THE USE AND ABUSE OF POWER AND WHY WE NEED A BILL OF RIGHTS: *THE ASIO (TERRORISM) AMENDMENT ACT 2003* (CTH) AND THE CASE OF *R V UL-HAQUE*

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This paper assesses the legislative changes contained in the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 *(Cth) and their effects, in light of the recent case of* R v Ul-Haque. *The author argues that this case is significant for a number of reasons: first, it illustrates the extent to which the new powers are open to abuse by ASIO officers. Second, it argues that those powers erode the fundamental legal principles of a democratic state, including the right to silence, the right to adequate legal representation and most importantly, the right of habeas corpus. Third, on the basis of a comparison between the interviews conducted by ASIO and those conducted by the Australian Federal Police, the case demonstrates why it is inappropriate for ASIO to wield detention and interrogation powers. Finally, the author suggests that the case highlights the growing need for a statutory bill of rights on at least two grounds: to ensure that rights are protected at law and to promote civics education.*

I INTRODUCTION

In December 2001, philosopher Jurgen Habermas was asked whether he thought the September 11 attacks had changed the meaning and character of terrorism. His response was that while the monstrosity and scale of the act was new, the event alone could not explain why terrorism itself should have assumed a new character. Essentially, the event did not change the meaning and the character of what we understand to be 'terrorism' or whom we identify as 'terrorists.' Unlike guerrillas who fight on familiar territory and have defined political objectives with the aim of seizing power, terrorists are scattered around the globe and are networked like secret services. They declare (at most) religious motives of a fundamentalist kind, but do not pursue any clear program or political agenda beyond crafting destruction, insecurity and fear. What this attack did change, however, was our ability to adequately assess the risk of an attack, anticipate its form or determine its magnitude. According to Habermas, 'the terrorism we associate for the present with the name "al-Qaeda" makes the identification of the

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opponent and any realistic assessment of the risk impossible. This intangibility lends the terrorism a new quality.'[1]

The intangibility of this form of terrorism, Habermas writes, 'leaves a threatened nation, which can react to such uncertain dangers only through administrative channels in the embarrassing position of possibly overreacting because of the inadequacy of its intelligence information'.[2] Such an overreaction runs the risk of discrediting the state on account of 'the inappropriateness of the measures it deploys, whether internally by a militarisation of security that undermines the rule of law or externally by mobilising a disproportionate and ineffective military and technological supremacy'.[3] This assessment of the change in the nature of terrorism and the effect it could potentially have on the state has been borne out in the legislative and military agenda pursued by various nations, including the United States, Europe and Australia.[4]

My aim in this paper is to assess the effects of the legislative changes contained in the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) (*'ASIO Amendment Act'*) in light of the recent case of *R v Ul-Haque*.[5] In this case, Adams J found that the interviews conducted by Australian Security Intelligence Organisation (*'ASIO'*) officers were inadmissible in the trial of the accused on the grounds that they constituted 'a gross breach of the powers given to the officers under the warrant' and 'in substance, they assumed unlawful powers of direction, control and detention'. Adams J concluded that the conduct of the ASIO officers 'was a gross interference by the agents of the state with the accused's legal rights as a citizen, rights which he still has whether he be suspected of criminal conduct or not and whether he is a Muslim or not'.[6] The case offers a rare glimpse into the activities of an organisation that is otherwise shrouded in secrecy and confirms suspicions about the dangers of

1 Jurgen Habermas, *The Divided West* (Ciaran Cronin trans, 2006 ed) 7 [trans of *Der Gespaltene Westen*].

2 Ibid.

3 Ibid 8.

4 Habermas' intuitions were echoed by the former Attorney-General Philip Ruddock in 2004 but with a very different emphasis. In an address to the Sydney Institute, Ruddock spoke of the necessary measures needed to fight this indeterminate threat. He claimed that:

> The war on terror is like no other war in living memory. This is a war which may have no obvious conclusion, no armistice and no treaty. Victory in this war will not necessarily be measured by territory gained or regimes toppled. In this war victories will be measured by disasters averted and democracy strengthened. This war's victories will be measured by citizens feeling safe in their homes ... In enacting such laws we are not only preserving traditional notions of civil liberties and the rule of law, but we are recognising that these operate in a different paradigm. If we are to preserve human rights then we must preserve the most fundamental right of all – the right to human security.

Philip Ruddock, 'A New Framework: Counter-Terrorism and the Rule of Law' (Speech delivered at the Sydney Institute, Sydney, 20 April 2004), cited in Michael Head, 'ASIO, Secrecy and Lack of Accountability' (2004) 11 *Murdoch University Electronic Journal of Law* 2. The concern here was not that the new measures would deprive us of our civil liberties and undermine the rule of law, but intriguingly, that these laws were necessary to protect our rights and uphold the rule of law.

5 (2007) 177 A Crim R 348 (*'Ul-Haque'*).

6 Ibid 378.

giving law enforcement powers to an intelligence-gathering body with very little accountability to the public.

I argue that this case is significant for a number of reasons: first, it illustrates the extent to which the powers conferred on ASIO risk being abused in the name of national security. Second, I argue that these powers erode the fundamental legal principles of a democratic state, including the right to silence, the right to adequate legal representation, and most importantly, the right of habeas corpus. Third, on the basis of a comparison between the interviews conducted by ASIO and those conducted by the Australian Federal Police ('*AFP*'), I argue that the case demonstrates why it is inappropriate for ASIO to wield detention and interrogation powers. Finally, I suggest that the case highlights the growing need for a statutory bill of rights on at least two grounds: to ensure that rights are protected at law; and to promote civics education.

II THE *AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION LEGISLATION AMENDMENT (TERRORISM) ACT 2003* (CTH)

Intelligence organisations in Australia have traditionally enjoyed extensive powers, including the power to tap telephones; install listening devices in homes, cars and offices; intercept telecommunications; open people's mail; monitor on-line discussions; use personal tracking devices; obtain warrants to search premises; and infiltrate and conduct clandestine surveillance on suspect organisations and political activists.[7] Under the Howard Government, ASIO was given extraordinary and unprecedented powers to detain and interrogate non-suspects on the grounds that they might have information about a possible terrorism offence.[8] These powers were deemed necessary on the basis that the threat of terrorism could be countered by mounting a secret intelligence war similar to the one that contained the threat of communism.[9] As Cain points out, the new powers enable ASIO to infiltrate, document and observe the Islamic organisations which harbour would-be terrorists, halt their money supply and pool information with other intelligence organisations, both in Australia and internationally.[10] To this end, the Howard Government allocated A$232 million

7 See *Australian Security Intelligence Organisation Act 1979* (Cth) div 2, ss 25–29.

8 It should be noted that investing in intelligence organisations and expanding their powers has traditionally occurred under liberal governments. For example, in 1916, Prime Minister William Hughes expanded the role of intelligence agencies as a means of prosecuting dissenters against the war, including critics of his leadership. In the 1920s, Prime Minister Stanley Bruce tried to suppress the new Communist Party of Australia ('CPA') by using legislation and surveillance bodies. In 1940, Prime Minister Robert Menzies legislated to ban the CPA and to allow government intelligence bodies to seize their documents and prosecute members. During the cold war, ASIO was created. Since Menzies, liberal governments have, as Cain points out, continued to nurture intelligence bodies in their efforts to uphold the law and in the name of national security. For an excellent analysis of the history of ASIO, see Frank Cain, 'Australian Intelligence Organisations and the Law: A Brief History' (2004) 27 *University of New South Wales Law Journal* 296.

9 Ibid 313.

10 Ibid.

to intelligence agencies in general and A$131 million to ASIO in particular to expand their personnel levels.[11] The legislative changes gave ASIO detention and interrogation powers that were greater than those of state and federal police and ensured that the organisation was protected from public scrutiny of its activities through a number of secrecy clauses. These powers effectively transformed the organisation's function from intelligence-gathering to law enforcement.

In its original form, the Bill (as introduced to Parliament in 2002) provided for the questioning and detention of persons without legal representation for up to 28 days. Persons could be held in a secure location and interrogated by ASIO agents. The Bill removed the right to silence, compelling the person to provide all information, despite the possibility that it could be used against them in subsequent criminal proceedings for terrorism. Failure to meet any of these demands could lead to a five-year jail sentence. Persons detained could be subjected to strip searches, including children. The Bill provided for the incommunicado detention of persons without charge for up to 48 hours. By allowing for warrants to be repeatedly sought and issued, the Bill provided for the possibility of indefinite detention.[12]

The Bill was referred to the Parliamentary Joint Committee on ASIO, ASIS and DSD (*'PJCAAD'*) for review and to the Senate Legal and Constitutional Legislation Committee. The PJCAAD received over 150 submissions from ASIO, other government departments and agencies, non-government organisations and interested individuals.[13] The Report made recommendations in relation to three main areas: the issue of warrants; the detention regime, including legal representation and protection against self-incriminations; and accountability measures.[14] The Senate Legal and Constitutional Legislation Committee made recommendations in relation to the administrative detention of non-suspects, the executive power to issue warrants and the particular powers of questioning and detention in the Bill.[15]

In December 2002, the Senate amended the Bill to reflect some of the recommendations made by the reports, with the exception of the recommendations made in relation to complete access to legal representation during detention, the questioning or the detention of children and the proposed three-year sunset clause. The Bill was finally passed in March 2003 with further amendments that included a sunset clause and an amendment to the *Intelligence Services Act 2001* (Cth) empowering the PJCAAD to review the questioning and detention powers before their expiry.[16]

11 Head, above n 4, 2.

12 Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, 'History of the Legislation' in *Review of Division 3, Part III of the ASIO Act 1979 – Questioning and Detention Powers* (2005) 122–3.

13 Ibid.

14 Ibid.

15 Ibid.

16 Ibid 125.

On 27 November 2003, the Government introduced further amendments in response to the Attorney-General's request that a report be commissioned on the 'shortcomings' of the legislation. The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2003 (Cth) amended the new Division 3, Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (*'ASIO Act 1979'*) by extending the maximum period during which a person using an interpreter could be held for questioning under an ASIO warrant. Other changes included the requirement that the subject of an ASIO warrant surrender their passport(s), with the consequence of criminal liability if he or she left the country without express permission from the Director-General of Security while the warrant was in force. It also created new offences relating to the disclosure of information about ASIO warrants or other operational information. This was passed in December 2003.[17]

The transformation of ASIO from an intelligence-gathering body to a law enforcement agency is just one of the inappropriate measures taken by the government in the face of the indeterminate and unidentifiable threat of the 'new' terrorism. The new powers are based on what Jenny Hocking refers to as 'universalised surveillance'. This is the idea that anyone in the population can be a potential suspect, or might have information about an attack. The approach to intelligence-gathering is one of pre-emption, 'according to which the state needs to anticipate threats, a crisis mentality in which peace-time is only a time before war-time and which renders the entire population the "enemy" in a militarised approach to domestic security'.[18] The fact that the four men responsible for the London bombings in 2005 were British Muslims who had become radicalised, two of whom had not come into contact with intelligence agencies, gave weight to the belief that the threat of terrorism could come from anyone at any time, further justifying the need for such 'universalised surveillance'.

Hocking argues that universalised surveillance creates an environment where:

> Nothing can remain private and everything is therefore unreliable. Indeed, providing whatever information is required – regardless of its veracity – clearly becomes the sole means of release from this form of intelligence-gathering detention. Gossip and unsubstantiated reports on the actions and beliefs of others lead us to into the authoritarian and now well-documented dangers of McCarthyism: 'naming', creating lists, and demands for loyalty.[19]

Such a legislative regime can only be justified if sufficient fear is generated about the immediacy or imminence of a terrorist attack. This fear is not necessarily based on a present reality, but on the basis of an unknowable and indeterminate, but nevertheless likely, future attack. The exploitation of such fear renders any

17 Ibid.

18 Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2004) 233.

19 Ibid.

measures, no matter how extraordinary, justifiable, including the controversial detention and interrogation powers given to ASIO.[20]

III DETENTION AND QUESTIONING POWERS: DIVISION 3, PART III OF THE *ASIO ACT 1979*

Division 3, Part III of the *ASIO Act 1979* gives ASIO the power to request a warrant to compulsorily question and/or detain persons aged 16 years and above who are suspected of having *information* relating to 'terrorism offences.' The person need not be suspected of engagement in any criminal or terrorist activity or even have any knowledge of an offence. All that is required is that the Minister be satisfied that 'there are reasonable grounds for believing that it will substantially assist the collection of intelligence that is important in relation to a terrorism offence' and that relying on other methods of collecting intelligence would be ineffective.[21] Prior to this, ASIO did not have questioning and detention powers. Powers of detention belonged to the state and federal police, who could only detain a person on grounds of suspicion that the person had committed a criminal offence.[22] Under those provisions, a person has the right to legal counsel and the right to remain silent. The right to choose whether to assist one's accusers by answering their questions lies at the very centre of the common law rule excluding involuntary confessions and the rule of the *Uniform Evidence Act* excluding confessions obtained by violence, oppression or inhumane or degrading conduct.[23] Subjects of police detention have to be immediately charged, or released.

In general, a person cannot be detained for interrogation and can decline a police request for assistance in investigating a matter, in the absence of any suspicion of involvement.[24] At common law, the only circumstances in which a person is required to aid the police is where a police officer calls upon that person to assist in making an arrest. A police officer does not have a common law right to require a person to answer him or her or even to give a name and address. To the extent that detention and compulsory questioning powers compel a person who is not a suspect to give information in relation to an offence, such powers undermine the common law right to silence.

Once consent to issue a warrant has been obtained from an 'issuing authority' such as a federal magistrate or judge, the person is brought before the 'prescribed

20 See, eg, the former Attorney-General's comments on the right of security as the most important right. Also, following the Bali bombings in 2002, former Prime Minister John Howard took the opportunity to emphasise, once again, the inevitability of a terrorist attack in Australia, noting that 'we're not used to having our young people blown up in Bali ... we're living in a different world and in these circumstances it is necessary, with appropriate safeguards, to adjust it': cited in Hocking, above n 18, 232.

21 *ASIO Amendment Act* s 34C.

22 *Williams v R* (1986) 66 ALR 385.

23 Jill Hunter, Camille Cameron and Therese Henning, *Litigation II* (7th ed, 2005) 574.

24 See also Head, above n 4, for an analysis of ASIO's new powers and its lack of accountability.

authority' immediately for detention and questioning.[25] The legislation allows the person to contact a single lawyer of their choosing once they are in detention, or once they have been brought before the authority for questioning, although there are some circumstances in which this provision does not apply. Under s 34TA, ASIO can prevent a person from contacting a particular lawyer if it is satisfied that contacting the lawyer in question will alert a person involved in a terrorism offence that the offence is being investigated. A person may also be prevented from contacting a lawyer if ASIO is satisfied that such contact may cause documents to be destroyed, damaged or altered. Despite the fact that the person can request to have a lawyer present, s 34TB allows questioning to take place in the absence of a lawyer and s 34U allows for the monitoring of contact between the person and their lawyer.

If the lawyer is present during questioning, he or she is not permitted to intervene in questioning except to request clarification of an ambiguous question. If the lawyer's conduct is deemed to be disruptive or unruly, he or she can be removed from the place where the questioning is taking place. These restrictions, as Williams argues, unjustifiably restrict the ability of a lawyer to represent their client's interests. Moreover, the concept of 'disrupting' proceedings is unknown in Australian law, 'and invites arbitrary and subjective exclusions of lawyers, particularly in the absence of judicial oversight'.[26] These provisions claim not to affect the law relating to legal professional privilege, but they nevertheless undermine lawyer-client confidentiality. For example, the legislation does not address the question of whether lawyer-client confidentiality is protected when advice during breaks is sought, giving rise to an inference that legal advice during breaks may also be monitored.[27]

Confidential communications passing between a client and his or her lawyer are protected both at common law and by the *Uniform Evidence Acts*. The objective is to enable the client to obtain legal advice in relation to existing or impending litigation.[28] In *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*,[29] the High Court held that:

> Being a rule of substantive law and not merely a rule of evidence, legal professional privilege is not confined to the process of discovery and inspection and the giving of evidence in judicial proceedings. Rather and in the absence of provision to the contrary, legal professional privilege

25 The 'prescribed authority' can be a person who has served as a judge in one or more superior courts for a period of five years and no longer holds a commission as a judge of a superior court. It is questionable whether this offends the incompatibility doctrine. While a federal judge is able to perform non-judicial functions, this is only permitted if those functions could be assigned to the individual as a *persona designata* and not in his or her judicial capacity. See *Hilton v Wells* (1985) 157 CLR 57. See also Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (3rd ed, 2002) 1284–5.

26 Submission to Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, Canberra, 24 March 2005, 5 (George Williams and Ben Saul).

27 Ibid.

28 See *Australian Federal Police Commissioner v Propend Finance Pty Ltd* (1997) 188 CLR 501 and *Uniform Evidence Acts* ss 118, 119.

29 (2002) 213 CLR 543 ('*Daniels*').

> may be availed of to resist the giving of information or the production of documents in accordance with investigatory procedures of the kind for which s 155 of the Act provides.[30]

In *Carter v Managing Partner, Northmore Hale Davey & Leake*,[31] Deane J suggested that '[privilege] plays an essential role in protecting and preserving the rights, dignity and freedom of the ordinary citizen – particularly the weak, the unintelligent and the ill-informed citizen – under the law'.[32] In *Daniels*, Kirby J went so far as to characterise the privilege as a fundamental civil and political right. The fact that ASIO can refuse the person's choice of lawyer, arbitrarily have a lawyer removed, and/or monitor what are essentially confidential communications between a client and his or her lawyer undermines not only the right to legal representation,[33] but also the rationale behind the rule of privilege. If the lawyer cannot interrupt proceedings except to ask for clarification of a question, it is not clear that he or she will be able to protect his or her client's interests and rights. At the same time, the monitoring of exchanges is likely to inhibit full and frank disclosure, which will, in turn, limit the legal advice the lawyer will give. For this reason, the claim that the provisions do not affect legal professional privilege appears to be more formal than substantive.

Questioning can last up to 24 hours, or up to 48 hours with an interpreter, within a maximum detention period of 168 hours or 7 days. According to Williams, this period, applicable to non-suspects, exceeds the already prolonged investigative period for federal and state terrorism offences in relation to terror suspects.[34]

The legislation also gives ASIO the power to further detain a person for further questioning under the warrant. In order to invoke these powers, the authority must be satisfied that there are reasonable grounds for believing that if the person is not detained, he or she will alert another person involved in a terrorism offence that they are being investigated, or that the person may destroy, damage, or alter a record or thing that has been requested in relation to the warrant.[35] The proceedings relating to detention and questioning must be video taped.[36]

On release, the person is subject to a number of secrecy clauses, prohibiting him or her from disclosing any aspect of the detention process, including where they

30 Ibid 551.

31 (1995) 183 CLR 121.

32 Ibid 133.

33 This is a common law right established by the High Court in *Dietrich v R* (1992) 177 CLR 292.

34 Williams and Saul further point out that the ASIO legislation permits detention for a maximum period of detention that is seven times longer than the period allowed for the investigation of terrorism offences, even though the subjects detained under ASIO legislation need not be suspected of any criminal activity. For example, under the *Crimes Act 1914* (Cth), a person arrested for a terrorism offence may only be detained for the purpose of investigating the offence for a period of four hours. The investigation period for serious, non-terrorism federal offences may only be extended for up to eight hours. The maximum period of detention is thus 12 hours, as per s 23D: See Williams and Saul, above n 26.

35 *ASIO Amendment Act* s 34HB(3)–(4).

36 *ASIO Amendment Act* s 34K.

were held and the methods employed by ASIO officers.[37] The detention of the person cannot be made public or discussed while the warrant is in effect and no 'operational information' about the detention can be disclosed for two years.[38] 'Operational information' includes any information held by ASIO, as well as information relating to ASIO sources and any 'method or plan' used by ASIO during the investigation. The secrecy provisions also apply to the person's lawyer. Section (7)(a) makes it an offence for a legal advisor to communicate to third persons information relating to the questioning or detention of the subject unless that communication is authorised by the authority. This offence carries with it a maximum penalty of five years imprisonment. The same rules apply to the person's parents if they are present during questioning.

The secrecy provisions contained in the 2003 amendments were deemed to be necessary to prevent persons suspected of plotting a terrorist attack from communicating with one another during an investigation. In the Second Reading Speech, the (then) Attorney-General Phillip Ruddock stated that:

> Currently people who obtain information as a result of the execution of a detention warrant are not under any obligation to refrain from discussing information they have obtained during questioning with others. This means that there is no deterrent to stop people from warning others who may be involved in a potential terrorist attack. The spread of such information could jeopardise efforts to stop such an attack.[39]

The questioning and detention powers, combined with the secrecy clauses, are arguably the most controversial aspect of the legislation as they specifically target non-suspects and therefore undermine the fundamental common law principle of habeas corpus. On these grounds, it has been convincingly argued that the powers lack constitutional validity. By empowering the executive to detain Australian citizens who have not committed an offence for the purposes of intelligence-gathering, the legislation potentially breaches the separation of powers and undermines basic rights.[40] In *Lim v Minister for Immigration, Local Government and Ethnic Affairs*,[41] the High Court held that:

> It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under

37 *ASIO Amendment Act* s 34ZS(1).

38 *ASIO Amendment Act* s 34ZS(2).

39 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2003, 23107–9 (Phillip Ruddock, Attorney-General).

40 See Williams and Saul, above n 26.

41 (1992) 176 CLR 1 ('*Lim*').

> our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[42]

While there are exceptional cases in which involuntary, non-punitive detention is permissible, such as where a person is committed to custody awaiting trial, or by reason of mental illness, infectious disease, or during war time under the defence power,[43] the joint judgment noted that 'the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth'.[44] A further question in *Lim* was whether a legislative scheme of detention in the absence of punishment for a criminal offence usurped judicial power. This question was determined by applying a test of proportionality. The court was of the opinion that a law purporting to establish a detention regime would be punitive in nature, and therefore offend Chapter III of the *Australian Constitution*, if it failed the test of proportionality. According to Brennan, Deane and Dawson JJ:

> The two sections will be valid laws if the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary ... On the other hand, if the detention which those sections require and authorise is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers ... In that event, they will be of a punitive nature and contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates.[45]

The principle established in *Lim* was that detention must be limited to what is 'reasonably necessary' for a valid purpose. Anything exceeding such purpose will be punitive in nature, and therefore unconstitutional on the basis that it offends the separation of powers.[46]

In defending the legislation against the charge that it was unconstitutional, the Attorney-General's Department submitted that the detention authorised by the

42 Ibid 27.

43 Ibid 28.

44 Ibid 28–9.

45 Ibid 33.

46 See also McHugh J's comments in *Al-Kateb v Godwin* (2004) 219 CLR 562 (*'Al-Kateb'*) regarding indefinite detention. McHugh J argued that it was 'not true' that indefinite detention at the will of the executive was an alien concept in Australia. During the First and Second World Wars, a number of people were detained under national security regulations because the government considered them disloyal to or a threat to the security of the nation. Such 'protective' detention was not limited to people born overseas, and was upheld by the High Court. He further held that there was 'no reason to think that this court would strike down similar regulations if Australia was again at war': *Al-Kateb* (2004) 219 CLR 562, 55–61. It should also be noted that while the majority rejected the principle established in *Lim* on the grounds that the constitutional authority for immigration detentions comes directly from the 'aliens' provision, the relevant law does not need to be 'appropriate and adapted' or 'reasonably necessary' to be within power. Nevertheless, it was agreed by both the majority and minority judgements that immigration detention had to be for a valid 'purpose' otherwise it would be punitive in nature and would amount to the type of imprisonment that could only be imposed by the courts.

legislation was essentially non-punitive in nature and was supported by several constitutional powers, including the s 51(vi) defence power, the s 51(xxiv) external affairs power and the implied power to protect the polity.[47] However, these powers can only be relied upon where the law in question is purposive in character in the sense that it serves the direct and explicit purpose of defending the Commonwealth or fulfilling Australia's international obligations. The law cannot merely relate to the subject matter of the powers, but must serve their particular purposes.

The High Court applies a test of proportionality to determine whether laws enacted under these provisions are purposive in character and therefore constitutional. For example, in *Nationwide News Pty Ltd v Wills*,[48] Mason CJ held that the test of proportionality was relevant to the external affairs power because, where a law is designed to fulfil Australia's obligations under an international treaty, it is the purpose of the law which gives it a sufficient connection with 'external affairs.' The same applies to the defence power. A law will be valid under the defence power if it is *conducive* to defence, and not simply if it has the subject matter of 'defence'.[49] It is not sufficient for a law to be *about* defence; it must serve the *purpose* of defence for it to be constitutional. Second, Mason CJ argued that in determining whether the requirement of reasonable proportionality had been satisfied, it was necessary to ascertain whether, and to what extent, the law went beyond what was reasonably necessary or conceivably desirable for the achievement of the legitimate object sought to be attained, and whether the law caused adverse consequences unrelated to the achievement of that object.[50]

The test of proportionality in relation to limitations on the executive power of detention under the s 51(xix) aliens power was more recently examined in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*.[51] There, the court emphasised that the power to detain was merely incidental to effecting deportation or was otherwise to enable the making and consideration of an application for an entry permit.[52] In that case, detention was also subject to various qualifications, including a limitation on the total period a person could be detained in custody and time limits on the finalisation of appeals and

47 See Legal and Constitutional Affairs Committee, Commonwealth Senate, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002) Ch 4.

48 (1992) 177 CLR 1.

49 Ibid 30. Mason CJ stated that 'even if the purpose of the law is to achieve an end within power, it will not fall within the scope of what is incidental to the substantive power unless it is reasonably and appropriately adapted to the pursuit of an end within power [that is] unless it is capable of being considered to be reasonably proportionate to the pursuit of that end'.

50 Ibid 31.

51 (2003) 126 FCR 54 (*'Al Masri'*).

52 Ibid 68–9. A complete analysis of the constitutional issues arising from this legislation is outside the scope of this paper. For the most comprehensive examination of the constitutional validity of these sections, 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, 532–3, 557.

reviews.[53] In *Al Masri,* the Full Federal Court held that the absence of a limitation period that would bring about release from detention would go beyond what was constitutionally permissible.[54]

If it is the case that non-punitive detention is constitutional provided that reasonable time limitations are imposed on the period of detention, it is likely that ASIO's new powers are inconsistent with Chapter III of the *Constitution.* The legislation enlarges ASIO's powers through extended detention time, increased flexibility of questioning within that detention time and the removal of any requirement to seek renewal of the detention and questioning warrant every 48 hours from a judge or federal magistrate. These aspects of the legislation may be unconstitutional because they do not satisfy the time limitation qualification as per *Lim* and *Al Masri.* Detention under the warrant is not for short 48-hour time periods but has been expanded to 168 hours, with no need to obtain further warrants for detention during that time. If a further warrant is sought in relation to information that has been obtained during the original detention period, there is no requirement for a minimum time interval before the person is taken back into custody. As Carne points out, '[i]t is therefore conceivable that there might only be a brief period of time between the first and second or subsequent detentions, meaning – in practical application – extended detentions.'[55]

The validity of detention was once again examined by the High Court in *Thomas v Mowbray*[56] in relation to control orders. The power to make interim control orders imposing obligations, prohibitions and restrictions upon an individual for the purpose of protecting the public from a terrorist act was found to be valid. Control orders were considered to be not dissimilar to bail and apprehended violence orders, insofar as the objective of both is 'preventive justice'. Gleeson CJ held that '[i]t is not correct to say, as an absolute proposition, that, under our system of government, restraints on liberty, whether or not involving detention in custody, exist only as an incident of adjudging and punishing criminal guilt.'[57] Restraint of a person is justified in the form of a control order if it would assist in preventing a terrorist act. However, the justification of control orders on these grounds is very different from the power to detain and question a person who is not suspected of any involvement in a terrorist act or terrorist training, but who *may* have some information in relation to same.

In defending the legislation against the charge that it was unconstitutional, the Attorney-General sought to rely on an expanded notion of the defence power, arguing that Australia was fighting a war of sorts, in the form of international terrorism. While it is the case that the High Court has upheld the validity of detention measures as essential to the defence of the Commonwealth during wartime, the relevant cases are all based upon an assessment of a direct risk

53 *Lim* (1992) 176 CLR 1, 254–5.

54 *Al-Masri* (2003) 126 FCR 54, 72–3; see also Carne, above n 50, 558 for a full analysis of this issue.

55 Carne, above n 52, 556 and *ASIO Act 1979* ss 34D(1A), 34D(1A)(ii).

56 (2007) 233 CLR 307.

57 Ibid 330.

of allowing a person to remain at large within the community.[58] That is, they served the explicit purpose of defending the Commonwealth. By contrast, the *ASIO Amendment Act* has only the secondary purpose of speculative intelligence-gathering from persons who do not pose any threat or risk to security or defence, in circumstances that are far from full-scale war hostilities.[59] Given this, it is not entirely clear how these laws are purposive in character insofar as they do not serve the purpose of meeting Australia's obligations under international law, or defending Australia from a terrorist attack.[60] Arguably, the laws also fail to meet the second requirement of Mason CJ's formulation of the proportionality test insofar as the laws have adverse consequences unrelated to the objective of countering the threat of terrorism). While the threat of a terrorist attack may exist, it is not sufficiently imminent to justify emergency powers.

The lack of any direct threat suggests that the powers given to ASIO may be disproportionate to the threat of a terrorist attack. The anti-terror legislative package was enacted largely in response to overseas attacks in New York, London and Madrid. Those attacks, coupled with a few non-specific threats made by al-Qaeda and other extremist groups about a possible attack on Australia as an ally of the US were deemed to be sufficient to enact the legislation.[61] While it is certainly possible that a terrorist attack could occur in Australia as Australia has not been immune from attack in the past, it is not possible to anticipate when it is likely to occur or what form it will take.

Even if the threat of a terrorist attack does exist, it cannot be accepted that the terrorist threat facing Australia constitutes a public emergency threatening the life of the nation. As Williams argues, 'international law requires that an emergency must be actual or imminent, not merely anticipated. It must also involve the whole population and threaten the interests of the nation, such as its physical or territorial integrity, or the functioning of state organs.'[62] A public emergency is defined by the European Court of Human Rights as a 'situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of a community which composes the State in question.'[63] Since 2001, Australia's national counter-terrorism alert level has been set at a 'medium' risk of terrorist attack. The level has never been set at 'high' or 'extreme'. The mere possibility of a terrorist attack occurring does not justify the detention on national security grounds of citizens

58 Carne, above n 52, 532–3.

59 Ibid 533.

60 The question of whether a legislative scheme of non-punitive detention offends the separation of judicial powers is also determined by applying the proportionality test. If the law is found to be punitive in nature, it fails the test and is deemed unconstitutional. It remains unclear whether the detention at issue in the *ASIO Amendment Act* is punitive in nature, despite assertions by the Attorney-General that it is not. For a full examination of this issue, see Carne, above n 52, 554–5.

61 For comments made by Bin Laden and Al-Qaeda, see, eg, the Australian Institute of International Affairs, Director-General's Address, 'National Security: The Need for Global Collaboration' (Public Statement, 31 May 2007).

62 Williams and Saul, above n 26, 4.

63 *Lawless v Ireland* (1961) Eur Court HR (ser A) 56.

who are non-suspects. To the extent that the legislation does this, it undermines our basic rights as citizens.[64] Moreover, given the elusiveness with which modern terrorism is conducted, it is not entirely clear how such legislation would prevent such an attack from occurring. To be sure, the objective of these laws is to gather intelligence by encouraging members of the community to give any information they may have, but detention and compulsorily questioning is not necessarily the best way of achieving this.

IV *R V UL-HAQUE*: ILLEGAL INTERROGATION AND DETENTION

The powers of detention and interrogation conferred by the legislation, the secrecy provisions prohibiting disclosure of ASIO's operational activities and its general lack of accountability to the public raised legitimate concerns that this confluence of factors would encourage and implicitly sanction lawlessness within the organisation. The clandestine nature of ASIO's activities has meant that legal challenges to its activities have always been difficult.[65] This is partly because of a general reluctance on the part of the judiciary to review ASIO's security assessment decisions. For example, in *Church of Scientology v Woodward*,[66] the High Court found that ASIO's functions in relation to intelligence-gathering were not subject to judicial review. Gibbs CJ rejected the plaintiff's claim that ASIO acted outside the scope of its permissible activities in continuing to gather intelligence in the absence of a security threat. His Honour found that:

> Today's intelligence may seem to establish that a suspected person is a loyal citizen; further information obtained tomorrow may show that he is engaged in espionage or subversion. There is nothing in the Act of 1979 that leads to the unlikely conclusion that ASIO must cease to obtain intelligence about a particular person unless its initial investigations are successful in establishing that he is a security risk.[67]

In relation to judicial review of ASIO's activities, Gibbs CJ held that:

> the legislation does not entrust to the courts the power to decide that ASIO may not obtain particular intelligence on the ground that it is not relevant to security. By s 20 the Parliament requires the Director-General to take all reasonable steps to ensure that the work of ASIO is limited to what is necessary for the discharge of its functions.[68]

While Brennan J dissented, claiming that the Court did have the jurisdiction to compel compliance with the Act, he nevertheless found that it would be difficult

64 I return to this issue in the final section of this paper.

65 See Joo-Cheong Tham, 'Casualties of the Domestic "War on Terror": A Review of Recent Counter-terrorism Laws' (2004) 28 *Melbourne University Law Review* 512, 520; Joo-Cheong Tham, 'ASIO and the Rule of Law' (2002) 27 *Alternative Law Journal* 216; Head, above n 4 and Cain, above n 8.

66 (1980) 154 CLR 25 ('*Woodward*').

67 Ibid 51–2.

68 Ibid 52.

for a plaintiff to bring an action against ASIO on account of the restrictions imposed on the admissibility of evidence relevant to security.[69]

This reluctance to question ASIO's conduct and the obstacles in bringing an action against ASIO – not least of which are the difficulties in obtaining classified evidence – have traditionally given ASIO significant discretion in terms of what it is able to investigate. However, it has also had the effect of justifying many of its activities, irrespective of how necessary they may be, on the grounds of national security. While in principle, ASIO's activities are subject to judicial review (as ASIO is an arm of the executive), in practice, its activities are extremely difficult to regulate on account of the allegedly sensitive information it deals with. In *Woodward*, Wilson J pointed out that by protecting ASIO in this way, the 'legislature makes clear its reliance upon the integrity and competence of the Director-General to ensure that ASIO conforms to its charter, and pays some attention to political processes in relation to the office'.[70] However, the reluctance of the judiciary to review ASIO's activities, and the trust placed in ASIO's Director-General by the legislature, are premised on the assumption that ASIO's primary function is intelligence-gathering, not law enforcement, as per s 17 of the *ASIO Act 1979*. The detention and questioning powers conferred by the new legislation change the nature and function of the organisation. If ASIO is to be given law enforcement powers, then it should be subject to the same public accountability as the AFP and state police, in the form of judicial review and other controls. In the absence of such controls, the potential for illegal behaviour increases markedly.

Section 34VAA consolidates the secrecy provisions of an already covert organisation, thereby sheltering ASIO from public scrutiny and accountability. It makes it difficult to monitor ASIO's activities such as how it executes warrants, or how effective the interrogations have been, as these are not a matter of public record. Submissions to the PJCAAD from journalists and the media claimed that these provisions undermine freedom of speech and the right to know. As one journalist stated:

> independence of a society means an ability to self-assess and freedom to question its functions. If a government warrant is carried out in entire secrecy, then the system tends to lean towards politics clearly separated from democracy ... prohibition of information publication for two years compromises immediacy. Those 24 months become a period of inaction and a tool of silencing.[71]

This lack of public accountability means that ASIO officers could act illegally and not be held accountable.

Secondly, as *Woodward* demonstrates, the secrecy offences prevent legal challenges to some of ASIO's activities. While the Act allows for disclosure in the

69 Ibid 71.

70 Ibid 40.

71 Cited in PJCAAD, above n 12, 86.

case of initiating legal procedures in relation to a detention or questioning warrant, this exception is quite limited. For example, the 'permitted disclosure' exceptions do not extend to disclosure of information for the purpose of legal proceedings in relation to ASIO's investigatory activities connected to the warrant. Disclosure of such information would constitute an 'operational information' offence, such that individuals cannot challenge the legality of such investigatory activities.[72]

The secrecy provisions, coupled with the detention and interrogation powers, raise new concerns about the extent to which ASIO's activities and investigations undermine civil liberties and implicitly sanction lawless behaviour. For example, McCulloch and Tham argue that the new powers make ASIO a hybrid organisation,

> a security organisation with police powers but unchecked by the usual due process protections afforded to suspects in the criminal justice system. The newly enacted secrecy offences compound the problems related to lack of transparency by further immunising ASIO from legal checks and, hence, implicitly sanctioning lawless behaviour.[73]

These concerns and intuitions were borne out in the case of *Ul-Haque*. This case, I suggest, forces us to question whether ASIO is the most appropriate organisation to wield such powers, whether a clarification of our rights as citizens in the form of a bill of rights is all the more pressing in light of these new anti-terrorism measures.

Ul-Haque was charged with offences against s 102.5(1) of the *Criminal Code Act 1995* (Cth) for training with the organisation Lashkar-e-Taiba (*'LeT'*) in 2003.[74] Further evidence against the accused was that he was in contact with Faheem Lodhi, who was charged with preparing for a terrorism offence. This connection brought the accused to the attention of ASIO, which led to the interviews that were the subject of the case.[75] The prosecution sought to rely on admissions alleged to have been made by the accused to AFP and ASIO officers in a series of interviews conducted on 7 and 12 November 2003 and 9 January 2004. The question before Adams J was whether the interviews were admissible as evidence. He found that they were not, on the grounds that the conduct of the ASIO officers was illegal. Two notable and interconnected issues emerge from the case. The first relates to ASIO's use of fear and intimidation in its interrogation of the accused. The second relates to the lack of awareness the accused seemed to have of his rights.

72 See Tham, above n 65. Tham argues, for example, that if ASIO questions one of Willie Brigitte's acquaintances then taps the phone of this person in breach of the *ASIO Act 1979*, it seems that this illegality could not be tested in courts, as it would be an 'operational knowledge' offence to disclose the fact that the phone has been illegally tapped.

73 Jude McCulloch and Joo-Cheong Tham, 'Secret State, Transparent Subject: The Australian Security Intelligence Organisation in the Age of Terror' (2005) 38 *Australian and New Zealand Journal of Criminology* 400, 406.

74 Although it was noted that the organisation had not been declared a terrorist organisation at the time the alleged training took place. Nevertheless, the prosecution claimed that LeT was a relevant terrorist organisation at the time because it was directly or indirectly engaged in preparing, planning, assisting or fostering a terrorist act. See *Ul-Haque* (2007) 177 A Crim R 348, [2], [3].

75 See Sarah Sorial, 'Guilt by Association: The Anti-terrorism Case of *R v Lodhi*' (2007) 32 *Alternative Law Journal* 160.

ASIO had a warrant to search the accused's home for reasons that were not detailed in the judgment. The warrant did not, however, give ASIO the power to detain or question anyone, except for the purpose of executing the search warrant. Nevertheless, in a gross abuse of power, three ASIO officers waited for the accused at the train station where he arrived on his way home from university and requested a private discussion with him. Unusually, the discussion took place in a nearby park. The accused describes being approached by three ASIO officers, one of whom informed him that he was in 'serious trouble' and that they needed to talk to him right away. The accused stated during the trial that he did not know where he was being taken: '[i]n my mind a lot of things were going on, you know, am I being taken to a secret location or some secret ASIO interrogation rooms. I didn't know what was going to happen to me and then they took me to a park near the Blacktown Railway Station'.[76] During the interview, the accused was not given specific details as to why ASIO was interested in him, but was only told, in very vague terms, that ASIO was conducting a terrorist investigation which had led it to the accused. The accused was also repeatedly reminded of the 'many means of investigation' ASIO had at its disposal and that it had 'considerable information about [the accused]', none of which was specifically disclosed.[77] At one point, one of the officers then drew a figure 'Y' into the ground and stated that:

> We've got two choices. We can go down the difficult path or a less difficult path. The difficult path would mean that we stand here putting these questions to you like this, having you tell us things which we know to be untrue, and having to demonstrate to you that we know these things are untrue before you give us a truthful answer. Or, we can take a less difficult path which would involve you co-operating and providing truthful answers to our questions and assisting us in resolving our concerns.[78]

The accused was also repeatedly told that there would be consequences for him if he did not co-operate, even though the ASIO officers were well aware that the accused was under no legal obligation to answer any questions without a questioning warrant and that there were, in fact, no consequences for him if he failed to comply with their request for information. The accused was then informed that his house was being raided. While travelling back to the house in an ASIO car, the accused was told once again that if he failed to co-operate, ASIO had other sources of extracting information. This exchange was not recorded, as required by the Act, and no notes were taken at the time. By using these kinds of interrogation techniques, such as thinly veiled threats, ambiguous references to information-gathering and constant reminders of the powers ASIO had at its disposal, the officers demonstrated a flagrant disregard for both the rights of the accused and the rule of law.

76 *Ul-Haque* (2007) 177 A Crim R 348, [17].

77 Ibid [20].

78 Ibid.

Following the interview in the park, the accused was told that the ASIO officers would take him home where the search warrant was being carried out. Once again, the accused was under no legal obligation to go anywhere with the officers, but the ASIO officers gave him no choice in the matter, effectively keeping him in detention.[79] A second interview, also unaccounted for, took place in the car park at Blacktown Station and a third in his bedroom. This one went from 12.04am to 3.45am with breaks. At no time during this period did the officers tell him that he was free to decline to take part if he wished.[80] In the absence of such knowledge, the accused complied with the officers' demands. In relation to the third interview, Adams J found that:

> To conduct an extensive interview with the accused, keeping him incommunicado, under colour of the warrant, was a gross break of the powers given to the officers under the warrant. The courts have, for over two hundred years, been jealous and rightly jealous, of the use which might be made of search warrants to interfere with the liberty of the citizen and the right of the citizen to his or her own privacy and to maintain the integrity of their personal possessions, including, of course, their home.[81]

The ASIO officers also used dubious interrogation methods, including problematic 'prompting' techniques. One of the officers characterised the interrogation methods in terms of 'robust discussion' and 'considerable prompting'. The latter was described in the following terms:

> Through a constant process of having to reveal limited information to him so that he understands that we knew about the matter and it seemed only in response to us revealing that we did, in fact, know something about the matter that then he gave us an answer which we believed or knew to be the truth answer.[82]

Under cross-examination, the ASIO officer admitted that if the accused responded to a question with a 'no', the officers considered the response unbelievable; the accused was then given a snippet of information, enough to suggest to him that the disbelief was reasonable, even if it was not. Such techniques, which involve the use of leading questions, remove the presumption of innocence until proven guilty and are designed to wear the person down in the hope that he or she will disclose the truth, the truth being whatever the ASIO officers think it is. Under cross-examination, the ASIO officers seemed to lack knowledge and grasp of basic procedures.

The ASIO interviews were followed by a further interview conducted by an AFP officer. By contrast, the AFP officer began the interview with a caution that the accused did not have to co-operate, that it was within his rights not to say anything and that anything he did say would be recorded and used in evidence.

79 Ibid [35].

80 Ibid [41].

81 Ibid [44].

82 Ibid [24].

Interestingly, the AFP officer was not aware of what the ASIO officers had said to the accused during the previous interviews. The officer claimed that had he been aware, he would have clearly differentiated the roles and the processes of ASIO and the AFP and would have adjusted his caution to ensure that anything said by ASIO about the legal obligation to speak was no longer operating. This is not to say that the AFP officer's conduct was completely legal during all stages of the proceedings,[83] but the AFP officer was accountable in ways that the ASIO officers were not.

Despite wielding what are essentially police powers, ASIO remains exempt from the *Freedom of Information Act 1982* (Cth), making it impossible to obtain unpublished information about the agency. The identity of ASIO officers is also protected, making it difficult to hold individuals accountable or responsible. The fact that the ASIO officers knew that they were acting illegally, but nevertheless went ahead and conducted three interviews without a warrant, suggests that they thought they could get away with anything in the name of national security.[84] Under cross-examination, they reiterated again and again the importance of the investigation, how they were pressed for time and how they were convinced the accused was not telling them everything he knew.[85] They took this to be sufficient justification for their actions, and suggested that this was consistent with the organisation's activities. The AFP, on the other hand, has a number of accountability measures built into the *Australian Federal Police Act 1979* (Cth). Part V of the Act deals exclusively with professional standards and AFP conduct. It identifies various categories of complaint and how they are to be dealt with, including police corruption and abuse of power. Moreover, the AFP is subject to annual reviews by the Ombudsman, ensuring transparency of conduct and accountability to an independent body.

By contrast, ASIO has a culture of secrecy and of operating outside the rule of law.[86] This culture has been tolerated in the past on account of ASIO's functions as an intelligence-gathering body.[87] However, giving ASIO unchecked powers of detention and interrogation (areas in which it has very little expertise) in a general climate of fear of terrorist attacks and against a backdrop of considerable political pressure to get results in terrorist investigations, leads to dubious intelligence-

83 For example, the AFP officer used threats to compel Ul-Haque to work as an informer: Ibid [108]–[114].

84 Closed court documents publicly revealed on 14 November 2007 found that senior ASIO officers had warned all of the officers involved in the raid on Ul-Haque's home that they were required to act with restraint and that they had no power to detain him or compel him to answer questions. See Natalie O'Brien and David King, 'ASIO to Feel the Heat of Scrutiny', *The Australian* (Sydney), 15 November 2007. This suggests that even if the officers were ignorant of the law, they were nevertheless briefed.

85 See, eg, *Ul-Haque* (2007) 177 A Crim R 348, [32].

86 Adams J's findings in *Ul-Haque* sparked an investigation into all of ASIO's policies and procedures. The investigation found that this case was considered the 'norm' rather than an exception: See Carne, above n 52.

87 See *Woodward* (1980) 154 CLR 25.

gathering and illegality.[88] Irrespective of the magnitude and indeterminacy of the 'new' terrorism, if we want to call ourselves a liberal democracy, the right of habeas corpus, the right to silence and the right to legal representation should be non-negotiable, as should the accountability of all public bodies. The fact that they are not when it comes to issues of national security marks a fundamental shift in the relationship between citizen and state and signifies a move towards a more executive-determined and authoritative conception of the state.[89]

V WHY WE NEED A BILL OF RIGHTS

The *ASIO Amendment Act* undermines the basic right of every citizen to move about freely in the absence of any reasonable suspicion of wrongdoing. This aspect of the anti-terror legislative framework is inconsistent with comparable legislation in other jurisdictions including Canada, the United Kingdom and New Zealand.[90] Arguably, the inconsistency arises because other jurisdictions developed their anti-terror laws around a bill of rights, which tempered the legislative responses to terrorism. The lack of rights protection at law in Australia has meant that rights are easily undermined in the name of national security. While the respect for the rule of law in the Australian political culture provides some protection of rights, as does the independence of the High Court, the absence of a bill of rights has meant that we lack a domestic reference point for setting out the basic rights and responsibilities attached to citizenship.[91] This means that any check on the power of government to abrogate human rights can only come from political debate and the goodwill of political leaders,[92] neither of which can be trusted in an age of so-called 'terror'.

The mass hysteria over the phenomenon of terrorism will invariably prevent any reasonable public debate over the issues it presents. At the same time, placing our trust in political leaders to uphold individual rights and civil liberties is a flimsy guarantee that such rights will be protected. Governments have been just as hysterical in their response to terrorism, passing extraordinary legislation with extraordinary speed and only later referring it for review.[93] This, in turn,

88 See comments made by Ben Saul, 'Bungled Terrorism Case Sparks ASIO inquiry', *ABC News* (online), 15 November 2007, <http://www.abc.net.au/news/stories/2007/11/15/2091387.htm> at 15 November 2008. Saul points out that there is a disturbing trend occurring in the investigation of terror suspects. This case, coming soon after the bungled handling of the investigation into Dr Haneef, suggests 'that there's been a kind of cultural and political pressure within the intelligence agencies to get results on terrorism investigations ... this has seemingly translated into some sloppy intelligence gathering, and in some cases seemingly excess use of statutory power'.

89 See Hocking, above n 18, 233 and Carne, above n 52, 525.

90 See Carne, above n 52, 529.

91 George Williams, 'National Security, Terrorism and Bills of Rights' (2003) 9 *Australian Journal of Human Rights* 263.

92 Ibid.

93 Conor Gearty describes this as the 'structural abuse' of perpetually rushed legislation, 'with there always being said to be only just a couple of days before all terrorist hell breaks loose unless this or that legislature buckles before the will of the executive': Conor Gearty, *The Hamlyn Lectures 2005: Can Human Rights Survive?* (2005) 105.

has created a culture where fundamental rights are all too readily sacrificed for the sake of catching would-be terrorists. Such a culture of disrespect for rights and due process was manifest in the trial of *Ul-Haque*, as was the general lack of awareness that ordinary Australians had about their basic rights when they were being undermined. This, together with other bungled terror investigations,[94] provides compelling justification for a statutory bill of rights. The purpose of the bill of rights would be to clarify our rights and responsibilities as citizens, to ensure that legislation, particularly legislation that is enacted during times of crisis, is consistent with rights guarantees, and to promote 'civics education'.

This is not to say that a bill of rights would necessarily guarantee protection of rights. The *United States Constitution* is supposed to protect both human rights and the rule of law, but has failed to do so in the context of the US government's legislative response to terrorism. Since the attacks on the World Trade Centre, the National Security Agency has been empowered by presidential order to monitor the international telephone calls and emails of US citizens and residents without a warrant, as required by law;[95] more than 80 000 people have been detained in facilities from Afghanistan to Cuba without charge[96] and rendition and torture of detainees and suspects is now a matter of course. Similarly, the UK's *Terrorism Act 2000* (UK) undermines political speech, requires the security vetting of judges, allows for the application of terrorism law extra-jurisdictionally so that it can be used against those who are seeking to overthrow dictatorships overseas, and gives police wide ranging stop and search powers, despite there being a bill of rights.[97]

The argument for a statutory bill of rights is more modest in its objectives. From a legislative perspective, a bill of rights would act as a reference point for legislators, setting up a basic threshold that cannot be crossed in enacting legislation. It would also articulate a set of political rights that include the right to equal liberties, equal rights to membership in voluntary organisations, equal rights to individual legal protection and the equal right to self-determination. These rights, as Habermas argues, are functional requirements of any legal system legitimated by democratic political processes and are thus non-negotiable.[98] Of course, the protection of rights ultimately depends on the existence of a culture of rights and arguably such a culture does exist in Australia, as evidenced by the robust public debate over the relationship between rights and counter-terrorism laws. A statutory bill of rights, enacted through the usual legislative channels and subject to judicial review, would go some way towards consolidating and augmenting rights discourse and culture in Australia.

94 Such as that of Dr Mohammad Haneef.

95 See Gearty, above n 93, 127.

96 *The Guardian*, 18 November 2005.

97 See Gearty, above n 93, 104.

98 Jurgen Habermas, *Between Facts and Norms* (William Rehg trans, 1998 ed) 127 [trans of *Faktizität und Geltung*].

A *The Case Against a Bill of Rights*

From time to time, various Australian governments have flirted with the idea of a bill of rights, but attempts at introducing one have been rejected.[99] The radical legislative changes of which the questioning and detention powers are a part, have renewed the debate over the necessity of a bill of rights. On the one hand, proponents of a bill of rights have argued that 'due to the lack of a national Bill of Rights ... the "balancing" process is far from transparent and the dynamic between security and rights is rather one-sided'.[100] On the other hand, the gross violations of human rights in nation states with bills of rights suggest that legal codification does not necessarily make much material difference to rights protection.[101] In what follows, I hope to show that while there are persuasive arguments against a bill of rights, and although the most appropriate way of addressing rights violations in the 'fight' against terror is to abolish the legislative implements responsible, the 'legal form' (as McNamara calls it) does matter in the protection of rights, both in relation to human rights discourse and culture, and in relation to its ability to defend and extend human rights values.[102]

The most obvious argument against a bill of rights as a way of countering the excesses of counter-terrorism laws is that it would be easier and more direct to simply abolish the offending legislation. As Gearty argues, in the context of liberal states, human rights are protected by the criminal justice system. Crimes such as murder, manslaughter and various other offences against the person put into practice the basic human rights to life and bodily integrity. They also make real the prohibitions on torture and inhumane treatment that are found in human rights charters. Most importantly, the criminal justice system ensures that charges are only brought against individuals where there is a reasonable suspicion of culpability and that punishment only follows after a fair trial. Crucially, Gearty writes that:

> from a human rights perspective, these crimes can be made to stick to state agents who break the law as well as other wrong-doers: on this model, torture or murder do not stop being torture or murder simply because someone with a uniform happens to be doing the killing or torturing.[103]

99 For an account of historical attempts to introduce a bill of rights, see, eg, Paul Kildea, 'The Bill of Rights Debate in Australian Political Culture' (2003) 9 *Australian Journal of Human Rights* 7. Kildea argues that the influence of utilitarianism on Australian political life has, and continues to be, evidenced by a privileging of majority interests, preoccupation with practical considerations, an aversion of abstract political concepts and a fear of the alleged power a bill of rights would give the judiciary.

100 Andrew Lynch, Ben Saul and George Williams, *Submission to United Nations Study on Human Rights Compliance while Countering Terrorism (Australia)*, 13 March 2006, Gilbert and Tobin Centre of Public Law, <http://www.gtcentre.unsw.edu.au/publications/docs/pubs/submissionUNHumanRights.pdf> at 15 November 2008.

101 See, eg, Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18, 23–5; Gearty, above n 93.

102 Luke McNamara, *Human Rights Controversies: The Impact of Legal Form* (2007) 262.

103 Gearty, above n 93, 124.

At a national level, the existing criminal justice system is the one to deploy in order to ensure that rights are protected and that politically motivated violence is adequately dealt with:

> The point is to stay within the criminal framework throughout – it orients the state in the right direction, towards law enforcement, fair procedures and sensitive, evidence-driven policing. There is no room for the language of terrorism in any shape or form.[104]

The most appropriate way of striking a balance between national security and individual liberties is not by way of a bill of rights or by counter-terrorism laws, but by way of the existing criminal justice model.

Given the contested nature of human rights and their status as political rights, a further objection against codification is that it would place human rights protection in the hands of the judiciary, rather than an elected parliament.[105] There is also an assumption, according to Tham and Ewing, that proponents of bills of rights have a 'rosy view of the capacity of the courts to protect human rights' and often have a 'dim view of parliaments as institutions where human rights are upheld',[106] an assumption that is by no means correct. Tham and Ewing argue that more generally, as a mechanism for protecting human rights, parliaments enjoy distinct advantages over courts for the following reasons: first, parliaments are not dependent upon litigation as a way of enabling rights review, but are able to engage in pre-legislative scrutiny. Second, rather than allowing the parameters of human rights debates to be cramped into legal questions, parliamentarians are free to grapple with human rights issues by drawing upon legal and other perspectives.[107]

While it is the case that parliamentary processes of decision-making reflect the interests of the majority, they also account for minority interests. As Tham and Ewing point out, there is 'clear evidence of Australian Parliaments paying attention to the rights of minorities, in particular, those of Australian Arabs and Muslims. In its review of ASIO's detention and compulsory questioning powers, PJCAAD devoted an entire chapter to the implications of these powers for Muslim communities.'[108] Such reviews are more effective forums because they allow much broader public deliberation and participation than the courts. Each of the parliamentary reviews of anti-terror laws were accompanied by a process of public consultation where anyone could make a submission and it was

104 Ibid 125.

105 For a discussion of the contested nature of human rights, see, eg, Jeremy Waldron, *Law and Disagreement* (1999) 11–12. Waldron argues that there exists fundamental disagreement regarding the nature of rights. Such disagreement reflects the fact that human rights politics are simply that, and 'disagreement (including disagreement about principles) is one of the basic circumstances of political life'. For a discussion of the way in which rights discourse has been used by both proponents and opponents of the counter-terrorism laws, see Joo-Cheong Tham and K D Ewing, 'Limitations of a Charter of Rights in the Age of Counter-Terrorism' (2007) 31 *Melbourne University Law Review* 474.

106 Tham and Ewing, above n 105, 475.

107 Ibid 476.

108 Ibid.

the accessibility of such processes that enabled Muslim representative groups to appear before all parliamentary committees conducing the major inquires into counter-terrorism laws. Moreover, according to Tham and Ewing, the record of parliamentary committees in reviewing Australian counter-terrorism laws suggests that their work has improved the protection of human rights in relation to these laws.[109] The final form of the statute reflects the way in which that process offered some protection, especially in relation to the seniority of the official required to issue the detention warrant, the detention of children and the ability to choose legal representation.[110]

The parliamentary process is thus the best mechanism or vehicle for rights protection: it allows for more deliberation, can draw on a variety of perspectives and is generally more inclusive. The courts, by contrast, cannot be as representative or as inclusive on account of the technicalities that codification invariably gives rise to, and the costs involved in litigation. As Gearty writes:

> the occasional *pro bono* case aside, these are not routes that are open to the poor, the disadvantaged, the voiceless for whom 'human rights' is supposed to be a specially tailored and supportive language. At its worst, the process of legal entrenchment takes these words from them and hands them to the rich, the powerful, the already fortunate, to do with what they will to consolidate their own advantage.[111]

Similarly, Tham and Ewing argue that:

> judicial dominance of human rights questions will likely mean that court processes will be seen as the principal method of protecting human rights ... Court decisions will become the authoritative source of human rights judgements even when bodies like government departments, parliamentary committees and community organisations are engaging in rights review of laws and executive action. Legal training, and in particular, knowledge of what is considered human rights law, will be seen as a perquisite for human rights literacy.[112]

B *The Case for a Bill of Rights on Grounds of Rights Protection and Clarification*

Abolishing the counter-terrorism legislative framework, especially the detention and questioning powers, is undoubtedly the most efficient way of redressing rights violations in this context. But while this may remove the immediate threat to civil and political liberties posed by counter-terrorism laws, it will not ensure the protection of such rights in future cases of perceived crisis. Nor will it clarify the nature and legitimacy of non-punitive detention in general. Such sentiments

109 Ibid 477.

110 Ibid 479.

111 Gearty, above, n 93, 82.

112 Tham and Ewing, above n 105, 473–4.

were expressed in the recent case of *Al-Kateb* in relation to the detention of non-citizens. McHugh J commented on the fact that while the outcome for Mr Al-Kateb was 'tragic', without a bill of rights there was nothing the High Court could do about indefinite detention:

> As long as the detention is for the purpose of deportation or preventing aliens from entering Australia or the Australian community, the justice or wisdom of the course taken by the Parliament is not examinable in this or any other domestic court. It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights.[113]

McHugh J also noted that '[i]t is an enduring – and many would say a just – criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights.'[114]

Moreover, the flagrant disregard of basic rights demonstrated by ASIO investigators, and the general discourse of 'rights' sacrifices for the sake of national security have created a general climate of confusion over what rights we enjoy as citizens. This was certainly apparent in the case of *Ul-Haque*, and more generally in the submissions made in reference to various aspects of the new legislative regime.[115] A statutory bill of rights would ensure that governments do not overstep the mark in enacting future legislation and would make explicit the rights that we do enjoy.

While the parliamentary process is often the best mechanism for rights protection, and while that process did make some notable amendments to the legislation, the final statute does not reflect a concern with human rights. Moreover, whatever rights were granted were subject to various qualifications, especially the right to legal representation. This gave the impression that the concessions were formal rather than substantive. In addition, other aspects of the counter-terrorism laws, especially those relating to sedition, have been subject to review by the Australian Law Reform Commission, but none of its recommendations have been incorporated into the legislation.[116] Further, while it is the case that parliamentary processes are vital for rights protection, the effectiveness of the deliberative process is often contingent on the goodwill of political leaders. While it can often act as a vehicle for political mobilisation, the deliberation process is also often a symbolic gesture, designed to give citizens the impression that what they think matters, while not incorporating any of their suggestions on the grounds that citizens could not possibly know what is good for them. This was a paternalism that was certainly characteristic of the former Liberal government.

113 *Al-Kateb* (2004) 219 CLR 562, 594.

114 Ibid 595.

115 See submissions made to PJCAAD more generally, <http://www.aph.gov.au/House/committee/pjcaad/> at 15 November 2008.

116 See, eg, Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006).

Further, as Webber points out and as this case illustrates, the tendency of the bill of rights debate to concentrate exclusively on legislation ignores the fact that rights violations are far more likely to emanate from the executive than from the legislature.[117] The representativeness of the legislature and its reliance on open debate and justification does, as Tham and Ewing argue, generally provide in-built protections against rights infringements, but this does not guarantee rights protection on the part of the executive. Judicial review is therefore necessary to constrain excessive executive action, interpret legislation against the bill of rights and issue declarations of incompatibility.

However, this does not mean that a bill of rights would encourage the creation of a 'freewheeling' High Court similar to that of the United States Supreme Court, which has, in the past, indulged in overt policy-making beyond its function.[118] A statutory bill of rights would constrain the judiciary because it would require the courts to interpret legislation and develop common law in a manner consistent with the rights set out in the bill. To this end, a statutory bill of rights would not only preserve parliamentary sovereignty, but would also facilitate ongoing debate and enable revision of rights discourse as the need arose. It would preserve parliamentary sovereignty because the legislature would still be able to overturn judgments handed down by the courts. It would facilitate ongoing debate because legislatures would remain the authors of the bill and could amend or revoke aspects of the bill as required, in consultation with other organisations, affected parties and institutions in the course of ordinary parliamentary process. It would provide for ongoing dialogue between the courts and the legislature. For example, the *Terrorism Act 2000* (UK) allows for ministers to respond to declarations of incompatibility made by the courts by amending the legislation by executive order, without further reference to Parliament.

The primary function of a statutory bill of rights would be to provide some role for the courts in reviewing executive and legislative action by subjecting the conduct of the executive, and to some extent, the courts themselves, to review on grounds of rights.[119] To this end, a bill of rights would govern important features of the criminal process, including the behaviour of the police, the conduct of prosecutors and those parts of criminal procedure that are not specified by statute. While these areas of law already take rights into account, a statutory bill, as Webber argues, would augment this protection by expressly articulating rights and authorising judicial review of them.[120] It would then function in the same way as judicial interpretation in other contexts. Its main advantages would be that it

117 Jeremy Webber, 'A Modest (but Robust) Defence of Statutory Bills of Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) 263, 267.

118 See, eg, Brian Galligan, *No Bill of Rights for Australia* (1989) 89 and Michael Sexton, 'A Bill of Rights Would Leave Us All Worse Off', *The Australian Financial Review* (Sydney), 22 August 2003, 54. Sexton claims that 'the law has no business in deciding issues that properly belong to Parliament'. The judiciary is there to interpret and apply the law, not make policy. If judges make incursions into the field of political decision-making, they are also undermining democracy and compromising their own independence.

119 Webber, above n 117, 266.

120 Ibid 267.

would clarify and make explicit civil and political liberties, which to date have been inferred by the High Court and therefore been open to interpretation.

A statutory bill of rights would not give courts exclusive control over rights discourse. It would merely provide a means by which rights could be enforced independent of the political process and offer avenues of redress to oppressed groups and minorities.[121] This would include asylum seekers and non-residents, prisoners in the criminal justice system and in the current case, terrorism suspects. The case of *Ul-Haque* makes apparent that we cannot necessarily trust the legislature or the executive to protect the rights that are fundamental to liberal democracies such as the right to silence, the right to legal representation and the right of habeas corpus. It illustrates the extent to which an independent judiciary plays a pivotal role in the protection of individual rights. Contrary to the claim that a bill of rights would politicise the judiciary, it would enable it to defend the rights of people to the fullest extent of the law.[122] As Higgins CJ has rightly pointed out:

> this is the role the courts have always played, and most probably always will play. A Bill of Rights – particularly a legislative Bill – does not fundamentally alter that role; it merely expands the repertoire of rights recognised, which may therefore be enforced.[123]

Given that our system does not have a comprehensive scheme of rights protection and given that many of the rights we think we have do not actually exist in law, it is time we clarify what rights we do have so that they cannot be so easily relinquished by the legislature, or abused by the executive.

C *The Case for a Statutory Bill of Rights on the Grounds of Civics Education*

Civics education is covered – to varying degrees – in formal primary, high school and tertiary education.[124] Despite this, various studies have found that there is a 'civics deficit' in Australia.[125] A 2002 study conducted by the Civics Education Group found that 'the system of government relies for its efficacy and legitimacy on an informed citizenry: without active, knowledgeable citizens the

121 It is of note that it is the High Court that has made explicit the civil and political liberties we have in Australia. The two significant cases that establish these rights are *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. A majority of judges held that the *Constitution* entrenches a system of representative democracy and that this, in turn, implies certain constitutional protection of freedom of speech, freedom of association and freedom of movement. *Dietrich v R* (1992) 177 CLR 292 established the right to adequate legal representation as an indispensable element of the common law requirement of a fair trial.

122 Terence Higgins, 'Australia's First Bill of Rights – Testing Judicial Independence and the Human Rights Imperative' (Speech delivered at the National Press Club, Canberra, 3 March 2004).

123 Ibid.

124 See, eg, Megan Davis, 'Civics Education and Human Rights' (2003) 9 *Australian Journal of Human Rights* 11 and Civics Education Group, *Whereas the People ... Civics and Citizenship Education – Report of the Civics Expert Group* (2002).

125 Civics Education Group, above n 124.

forms of democratic representation remain empty; without vigilant, informed citizens there is no check on potential tyranny'.[126] The research revealed a high degree of ignorance in the Australian community about the 'Constitutions of the Commonwealth, States and Territories', the concept of responsible government, separation of powers, and the relationship between the legislature, the executive and the judiciary. The report found that only 18 per cent of Australians surveyed had some knowledge of the *Constitution*, only 41 per cent were aware that the *Constitution* could be altered by referendum and only 50 per cent understood that the High Court was the highest court in Australia.[127] In relation to citizenship, 62 per cent thought that the main attribute of a good citizen was not breaking the law and only 33 per cent felt that they were reasonably informed about their rights and responsibilities as Australian citizens.[128] The lack of civics education in Australia means that citizens are susceptible to scare tactics and are ill-equipped to make decisions about constitutional matters including whether Australia should be a republic and whether we need a bill of rights. It also means that the majority of Australians do not know what their rights are when they come into contact with law enforcement and intelligence organisations; a fact that is often exploited, as this case demonstrates.

Ul-Haque demonstrates the extent to which ordinary Australians are not aware of their rights and how intelligence officers are able to easily exploit this. The accused reiterated that he did not think that it was within his rights to refuse to speak with ASIO officers. Instead, he believed that he was under arrest

> and that if [he] did not comply with whatever they asked me that they will either use physical violence or take me to a more sinister place to interrogate me or, you know, do something to my family or deport me, or lots of other things were going on in my mind, and the thought of choice never really occurred because I was under extreme pressure and stress.[129]

The ASIO officers not only abused their powers, but also exploited the fear felt by the accused at being targeted by ASIO. Unsure of what his rights and legal obligations were, the accused was forced to comply with unreasonable and illegal requests, including being interviewed in a park without a warrant, not being told what he was being investigated for except in very general terms, being threatened and being told that he was in 'serious trouble'. In his critique of the interrogation methods used by ASIO, Adams J came to the following conclusion:

> It is to my mind, incontrovertible that the accused was intentionally given to understand that he was under an obligation to accompany the ASIO officers and answer their questions. The nature of this obligation was, not surprisingly, not spelled out. It could not be, because the officers knew perfectly well that the accused was not obliged to accompany them or to answer their questions or provide any information. But I do not doubt that

126 Ibid.

127 Ibid, 133.

128 Ibid.

129 *Ul-Haque* (2007) 177 A Crim R 348, [21].

> he felt under compulsion to obey the directions he was given lest some action be taken against him or his family by ASIO or some other instrument of government. This is, it seems to me, the natural and obvious meaning both of the words and conduct of the officers on this occasion. Although it was described as a request, I think that his being told to accompany them to a nearby park was an instruction and was intended to be taken as such.[130]

A statutory bill of rights may go some way towards promoting and cultivating knowledge about the rights and responsibilities attached to citizenship. It would both supplement and compliment civics education programs and would further cultivate a human rights culture. While it is difficult to determine the precise effect of a bill of rights in relation to the promotion of civics education, there is evidence to suggest that the *Human Rights Act 2004* (ACT) has deepened the human rights culture in that state. As Charlsworth points out, the rights culture has benefited from greater dialogue between institutions and organisations, interest groups and academic interest. Greater transparency about human rights conversations happening within government by, for example, releasing the advice to government by the Human Rights Commissioner on particular legislative and policy proposals would further enhance rights awareness and discourse.[131]

This is not to say that a bill of rights will make all our rights-related problems disappear. Nor would it compromise our institutions or the nature of our democracy. Rather, it would act as a mechanism for instilling and reinforcing a rights culture or, in the words of Higgins J, the 'spirit of rights' in the Australian people. It would serve as 'an important reminder that no matter how fully that spirit is imbued in the hearts of the people, if it is not equally imbued in the hearts of our legislatures and administrators then the people must have a means of recourse'.[132] The counter-terrorism laws, and the way they have been enforced by the executive, suggest that such a spirit is somewhat lacking in our institutions. A bill of rights might be just the thing to revive it.

VI CONCLUSION

The legislative response to the indeterminate threat of terrorism represents a tough 'law and order' approach. Like all law and order measures, it is designed to give the impression that the government is taking action, that it is tough on terrorism and that its primary concern is the safety and protection of the Australian people. But the law and order approach has also eroded the democratic principles it alleges to protect and has discredited the state and its institutions. It has also alienated many sections of the community – including journalists, judges, and academics to name but a few – and misunderstood the more complex phenomenon of 'home grown' terrorism. If the objective of this legislation is to encourage ordinary

130 Ibid [27].

131 Hilary Charlesworth, 'Australia's First Bill of Rights: The ACT's *Human Rights Act*' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) 289, 301.

132 Higgins, above n 122.

people to report a terror suspect or terrorist plot, detention and questioning is not the most appropriate way of achieving it. At best, it breeds alienation and mistrust; at worst, it provokes widespread hostility in the vulnerable communities it targets.[133] The case of *Ul-Haque*, together with the bungled investigation of Dr Haneef, highlights the dangers of the law and order approach and invites us to consider different approaches to this complex issue, approaches that address the causes of terrorism by building relations with vulnerable communities while at the same time upholding and protecting our fundamental rights, especially that of habeas corpus.[134]

133 See, eg, John Lyons, 'Australia risks London-type Bombing', *The Australian* (Sydney), 27 October 2007, regarding comments made by an influential Islamic leader who warns that Australia also faces a London style attack if relations between intelligence and police authorities and Muslims does not improve.

134 See, eg, Cynthia Banham, 'Rudd to Shake Up National Security', *Sydney Morning Herald* (Sydney), 18 January 2008. The new Rudd Government appears to be taking steps to redress this problem. Instead of investing more funds into intelligence organisations in the hope they will uncover terrorist plots, the government is seeking ways to address the causes of terrorism itself. To this end, it is currently considering the British model of putting more resources into building relationships with vulnerable communities. This is a very different and welcome approach to that of the previous government.