incorrect argument that ‘the suggestion that non-suspects cannot be detained is also a generalisation.’<sup>145</sup> There are elisions and gaps in the language of the submission,

<sup>139</sup> “Despite the opinion, it appears that a number of foreign nationals detained under the *Anti-Terrorism Crime and Security Act 2001* (UK) remained in detention following the opinion” (the House of Lords judgments finding that application of the detention powers to foreign nationals on the basis that they were suspected international terrorists was a disproportionate and discriminatory response under the *Human Rights Act 1998* (UK)).

<sup>140</sup> See s 3 of the *Human Rights Act 1998* (UK): “(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. (2) This section — (a) applies to primary legislation and subordinate legislation whenever enacted; (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of that incompatibility.”

<sup>141</sup> See s 4 of the *Human Rights Act 1998* (UK).

<sup>142</sup> See ss 104.1 to 104.32 of the *Anti-Terrorism Act (No 2) 2005* (Cth).

<sup>143</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664.

<sup>144</sup> *Al Kateb v Godwin* (2004) 219 CLR 562.

<sup>145</sup> Submission No 102, above n 99, 15.

suggestive, particularly to a reader without a legal background or familiarity with the Canadian legislation, that detention is a regular part of the Canadian investigative hearings mechanism.<sup>146</sup> In reality, as has been mentioned, such detention in an investigative hearing is clearly only available in circumstances of evading service of the order, absconding, failure to attend or to remain in attendance.<sup>147</sup>

Likewise, in citing the Canadian legislation, there is an incorrect conflation of the attendance requirements at an investigative hearing with detention.<sup>148</sup> The requirement to attend and to remain in attendance<sup>149</sup> is of a qualitatively different nature to custodial detention which typically involves arrest, loss of freedom of movement and the potential application of force to affect arrest and ensure continuing custody. Furthermore, the preventative arrest and recognizance provisions in the *Canadian Criminal Code* are described in a manner which fails to identify the linkage of anticipated criminal terrorist activity to the preventative arrest and recognizance provisions.<sup>150</sup>

Following the holistic and context orientated standard advocated in the Attorney-General's department supplementary submission,<sup>151</sup> it is highly appropriate to assess the statistical material of the use of ASIO warrants as against use of the Canadian investigative hearings mechanism. During ASIO's May 2005 submission to the Joint Parliamentary Committee on ASIO, ASIS and DSD review of the detention and questioning powers, it was disclosed that 8 questioning warrants had been used,<sup>152</sup> with a subsequent report of a further 6 warrants, including at least 2

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<sup>146</sup> See the comments in the fourth paragraph of page 15 of Submission 102, above n 99 and the comment "Mr Lenehan (of HREOC) suggested that the Canadian power to detain is really an ancillary power to the questioning power, and only arises if a judge is satisfied that the person is evading service or may not attend. We do not agree with this assessment...In comparison, detention under the ASIO Act is ancillary to questioning": Submission 102, above n 99, 17.

<sup>147</sup> Criminal Code (Canada) s 83.29 and see the discussion above under the heading "Differentiating the purposes of the Australian legislation and overseas legislation".

<sup>148</sup> Criminal Code (Canada) s 83.29.

<sup>149</sup> Criminal Code (Canada) s 83.28(5)(b).

<sup>150</sup> This is apparent from the wording of s 83.3 making explicit the linkage between imposition of a recognizance with conditions, arrest or detention of the person in custody "is necessary to prevent the carrying out of the terrorist activity" (s 83.3(2)(b)) or "is necessary in order to prevent a terrorist activity" (s 83.3(4)(b)).

<sup>151</sup> "[I]t is necessary to examine the whole suite of legislation that is in place and the surrounding circumstances, not just the particular provisions in isolation": Attorney-General's Department Supplementary Submission to Review of ASIO's questioning and detention powers, Submission No 102, 13.

<sup>152</sup> See Parliamentary Joint Committee on ASIO, ASIS and DSD Review of ASIO's Questioning and Detention Powers *Hansard* 19 May 2005, 3-4.

detention warrants, being disclosed in July 2005.<sup>153</sup> In contrast, from December 2001 to December 2004, the Canadian Federal authorities had made no use of the investigative hearings power,<sup>154</sup> and there is one identified case of a provincial authority<sup>155</sup> invoking the power.<sup>156</sup> The non-use by the Canadian Federal authorities of the investigative hearings mechanism over three years places the use of up to 14 questioning warrants in Australia in the two year period from July 2003 to July 2005 in proper perspective, calling into question the “last resort”<sup>157</sup> claim of the warrants, particularly as Canada has a larger population of 32 million<sup>158</sup> and its geographical proximity to the United States, a major world terrorist target.

Alternatively, it may suggest that the real threat of terrorist activity in Australia is appreciably higher than in Canada — the reasons for this being open to speculation, particularly given the divergence of policy between the two nations over participation in the activities of the coalition of the willing in Iraq. In any event, the discrepancy of using this process between the two nations raises legitimate accountability questions, including the need in Australia for more detailed public reporting on warrants as an accountability measure.<sup>159</sup>

<sup>153</sup> See Martin Chulov, ‘Suspicious focus on internal threats’ *Weekend Australian* July 30–31, 2005. The Chulov claim regarding the use of detention warrants could only possibly cover July 2005, as the ASIO Annual Report to Parliament states that ‘ASIO executed 11 questioning warrants issued in 2004–05 involving 10 people. None of these warrants authorised the detention of a person’: *ASIO Annual Report to Parliament 2004–2005*, 41. The use of a further 6 warrants in 2005 was acknowledged by ASIO in the final hearing of the Joint Parliamentary Committee on ASIO, ASIS and DSD on 8 August 2005, but observes that “By the end of the review, there had still been no detention warrants issued”: see Parliamentary Joint Committee on ASIO, ASIS and DSD *ASIO’s Questioning and Detention Powers Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* Canberra: Parliament of Commonwealth of Australia, 6.

<sup>154</sup> *The Anti-terrorism Act – Annual Reports concerning Investigative Hearings and Recognizance with Conditions* December 24 2001– December 23 2002; December 24 2002 – December 23 2003 and December 24 2003 – December 23 2004.

<sup>155</sup> The province of British Columbia — see *Re Vancouver Sun* [2004] 2 SCR 332.

<sup>156</sup> See *Re Application under s.83.28 of the Criminal Code* [2004] 2 SCR 248 and a parallel action arising from the same matter, *Re Vancouver Sun* [2004] 2 SCR 332.

<sup>157</sup> See House of Representatives *Hansard* 20 March 2003, 13172 and Attorney-General’s Press Release 21 March 2002, “ASIO Legislation Amendment Bill Introduced”.

<sup>158</sup> SBS World Guide Canada — Geography at <<http://www.theworldnews.com.au/Worldguide/index.php3?country=37&header=3>>

<sup>159</sup> The Joint Parliamentary Committee 2005 Report at 96 recommended additional statistical information be included in the ASIO Annual Report, comprising “the number and length of questioning sessions within any total questioning time for each

### G. *Advocacy of French and other systems of extended detention*

A further example of selective internationalism is found in the Attorney-General's apparent advocacy of French system of extended detention in terrorism matters. Such advocacy arose in circumstances surrounding the 2003 deportation of French terror suspect, Willy Brigitte. The Attorney-General made a number of observations suggesting that the then recently conferred and extraordinary ASIO detention and questioning powers were not invoked because they were of such an inferior legislative nature<sup>160</sup> to the French system that it was preferable to deport Brigitte to France where he would be subject to more extensive powers.

The French counter-terrorism powers permit four days of intense questioning in police custody, the first three days of which is without access to a lawyer. Following this, years of detention can follow, during which a formal investigation is conducted by special anti-terrorism magistrates, with the holding charge of "criminal association relating to a terrorist enterprise" often used as the basis for the detention which is both investigative and intelligence gathering in nature.

The French system is presented in a highly abstract manner, and reflects a strong selective internationalism. First, a simplistic representation of a democratically elected government, in this instance France, is made synonymous with suitability and appropriateness of counter-terrorism measures, including compliance with human rights.<sup>161</sup> Second, no acknowledgment is made of, nor attempts to engage

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warrant", "the number of formal complaints made to the IGIS, the Ombudsman or appeals made to the Federal Court" and "if any, the number and nature of charges laid under this Act, as a result of warrants issued". This recommendation was rejected by the Government: see Parliamentary Joint Committee on Intelligence and Security Report on the operation, effectiveness and implications of div 3 of pt III of the *Australian Security Intelligence Organisation Act 1979 Government response – March 2006 Recommendation 18, 7.*

<sup>160</sup> See Hon P Ruddock "Press Conference Announcing A Review of Migration Litigation and Answering Questions On Deportation of French National" Transcript 27 October 2003 and "Item: Attorney-General Philip Ruddock Confirms ASIO Has Used Its New Powers To Interrogate Australian Associates of French Terror Suspect Willie Brigitte" Transcript 10 December 2003. See also ABC Television, 'Intelligence delay has Ruddock asking questions', *Lateline*, 27 October 2003; Channel Nine Network 'Interview: Philip Ruddock', *Sunday Program*, 2 November 2003 and ABC News Online, 'New anti-terrorism laws too cumbersome: Ruddock' 10 November 2003.

<sup>161</sup> ABC, Television, 'Intelligence delay has Ruddock asking questions' *Lateline* 27 October 2003: 'But what you do have is an example here of broader powers that an intelligence agency in a developed Western country — namely France — has in relation to being able to detain and question people'. See also the later citation of Spain by the Commonwealth Attorney General in response to a question without

with, systemic and significant human rights infractions identified by different bodies<sup>162</sup> as occurring under the French system.

In *Tomasi v France*,<sup>163</sup> Tomasi, a French national who was a Corsican independence organisation member, was detained for five years and seven months under French anti-terrorism laws. The European Court of Human Rights found violations of Articles 5(3),<sup>164</sup> 3,<sup>165</sup> and 6(1)<sup>166</sup> of the European Convention on Human Rights.

It should also be noted that the real and potential abuses within the French system of the investigation of terrorism suspects are enabled as the broader counter-terrorism powers and discretions are superimposed upon the French criminal

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notice: ‘In Spain they can hold people incommunicado for 13 days but for up to four years in pre-trial detention if required’: House of Representatives *Hansard* 1 November 2005, 7. Spain was severely criticised for its practice of incommunicado detention in terrorism cases and torture arising therein in the 2004 report of the UN Special Rapporteur on the question of Torture. See *Civil and Political Rights, Including the Question of Torture and Detention Addendum Visit to Spain* UN Doc E/CN.4/2004/56/Add.2 6 February 2004, esp 17–20 Conclusions and 21–22 Recommendations.

<sup>162</sup> These bodies include the European Court of Human Rights, the United Nations Human Rights Committee and the United Nations Committee Against Torture. See also Amnesty International Report 2001: France.

<sup>163</sup> Case Number 27/1991/279/350 European Court of Human Rights [1992] ECHR 53 (27 August 1992)..

<sup>164</sup> Article 5(3) European Convention For The Protection of Human Rights and Fundamental Freedoms: ‘Everyone arrested or detained in accordance with the provisions of para 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial’.

<sup>165</sup> Article 3 of the European Convention For The Protection of Human Rights and Fundamental Freedoms : ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

<sup>166</sup> Article 6(1) of the European Convention For The Protection of Human Rights and Fundamental Freedoms: ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced quickly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice’.



investigative system, itself the subject of serious breaches<sup>167</sup> of the *European Convention of Human Rights*. Furthermore, evidence of human rights abuses in France's counter-terrorism detention laws has been found by United Nations human rights treaty body committees.<sup>168</sup>

Advocating features of the French counter-terrorism detention powers is a striking variant of selective internationalism. The risks and abuses found within the system by respected bodies have simply been ignored, with the system of lengthy detention presented advantageously, as a model suggestive and supportive of further liberalisation of executive power inherent in the Australian detention and questioning provisions. At the same time, attention was drawn away from a potentially politically damaging domestic administrative issue.<sup>169</sup>

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<sup>167</sup> See *Selmouni v France* European Court of Human Rights Application No 25806/94 28 July 1999 [1999] ECHR 66..

<sup>168</sup> See Human Rights Committee: Concluding observations of the Human Rights Committee: France 4 August 1997 UN Document CCPR/C/79/Add.80; Committee Against Torture: Summary record of the public part of the 323<sup>rd</sup> meeting: France 11 May 1998 UN Document CAT/C/SR.323 D; Concluding observations of the Committee against Torture: France 27 May 1998 UN Document A/53/44; *Arana v France* Committee Against Torture Communication No 63/1997. For a more recent example of such breaches, see the findings of the Committee Against Torture in *Brada v France* Communication No 195/2002 UN Doc CAT/C/34/D/195/2002 (2005). In para 13.4, the Committee found that the expulsion of the applicant from France to Algeria 'nullified the effective exercise of the right to complaint conferred by article 22 and has rendered the Committee's final decision on the merits futile and devoid of object. The Committee thus concludes that in expelling the complainant in the circumstances that it did the State party breached its obligations under article 22 of the Convention'. In paras 13.5 and 13.6, the Committee also observed 'that the Bordeaux Administrative Court of Appeal, following the complainant's expulsion, found upon consideration of the evidence presented, that the complainant was at risk of treatment in breach of article 3 of the European Convention, a finding which would encompass torture...As a result, the Committee also concludes that the complainant has established that his removal was in breach of article 3 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment'.

<sup>169</sup> French intelligence had alerted Australian authorities on 22 September 2003 that Brigitte had reportedly participated in terrorist training and again, having received no response, on 3 October 2003 indicating that he may be in Australia for terrorism related activity and that he was possibly dangerous. That communication was not acted upon by ASIO until 7 October 2003, the communications area having closed for an intervening long weekend public holiday: See Senate Legal and Constitutional Committee Estimates, *Hansard*, 16 February 2004, 4-5 concerning the receipt dates of the various communications from the French authorities to ASIO and House of Representatives *Hansard* 3 November 2003, 21727.

The development of new detention measures following the COAG terrorism summit of 27 September 2005 has unsurprisingly invoked characteristics of selective internationalism — in adopting the control orders regime from the *Prevention of Terrorism Act 2005* (UK) and in purporting to follow, for preventative detention purposes, the *Terrorism Act 2000* (UK), in the agreement with the states for state legislation to provide for 14 days of preventative detention.

Already, the s 41 *Terrorism Act 2000* (UK) minimum criminal law criterion of reasonable suspicion of being concerned in the commission, preparation or instigation of acts of terrorism to enable such detention, with judicial review after 48 hours, has not been considered as the appropriate reference point for Australian legislation. The final form of *Anti-Terrorism Act (No .2) 2005* (Cth), whilst promoted and reassured through suggested derivation from the UK legislation,<sup>170</sup> confer similar powers, but without quite the array of checks and balances properly commensurate with such legislation.<sup>171</sup>

*H. Failure to include adequate exemptions for the provision and communication of legal advice or for legal representation in relation to the s 102.8 Commonwealth Criminal Code offence of Associating with terrorist organisations, introduced by the Anti-Terrorism Act (No 2) 2004 (Cth)*

Another form of selective internationalism associated with the questioning and detention powers is the apparent failure to provide comprehensive exemptions for the provision of legal advice and legal representation for pursuing legal redress in international forums, in the context of associating with terrorist organisations offence. The quite specific nature of this example, as against the broader concerns of examples canvassed so far, illustrates the consistency and versatility of the

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<sup>170</sup> See Prime Minister's Media Release "Counter-Terrorism Laws Strengthened" 8 September 2005: 'States and Territories will be asked to provide for longer detention periods, similar to those available in the UK which allow for up to 14 days detention, because there are constitutional restrictions on the capacity of the Australian Government to provide for this type of detention' and "Transcript of Prime Minister The Hon John Howard MP Joint Press Conference With Attorney General Parliament House Canberra" 8 September 2005, Attorney General: 'Can I just say in relation to the control orders, when I hear comments that suggest that this is somewhat akin to what you might expect in a police state that it's modelled upon the provisions in the United Kingdom. So you know, you're looking at countries that observe the rule of law of democratic institutions and were certainly not accused of being a police state when those laws were enacted there'.

<sup>171</sup> See "Government Enhances Anti-Terror Bill" Attorney-General's Media Release 1 December 2005 in contrast to the 52 recommendations in the Senate Legal and Constitutional Legislation Committee report *Provisions of the Anti-Terrorism Bill (No 2) 2005* Canberra: The Senate, November 2005, ix–xvi.

selective internationalism approach, emerging as it has with both narrower and broader topics.

Section 102.8 of the *Commonwealth Criminal Code* creates an offence for associating with terrorist organisations. A series of exemptions from the offence are provided,<sup>172</sup> for which the defendant must bear an evidential burden,<sup>173</sup> including association only for the purpose of providing legal advice or legal representation in connection with...(iii) a decision made or proposed to be made under Division 3 of Part III of the *ASIO Act 1979* (Cth), or proceedings relating to such a decision or proposed decision,<sup>174</sup> namely the ASIO detention and questioning powers.

It is uncertain whether “proceedings” relating to a decision or proposed decision under the questioning and detention powers under Division 3 of Part III of the *ASIO Act 1979* (Cth) would extend to a range of *internationally oriented* legal and quasi-legal mechanisms. This issue was highlighted in a submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the *Anti-Terrorism Bill (No 2) 2004* (Cth).<sup>175</sup> A number of categories of the giving of legal advice relating to international legal remedies were not included in the final version of the legislation.<sup>176</sup>

Accordingly, the exclusion of these forms of communication for the provision of legal advice and legal representation arguably fall within the s 102.8 *Criminal Code* association with terrorist organisations offence. These are communications from Australia to overseas for the purpose of providing legal advice or legal representation (for the following purposes not included in s 102.8 of the *Commonwealth Criminal Code*):

- . In relation to proceedings before US courts to test the legality of detention and military commission trials following the US Supreme Court decisions in *Hamdi*<sup>177</sup> and *Padilla*<sup>178</sup> (as matters stood at the time of the passage of the s.102.8 *Criminal Code* offence) and subsequently, in relation to any changes

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<sup>172</sup> *Commonwealth Criminal Code* s 102.8 (4).

<sup>173</sup> See note to *Commonwealth Criminal Code* s 102.8(4): “A defendant bears an evidential burden in relation to the matters in subsection (4)”.

<sup>174</sup> *Commonwealth Criminal Code* s 102.8(4).

<sup>175</sup> Submission 87 to Senate Legal and Constitutional Legislation Committee Inquiry into Provisions of the *Anti-Terrorism Bill (No 2) 2004*.

<sup>176</sup> *Anti-Terrorism Act (No 2) 2004* (Cth).

<sup>177</sup> *Hamdi v Rumsfeld* 542 US 507 (2004).

<sup>178</sup> *Padilla v Rumsfeld* 542 US 426 (2004).

negotiated by the US Executive with Congress to the military commissions process following the US Supreme Court decision in *Hamdan*<sup>179</sup> in 2006.<sup>180</sup>

. In relation to other proceedings, civil and criminal, in other foreign (ie non-US) courts or tribunals.

. Communications relating to exploring possible invocation of proceedings by the Office of the Prosecutor of the International Criminal Court in relation to war crimes or crimes against humanity arising from detention overseas or in a failure or unwillingness to domestically invoke the relevant ICC provisions in the *Criminal Code* (Cth) (Chapter 8, Subdivision C and Subdivision D) for alleged offences committed overseas or in Australia but within the jurisdictional ambit of the Australian statute.

. Individual communications (complaints) under the optional protocol or other processes before the United Nations treaty system committees, that is the Human Rights Committee (ICCPR), Committee for the Elimination of Racial Discrimination (CERD) and the Committee Against Torture (CAT).

### *I. The role of a sunset clause in periodic review of the detention and questioning powers*

A further issue of selective internationalism arises in relation to the sunset clause provision of the detention and questioning powers,<sup>181</sup> and the then requirement for review of Division 3 of Part III of the *ASIO Act 1979* (Cth).<sup>182</sup> This issue emerged in the May and June 2005 Joint Parliamentary Committee hearings reviewing the legislation, where firm opposition to continuing the presence of a sunset clause in a renewal of the legislation was made by the Attorney-General's department and

<sup>179</sup> *Hamdan v Rumsfeld* (29 June 2006).2006 US LEXIS 5185

<sup>180</sup> See, for example, the *Military Commissions Act of 2006* s.3960. See also the *Detainee Treatment Act of 2005* 42 USCS 2000dd

<sup>181</sup> Formerly s 34Y of the *ASIO Act 1979* (Cth), now s 34ZZ of the *ASIO Act 1979* (Cth).

<sup>182</sup> *Intelligence Services Act 2001* (Cth) s 29(1)(bb) to review, by 22 January 2006, the operation, effectiveness and implications of: (i) div 3 of pt III of the *Australian Security Intelligence Organisation Act 1979*; and (ii) the amendments made by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*, except item 24 of sch 1 to that Act (which included div 3 of pt III in the *Australian Security Intelligence Organisation Act 1979*); and (c) to report the Committee's comments and recommendations to each House of the Parliament and to the responsible Minister. Section 29(1)(bb) of the *Intelligence Services Act 2001* (Cth) was amended by the *ASIO Legislation Amendment Act 2006* (Cth) and now requires that the Committee "review, by 22 January 2016, the operation, effectiveness and implications of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*".

ASIO. That opposition was confirmed in the official Government response of March 2006 to the Joint Parliamentary Committee report.<sup>183</sup>

Such opposition is best considered and understood in its context. That context is provided first, by the exceptional nature of the detention and questioning powers — a point canvassed, in comparative jurisdictional terms<sup>184</sup> elsewhere, but for present purposes, mentioned directly in terms of exceptionality and last resort. Secondly, context is also provided by relevant legislative examples in the UK and Canada where a sunset clause and review mechanism have been included as necessary safeguards.

It would seem as a matter of logic and consistency that powers recognised as exceptional deserve additional safeguards for executive accountability and public reassurance. The detention and questioning powers have been consistently acknowledged as of a special character, often described as powers of last resort. The last resort characterisation first arose in circumstances leading up to the passage of the legislation. Attorney-General Williams emphasised this aspect,<sup>185</sup> whilst the Attorney-General's department also argued the exceptionality of the "last resort" application of detention warrants.<sup>186</sup> It more recently arose in evidence before the Joint Parliamentary Committee Review of ASIO's questioning and detention powers.<sup>187</sup>

However, from a government perspective, there is little or no connection between that exceptionality and the desirability of a sunset clause as a further safeguard. At the passage of the legislation, the sunset clause was simply included as part of a compromise,<sup>188</sup> following earlier, strident opposition to its inclusion.<sup>189</sup> At the

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<sup>183</sup> See Parliamentary Joint Committee on Intelligence and Security *Report on the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 Government response — March 2006*, Recommendation 19, 7–8.

<sup>184</sup> See the discussion above under sub-headings following the heading "Dealing with and responding to overseas legislation".

<sup>185</sup> See Hon D Williams House of Representatives *Hansard* 20 March 2003, 13172, Attorney-General's Press Release 21 March 2002 "ASIO Legislation Amendment Bill Introduced" and 26 June 2003 "Final Passage of ASIO Powers Legislation". Attorney General Ruddock has also invoked the last resort claim: See A-G's Media Release "ASIO's Questioning and Detention Regime To Continue" 15 June 2006.

<sup>186</sup> See Senate Constitutional and Legal References Committee *Hansard* 18 November 2002, 110 and 125.

<sup>187</sup> See Joint Parliamentary Committee on ASIO, ASIS and DSD *Hansard* 19 May 2005, 3, 6, 8 and 21. See also discussion in the Joint Parliamentary Committee 2005 Report at 104–7.

<sup>188</sup> See Attorney-General's Media Release 'Compromise For The Sake Of National Security'" 11 June 2003: "These (amendments) are in addition to the substantial

review of the legislation, continued inclusion of a sunset clause was strongly objected to by the Attorney-General's department for a variety of reasons.<sup>190</sup>

The departmental reasons advocating removal of the sunset clause were extensive and carefully cultivated. They included that the 'current national security and counter-terrorism environment justifies the continued need for the powers and that the sunset clause should be removed';<sup>191</sup> that the "inflexible nature" of the sunset clause means that the expiration of the legislation could coincide with a time of national crisis;<sup>192</sup> that reviews accompanying sunset clauses are resource intensive, diverting resources from protecting the Australian community to the review and re-enactment of legislation to avoid the lapsing;<sup>193</sup> and some extraordinary claims intended to diminish the significance of the sunset clause, which ignore its restraining influence on agency culture and the qualitative difference for review when it is underpinned by the reality of the legislation's prospective expiration:

There is really no magic in a sunset clause. If there is any concern about the operation of the legislation (which may become evident through parliamentary committee reviews, reports or inquiries by the IGIS, or through other means) or if it becomes clear that the powers are no longer required (for example, through continual parliamentary committee reports that the powers have not been used and appear to be no longer necessary), then the Parliament can change or remove the legislation. This would achieve the objective of changing or removing the powers if the threat environment changes and the powers are no longer needed, but (as the then Director-General of Security noted) without the artificiality and difficulties that may be caused by an arbitrary time limit imposed by a sunset provision.<sup>194</sup>

Clearly, the tenor of this claim — exemplified by the implicit, unrealistic role of a neutral, non-partisan, responsive Parliament — would further concentrate executive

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number of amendments that we have already agreed to in an effort to secure passage of the Bill, including that the bill will sunset in three years time'.

<sup>189</sup> See Attorney-General's, Media Release 'Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill House Message'' 12 December 2002: "'The Government has repeatedly stated that a sunset clause is not appropriate. We are moving amendments to remove the sunset clause inserted by the Opposition in the Senate'.

<sup>190</sup> Indeed, removal of the sunset clause was listed as '7. Key recommendation — removal of sunset provision' in the Attorney-General's Department submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD review of ASIO's questioning and detention powers.

<sup>191</sup> 'Submission 102, above n 99, 10.

<sup>192</sup> 'Submission 102, above n 99, 10.

<sup>193</sup> Submission 102, above n 99, '10.

<sup>194</sup> Submission 102, above n 99, 11.'

power and remove one of a limited number of effective accountability measures. It completely discounted the dynamics of effective, substantive review tied to a fixed expiration of the legislation, which actually expresses its exceptionality.

These attitudes and approaches produced suggestions which may be described as Australianised review alternatives, premised upon removal of the sunset clause. Such alternatives are wholly inadequate given the exceptionality and reach of the powers. They place a disproportionate trust in the influence of the Parliamentary Joint Committee on Intelligence and Security over an executive with little interest in implementing effective accountability mechanisms.<sup>195</sup>

Whilst elsewhere international comparative examples have been engaged and responded to in pursuing concentrations of such powers, in this instance there was no such engagement, because to do so would encounter recent examples where the utility of a sunset clause has been endorsed.

The *Criminal Code* (Canada) limits the operation of the investigative hearing mechanism to terms of five years duration, unless specifically renewed by the Parliament. As previously discussed, Section 83.28 of the *Criminal Code* (Canada) provides for an investigative hearing for the purposes of the gathering of information for the purposes of an investigation of a terrorism offence. Under s. 83.32, s.83.28 (as well as ss 83.29 and 83.3) of the *Criminal Code* (Canada) cease to apply at the end of the fifteenth sitting day after December 31, 2006 ‘unless, before the end of that day, the application of those sections is extended by a resolution — the text of which is established under subsection (2) — passed by both Houses of Parliament in accordance with the rules set out in subsection (3)’.

Subsection (2) of s 83.32 of the *Criminal Code* states:

The Governor-General in Council may, by order, establish the text of a resolution providing for the extension of the application of sections 83.28, 83.29 and 83.3 and specifying the period of the extension, which may not exceed five years from the first day on which the resolution has been acceded to by both Houses of Parliament.

Subsection (4) of s 83.32 of the *Criminal Code* states:

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<sup>195</sup> The Joint Parliamentary Committee itself found ‘arguments in favour of retaining the sunset clause the more compelling...The debate on the legislation will necessarily be more extensive if it must go through a Committee review, such as the current one, and then be debated as legislation in the chambers of the House of Representatives and the Senate. Only a sunset clause will achieve this. Anything else is potentially academic or indefinitely deferrable’: Joint Parliamentary Committee 2005 Report, 106–7.

The application of sections 83.28, 83.29 and 83.3 may be further extended in accordance with the procedure set out in this section, with the words “December 31, 2006” in subsection (1) read as “the expiration of the most recent extension under this section”.

Accordingly, the Canadian legislation — at its most expansive point equivalent to an Australian questioning only warrant — includes a sunset clause specifically requiring reinstatement of the provisions every five years.

In the United Kingdom, the *Terrorism Act 2000* (UK) was implemented as permanent counter-terrorism legislation, replacing periodically renewed legislation that contained a sunset clause,<sup>196</sup> as well as removing a derogation from the *European Convention of Human Rights*,<sup>197</sup> the derogation having been made following an adverse finding against the UK in the European Court of Human Rights.<sup>198</sup>

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<sup>196</sup> See J J Rowe, ‘The Terrorism Act 2000’ [2001] *Criminal Law Review* 527, 527. The preceding legislation was the *Prevention of Terrorism (Temporary Provisions) Act 1989* (UK) and the *Northern Ireland (Emergency Provisions) Act 1996* (UK).

<sup>197</sup> The derogation from Article 5(3) was removed on February 19, 2001: See per Lord Bassam of Brighton in House of Lords debate vol 611, col 1432 ‘In order to withdraw those derogations, the Bill provides a system for extensions of detention under independent judicial authority. The Government intends to lift the derogations once those provisions are in force’. The *Terrorism Act 2000* (UK) bore on its face the Minister’s statement of compatibility with the Convention, in conformity with s 19(1)(a) of the *Human Rights Act 1998* (UK).

<sup>198</sup> In 1988, following the judgment of the European Court of Human Rights in *Brogan and Others v United Kingdom*, where the Court found a violation of Articles 5(3) and 5(5) of the *European Convention of Human Rights*, the UK notified a derogation for Article 5(3) in relation to terrorism powers applying to Northern Ireland enabling further detention for up to 5 days upon authority of the Secretary of State. Schedule 3 of the *Human Rights Act 1998* (UK) contains the 1988 notification of the derogation to the Council of Europe ‘to ensure compliance with the obligations of Her Majesty’s Government in the United Kingdom of the Convention’, stating ‘Since the judgment of 29 November 1988 as well as previously, the Government have found it necessary to continue to exercise, in relation to terrorism connected with the affairs of Northern Ireland, the powers described above enabling further detention without charge for periods of up to 5 days, on the authority of the Secretary of State, to the extent strictly required by the exigencies of the situation to enable necessary enquiries and investigations properly to be completed in order to decide whether criminal proceedings should be instituted. To the extent that the exercise of these powers may be inconsistent with the obligations imposed by the Convention the Government has availed itself of the right of derogation by Article 15(1) of the Convention and will continue to do so until further notice’. In *Brannigan and McBride v United Kingdom*,



The relevant section of the 2005 enacted legislation dealing with control orders, section 13(1) of the *Prevention of Terrorism Act 2005* (UK) provides that 'Except so far as otherwise provided under this section, sections 1 to 9 (dealing with control orders) expire at the end of the period of 12 months beginning with the day on which this Act is passed'. Section 13(2) allows the Home Secretary to make an order by statutory instrument enabling revival of sections 1 to 9 for a period not exceeding one year or for the sections to continue in force from the time they would otherwise expire for a period not exceeding one year. Section 13(4) requires that the making of a section 13(2) order by the Home Secretary must be preceded by a draft being laid before Parliament and approved by a resolution of each House.

The relevance of this UK experience for present consideration of ASIO's questioning and detention powers is the insistence and eventual inclusion of a sunset clause in the UK legislation controlling movement, contacts and conduct, providing a linkage through reasonable suspicion of involvement in terrorism related activity. Furthermore, that legislation is not expanded to include innocent persons who may be thought to have information relevant to a terrorism offence.

The omission of discussion about the UK sunset clause from the present review can be seen as a further example of selective internationalism. That view is reinforced by developments from the September 2005 COAG Terrorism summit, where Federal, State and Territory leaders agreed to the introduction of control orders and preventative detention<sup>199</sup> — with a review to be conducted by COAG itself after five years<sup>200</sup> and a sunset clause of 10 years.<sup>201</sup> Strikingly absent from Government advocacy are the time limits and review instituted in the comparable UK control orders legislation, which itself only arose because of the declared inconsistency by the House of Lords of indefinite detention of suspected international terrorists under the *Anti-Terrorism Crime and Security Act 2001* (UK), a difficulty which comparably would not arise in relation to constitutional aliens under the *Migration*

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the European Court of Human Rights found that the derogation of Article 5(3) satisfied the requirement of Article 15 on the basis of a public emergency.

<sup>199</sup> Now enacted as div 104 and div 105 of the *Criminal Code* (Cth) by the *Anti-Terrorism Act (No 2) 2005* (Cth).

<sup>200</sup> Reflected in s 4 of the *Anti-Terrorism Act (No 2) 2005* (Cth).

<sup>201</sup> Council of Australian Governments Special Meeting on Counter-Terrorism 27 September 2005 Communique. Section 104.32 of the *Anti-Terrorism Act (No 2) 2005* (Cth) specifies that (1) A control order that is in force at the end of 10 years after the day on which this Division commences ceases to be in force at that time (and) (2) A control order cannot be requested, made or confirmed after the end of 10 years after the day on which this Division commences. Section 105.53 provides a ten year sunset clause in similar terms to section 104.32 for preventative detention orders and prohibited contact orders.

*Act 1958* (Cth) powers, following the High Court's decisions in *Al Kateb*<sup>202</sup> and *Al Khafaji*.<sup>203</sup>

In further articulating this Australianised approach, the Attorney-General announced<sup>204</sup> that the five year sunset clause and review period recommended by the Parliamentary Joint Committee Inquiry into ASIO's Questioning and Detention Powers<sup>205</sup> would not be adopted. Instead, a 10 year review period and sunset clause would be enacted,<sup>206</sup> justified on the dual basis of consistency with the 10 year sunset clause for preventative detention legislation agreed at COAG and because 'recent experience with statutory reviews has demonstrated that they are resource intensive and do have an impact on operational priorities'.<sup>207</sup> The continuation of the questioning and detention powers for the next decade was confirmed with the passage of the *ASIO Legislation Amendment Act 2006* (Cth) on 13 June 2006.<sup>208</sup>

In a similar manner, whilst UK legislation<sup>209</sup> has been cited as the precedent and model for Australian preventive detention, the UK legislation continues to provide a higher criminal threshold than what is envisaged under the Australian legislation.<sup>210</sup> Significantly, the form of legislation extending preventative detention up to 14 days, as agreed by the States and Territories, for constitutional reasons<sup>211</sup> is

<sup>202</sup> *Al-Kateb v Godwin and Others* (2004) 219 CLR 562.

<sup>203</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* 219 CLR 664.

<sup>204</sup> See House of Representatives *Hansard* 29 March 2006, 4–5 and Attorney-General's News Release 29 March 2006 "ASIO's Questioning and Detention Regime To Continue".

<sup>205</sup> *ASIO's Questioning and Detention Powers Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* Canberra: Parliamentary Joint Committee on ASIO, ASIS and DSD, 102–8, recommendation 19, 108.

<sup>206</sup> See House of Representatives *Hansard* 29 March 2006, 4–5 and Items 32 and 33, sch 2 *ASIO Legislation Amendment Bill 2006* (Cth).

<sup>207</sup> House of Representatives *Hansard* 29 March 2006, 4.

<sup>208</sup> See A-G's Media Release "ASIO's Questioning and Detention Regime To Continue" 15 June 2006. The Assent date for the legislation was 19 June 2006. See also s.34ZZ of the *ASIO Legislation Amendment Act 2006* (Cth) : " This Division ceases to have effect on 22 July 2016".

<sup>209</sup> *Terrorism Act 2000* (UK) ss 40 and 41.

<sup>210</sup> 'In relation to preventative detention orders COAG noted...the AFP must have reasonable grounds that making the order would substantially assist in preventing a terrorist attack or, where a terrorist act has occurred, preserve evidence': Council of Australian Governments Special Meeting on Counter-Terrorism 27 September 2005 Communique

<sup>211</sup> 'State and Territory leaders agreed to enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact, including preventative detention for up to 14 days': Council of Australian

potentially open to a still broader threshold.<sup>212</sup> In another sense, it can also be argued that comparisons with the UK and the need for preventative detention are further misleading in that the existing ASIO detention powers language forms a preventative purpose<sup>213</sup> and that the ASIO powers have been previously characterised elsewhere as preventative in nature.<sup>214</sup> Indeed, the preventative language associated with the then proposed ASIO detention powers in 2001 strongly suggests that the 2005 Australian preventative detention reforms are

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Governments Special Meeting on Counter-Terrorism 27 September 2005 Communiqué.

<sup>212</sup> As evidenced in the language of the Communiqué, which is Commonwealth-specific: ‘The NCTC will settle the amendments to the Commonwealth Criminal Code by the end of October 2005 and consider options for harmonising State and Territory legislative provisions’ and the fact that the attachment to the communiqué refers only to the AFP and proceeds on the assumption of a Chapter III separation of powers as applying to the Commonwealth: ‘the AFP must have reasonable grounds that making the order would substantially assist in preventing a terrorist attack or, where a terrorist act has occurred, preserve evidence...an AFP officer could issue an order for an initial 24 hours; that period could be extended by an issuing authority for a further 24 hours only; the total detention period allowable would be a maximum of 48 hours; an issuing authority would be a Magistrate or Judge who agrees to act as an issuing authority in their personal capacity’.

<sup>213</sup> See s 34F(4)(d) of the *ASIO Act 1979* (Cth) (request for questioning and detention warrant): ‘that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person: (i) may alert a person involved in a terrorism offence that the offence is being investigated; or (ii) may not appear before the prescribed authority; or (iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce’.

<sup>214</sup> See Senate Legal and Constitutional References Committee *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* 77–78 under the headings “Protective detention” and “Preventive detention”. See also Attorney-General’s Media release “New Counter-Terrorism Measures” 2 October 2000: “Such action only would be authorised where the magistrate or tribunal member was satisfied it was necessary in order to protect the public from politically motivated violence”; ABC Television, ‘A-G defends new anti-terrorism laws’, “*Lateline*, 27 November 2001; and *Enclosure: Report of Australia to the Counter-Terrorism Committee of the United Nations Security Council Pursuant to Paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001*, 10, UN Doc S/2001/1247 (2001) — the power of detention referred to is ‘for up to 48 hours without legal representation in very serious cases where such a step is necessary to prevent a terrorist attack’. Interestingly, the evidence-preservation aspect in s 34F(4)(d)(iii) of the *ASIO Act 1979* (Cth) also appears as a justification following the September 2005 COAG terrorism summit: “In relation to preventative detention orders COAG noted “the AFP must have reasonable grounds that making the order would substantially assist in preventing a terrorist attack or, where a terrorist act has occurred, *preserve evidence*.”

reclamations or expansions of that existing concept, inappropriately mobilising<sup>215</sup> the example of the UK legislation as comparative justification, and conferring those powers on police agencies rather than ASIO.<sup>216</sup> Such a hypothesis is entirely consistent with widely and publicly expressed government frustration<sup>217</sup> of not obtaining the scope of ASIO powers, absent the inclusion of current safeguards,<sup>218</sup> which it had sought in 2002–2003.

*J. Asserted compliance with international human rights obligations and the implementation of Security Council Resolution 1373*

Another intersection of the questioning and detention powers with international comparative examples arises in situations where it has been asserted that the legislation complies with international human rights obligations. The Attorney-General's department's response to this issue has been to consistently assert full compliance of the legislation with such obligations.

A most obvious instance arose early on in relation to the meaning of then clause 34 J of the *ASIO Legislation Amendment (Terrorism) Bill 2002* (Cth) requiring humane treatment of detainees.<sup>219</sup> It was seen as sufficient in the original versions of the bill

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<sup>215</sup> On the basis that whilst it can be said that the UK provisions have a preventative element, the threshold test in ss 40 and 41 of the *Terrorism Act 2000* (UK) of concern in the commission, preparation or instigation of acts of terrorism and the structure of the legislation leading to investigation, charge or release. See also Annex A “Pre-Charge Detention Periods” of letter of UK Home Secretary dated 15 September 2005 regarding the *Terrorism Bill 2005* (UK) to Conservative and Liberal Democrats spokespersons on home affairs, which uses the phrase “early preventative arrest” but goes on to state that ‘The aim must always be to ensure that a person is charged with an appropriate offence’ and ‘why it may not be possible to gather all the evidence in the time currently available in terrorist cases’.

<sup>216</sup> Indeed, the major conceptual difference between the ASIO detention powers and the AFP detention powers appears that ‘a person detained could not be questioned except to confirm their identity’: Council of Australian Governments Special Meeting on Counter-Terrorism 27 September 2005 Attachment.

<sup>217</sup> See Attorney-General's Media Releases, ‘Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill House Message’ 13 December 2002); ‘Compromise For The Sake Of National Security’ 11 June 2003) and ‘Final Passage of ASIO Powers Legislation’ 26 June 2003).

<sup>218</sup> As evidenced in a comparison between the original version of the *ASIO Legislation Amendment (Terrorism) Bill 2002*, introduced into the House of Representatives on 21 March 2002, and the final version of the bill, passed on 26 June 2003.

<sup>219</sup> See *ASIO Act 1979* (Cth) s 34T(2): ‘The person must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment, by anyone exercising authority under the warrant or implementing or enforcing the direction’.

to have a statement of the requirement of humane treatment, without penalties for breach and without a protocol to guide the operation of detention and questioning warrants.<sup>220</sup>

Likewise, the requirements for drafting the protocol itself<sup>221</sup> included no specific reference to the *ICCPR* articles or General Comments on those articles, nor require consultation with the Commonwealth Human Rights Commissioner or other competent human rights authority in its preparation.<sup>222</sup> All that was additionally indicated was that ‘ASIO, together with the Australian Federal Police and the Attorney-General’s Department have been working on the Protocol...Relevant standards, including United Nations Rules in relation to detained persons, have been taken into account in preparing the document’.<sup>223</sup>

Similarly, it was seen as a sufficient response to a question about the meaning of “humanely” in the provision, to explain the word in general terms deriving from

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<sup>220</sup> See Parliamentary Joint Committee on ASIO, ASIS and DSD *Hansard* 30 April 2002, 40–41. See also original version of *ASIO Legislation Amendment (Terrorism) Bill 2002* (Cth), introduced into the House of Representatives on 21 March 2002, cl 34J(2): ‘The person must be treated with humanity and respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment, by anyone exercising authority under the warrant or implementing or enforcing the direction’.

<sup>221</sup> Formerly *ASIO Act 1979* (Cth) s 34C (3A), now s 34C *ASIO Act 1979* (Cth). See also sch 1 pt 3 Item 20 Transitional — existing Protocol of the *ASIO Legislation Amendment Act 2006* (Cth).

<sup>222</sup> *ASIO Act 1979* (Cth) s 34C(3A) stated: ‘The adopting acts in relation to a written statement of procedures to be followed in the exercise of authority under warrants issued under 34D are as follows: (a) consultation of the following persons by the Director-General about making such a statement : (i) consultation of the following persons by the Director-General about making such a statement (i) the Inspector-General of Intelligence and Security; (ii) the Commissioner of Police appointed under the *Australian Federal Police Act 1979*; (b) making of the statement by the Director-General after that consultation; (c) approval of the statement by the Minister; (d) presentation of the statement to each House of the Parliament; (e) briefing (in writing or orally) the Parliamentary Joint Committee on ASIO, ASIS and DSD (whether before or after presentation of the statement to each House of the Parliament’.

A similar procedure has been adopted in the *ASIO Legislation Amendment Act 2006* (Cth): see s 34C(1)–(6) of the Act, the major difference being that the statement prepared by the Director General and approved by the Minister is a legislative instrument made by the Minister on the day on which the statement is approved, with the Director required to brief the Parliamentary Joint Committee on the statement after it is approved by the Minister.

<sup>223</sup> Attorney-General’s, Media Release ‘ASIO Protocol To Guide Warrant Process’, 12 August 2003 .

international conventions,<sup>224</sup> rather than more precisely identifying its origins in Articles 7 and 10 of the *International Covenant of Civil and Political Rights* and refining its meaning by definition and exposition in the legislation by drawing upon the communications determined by the Human Rights Committee on these Articles, as well as the General Comments on the Articles.<sup>225</sup> It was asserted shortly thereafter that, contrary to various submissions received by the Committee, none of the provisions of the legislation breached Australia's obligations under the *International Covenant on Civil and Political Rights*.<sup>226</sup>

At the later Senate Legal and Constitutional References Committee hearings, the genesis for the detention and questioning powers was seen as UN Security Council Resolution 1373.<sup>227</sup> However, subsequent UN Security Council Resolutions building upon Security Council Resolution 1373 have cautioned the need to implement counter-terrorism measures in a manner that respects international law, in particular international human rights, refugee and humanitarian law.<sup>228</sup> Such statements now have to be read in conjunction with Security Council Resolution 1373.

Australian legislative practice and implementation of UN Security Council Resolution 1373 has not been consistently and identifiably linked with the introduction of the detention and questioning powers.<sup>229</sup> Furthermore, various other UN human rights bodies have emphasised the need to implement counter-terrorism obligations and measures in a manner consistent with human rights — such as the

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<sup>224</sup> See Parliamentary Joint Committee on ASIO, ASIS and DSD *Hansard* 30 April 2002, 41: 'It may be possible to add that this provision derives in part from provisions of a number of international conventions that deal with human rights...The question of what is or what is not humane will depend to some extent on the context. The decisions of the various committees that look at those conventions bear that out'.

<sup>225</sup> Namely, General Comment 20 on Article 7 and General Comment 21 on Article 10.

<sup>226</sup> Parliamentary Joint Committee on ASIO, ASIS and DSD *Hansard* 30 April 2002, 49.

<sup>227</sup> See Senate Legal and Constitutional References Committee *Hansard* 12 November 2002, 2: 'The United Nations in resolution 1373 set the parameters of the new approach that countries around the world took to this problem. While not divorcing itself from the approach of punishing and prosecuting terrorists, there was a new focus on ways to prevent terrorism in the first place. Most of the material in resolution 1373 deals with that new approach'.

<sup>228</sup> See SC Resolution 1456 (2003) para 6 and SC Resolution 1566 (2004) preamble.

<sup>229</sup> See Greg Carne, 'Detaining Questions or Compromising Constitutionality? The ASIO Legislation Amendment (Terrorism) Act 2003 (*Cth*)' (2004) 27 *University of New South Wales Law Journal* 524, 536–45.

Sub-Commission on the Promotion and Protection of Human Rights,<sup>230</sup> the Commission on Human Rights,<sup>231</sup> and the High Commissioner of Human Rights<sup>232</sup>

Later responses, both at the Parliamentary Committee stage<sup>233</sup> and in a written submission<sup>234</sup> continue the approach of a brief, asserted, but unsubstantiated compliance of detention and questioning provisions with international human rights obligations. In total, this particular interaction of the detention and questioning powers provides an additional dimension of selective internationalism — a failure to expound and justify how these provisions fully comply with both international obligations and international human rights obligations — its selectivity

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<sup>230</sup> *Terrorism and human rights* Sub-Commission on Human Rights Resolution 2004/21, 2: ‘all measures to counter terrorism must be in strict conformity with international law, including international human rights and humanitarian law standards and obligations’.

<sup>231</sup> *Protection of human rights and fundamental freedoms while countering terrorism* Human Rights Resolution 2005/80, 2: ‘that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law...that everyone is entitled to all the rights and freedoms recognized in the Universal Declaration of Human Rights without distinction of any kind’ and *Report of The Independent Expert On The Protection of Human Rights And Fundamental Freedoms While Countering Terrorism* (submitted in accordance with Commission on Human Rights resolution 2004/87), 6: ‘Success in the struggle against terrorism, however will require the international community not just to respond to its violent consequences, but to uphold the rule of law in combating it’.

<sup>232</sup> *Promotion and Protection of Human Rights Protection of human rights and fundamental freedoms while countering terrorism* 4: ‘the High Commissioner for Human Rights, Louise Arbour, has stressed her view that counter-terrorism measures, whilst both urgent and necessary, must be taken within a context of strict respect for human rights obligations’.

<sup>233</sup> See Joint Parliamentary Committee on ASIO, ASIS and DSD *Hansard* 19 May 2005, 5: ‘The second area of concern is to do with our human rights obligations. The comments about them are quite similar to some of the comments that were made when the legislation was first put together. I can assure you that our department has examined these points again, these submissions, and we do not believe that this legislation is inconsistent with those human rights obligations...It is not arbitrary and so much of its focus is about ensuring that there are reasonable limitations to it’.

<sup>234</sup> See Submission No 102 (Attorney-General’s Department supplementary submission) to Parliamentary Joint Committee on ASIO, ASIS and DSD Review of ASIO’s questioning and detention powers at 23: ‘Many submissions and witnesses have referred to international human rights obligations and suggested that our legislation is deficient in this regard. There does not appear to have been anything new on this issue raised in the hearings, and our view remains as set out in our opening statement to the Committee on 19 May 2005’.

characterised through the omission of a great deal of material that needs to be addressed and explained.<sup>235</sup>

This further variant of selective internationalism, the asserted compliance of the detention and questioning powers with international law and human rights obligations, lacking in public substantiation, perhaps is part of a broader selective culture in Australian counter-terrorism measures — one that fails to integrate human rights mechanisms and expertise in counter-terrorism policy and procedural activity. In fact, there is a marked disconnection of international human rights framework from the formulation of the detention and questioning powers. The compliance as exists is likely to have been produced coincidentally by ad hoc amendments, rather than as a systematic method of drafting compliance. A significant example of these phenomena arise again in the further acquisition of preventative detention powers under the *Anti-Terrorism Act 2005* (Cth).

## V. CONCLUSION

The Australianisation of international comparative examples in developing a counter-terrorism ASIO questioning and detention regime has many dimensions and characteristics. The range of examples canvassed in this article demonstrates how the development of Australian detention and questioning powers has taken on a unique format, by interacting with and engaging international examples and approaches to encourage and produce executive-orientated Australian legislative objectives and consequences. This process has been identified and described as one of selective internationalism. The consistency and variety of its manifestations strongly suggest that it is a deliberate, overarching executive and legislative approach to the introduction and development of controversial intelligence gathering questioning and detention laws.

The objectives and consequences of selective internationalism include accretions of executive power, an expansion and reliance upon executive discretion, a constant re-working and re-visiting of legislative provisions to expand power with increasing demands that such amendments be speedily enacted, as well as a deliberate diminution or exclusion of international human rights safeguards for the Australian questioning and detention provisions.

It is both instructive and appropriate to see the Australianisation process regarding the detention and questioning powers legislation as located within and drawing upon some broader developments. Under the heading ‘Examining Individual and

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<sup>235</sup> International standards were referred to in submissions opposing the legislation and these are noted in the Joint Parliamentary Committee 2005 Report, above n 10, 29. .



Community Rights',<sup>236</sup> the Secretary of the Attorney-General's department observed:

The second area requiring attention over the next couple of years is an examination of our understanding of individual and community rights in the 21<sup>st</sup> century...things are a bit different now. Australia and Australians have been nominated as terrorist targets. We have to ensure that we take all the steps necessary to protect the safety of our community as a whole and, in the process, to protect the rights of individuals within our society...I do not see these moves as an infringement of individual rights. I see them as reflecting the extent to which we, as a society, agree that our individual rights fit within the overall interests of the Australian community as a whole in a more dangerous world.

These statements, made by the head of the department sponsoring and responsible for the questioning and detention powers, signal a public justification of concentrating executive power under the mantle of counter-terrorism. The community rights reference is really advocating a state-centric security approach, tending towards a decidedly more formalist or guided democracy model, claiming and reconstituting individual protection through protection of the community. The product of such a model is a likely marginalisation or neutralisation of individual type human rights content in legislation. This view coincides with and reinforces the Australianisation process in relation to the international comparative examples.

A further significant international context within which the detention and questioning powers can be more readily comprehended is the more extensive attempt by the United States administration to construct an intelligence gathering detention regime<sup>237</sup> — one essentially where the suspect — non-suspect distinction is rendered largely irrelevant and the principle of prolonged detention, during which accepted human rights principles are severely curtailed or excluded, is normalised. These later characteristics have to a smaller degree been borrowed and adapted for the Australian model and instituted within a legislative framework.

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<sup>236</sup> Robert Cornall, 'A Strategic Approach To National Security' Paper presented at the Security In Government Conference, Canberra, 10 May 2005. For criticism of Cornall's approach, see Christopher Michaelsen, 'Security Against Terrorism: Individual Right Or State Purpose?' (2005) 16 *Public Law Review* 178; Ian Barker, 'Human Rights in an age of counter-terrorism' (2005) 26 *Australian Bar Review* 267, 274–5; Greg Carne, 'Beware a populist approach to counter-terrorism laws' *The Canberra Times* (Canberra) 11 August 2005.

<sup>237</sup> See generally Phillippe Sands, *Lawless World America and the Making and Breaking of Global Rules* (2005); Karen Greenberg and Joshua Dratel (eds), *The Torture Papers The Road To Abu Ghraib* (2005) and Michael Ratner and Ellen Ray, *Guantanamo: What the World Should Know* (2004).

This development represents a fundamental re-alignment, so that everyone is a potential source of intelligence and subject to detention. The character and practical effects of the loss of liberty associated with detention are seen as unremarkable and unproblematic,<sup>238</sup> as they are being pursued for a nominally preventative, pre-emptive and/or intelligence gathering purpose. Its milder characteristics and assumptions — such as incommunicado detention and a focus upon the individual as a potential human information source, rather than a subject of reasonable suspicion, culpability or guilt — are found in the Australian detention and questioning provisions. Likewise, the model sees criminal law investigation, charge and prosecution as incidental, rather than central to, that executive-mandated process.<sup>239</sup>

Such characteristics overall are likely to produce a transformative shift in the balance between representative interests and executive interests in the Australian polity, facilitated by an expanding penumbra of secrecy over the questioning and detention powers.<sup>240</sup> This concentration of executive power raises fundamental questions about the character and transformation of Australian democratic values, institutions and practices — supposedly the very matters being safeguarded, in part, by the questioning and detention powers against an international terrorism threat. The Australianisation process and its selective internationalism will itself generate the momentum and justification for further concentrations of executive power, doubtless through ongoing amendments to the legislation, prompted and justified by each successive major terrorist incident.

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<sup>238</sup> See Parliamentary Joint Committee on ASIO, ASIS and DSD *Hansard* 19 May 2005, 7 and 14 and 20 May 2005, 16: ‘But that is the purpose of the act. A person does not necessarily have to be a suspect. The act covers someone who may have or could provide information as to potential terrorist threats’.

<sup>239</sup> Note, however, the lack of derivative use immunity for evidentiary purposes in the prosecution of criminal offences from intelligence gathered from the questioning and detention provisions: see *ASIO Act 1979* (Cth) s 34L(9). Critical observations were also made about the potential for misuse of coercive questioning powers to lay the groundwork for a charge of providing false and misleading information, an offence under s 34G(1)–(9) (now 34L(1)–(9) of the *ASIO Act 1979* (Cth): see Joint Parliamentary Committee 2005 Report, 24, 25.

<sup>240</sup> See s 34ZS(1)(a)–(f) and s 34ZS(2)(a)–(f) of *ASIO Act 1979* (Cth) and s. 105.41 Disclosure Offences and ss. 105.15 and 105.16 Prohibited contact orders in *Anti-Terrorism (No 2) Act 2005* (Cth).