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The Rudd government and national security: Is judicial oversight necessary?

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## Abstract

A vast proportion of the national security architecture to fight the amorphous global ‘war on terror’, created after 9/11, remains untouched. Prime Minister Kevin Rudd has expressed a commitment to ensuring that agencies such as the AFP and ASIO have the expertise, capacity and resources to collect and analyze the information needed to combat terrorism. Rudd has also identified a commitment to stop a terrorist attack while not compromising the integrity of democratic traditions and constitutional processes. This paper will address the tone and direction of the Rudd government’s approach to the problem of terrorism, examine proposed reform in key areas of national security legislation and explore the judicial mechanisms that are in place to assure that the security sector conducts its business in accordance with the law, national intelligence priorities and the protection of fundamental human rights.

## The Rudd government and national security: Is judicial oversight necessary?

### Introduction

In a post 9-11 world, the rationale for the Australian approach to deal with current or potential terrorist threats has received much attention. The introduction of a more broad-based, intrusive national security and law enforcement infrastructure is considerable. Both major political parties have expressed a commitment to security framework that will ensure intelligence agencies such as the Australian Federal Police (AFP) and the Australian Secret Intelligence Organisation (ASIO) have the expertise, capacity and resources to collect and analyze the information needed combat terrorism and related activities in a 'risk society' (see Beck, 1992). PM Kevin Rudd (2010) has argued that "...terrorism has become a persistent and permanent feature of Australia's security environment". At the same time, the Rudd Government broadly reinforced an assurance to professionally administrate a regime of intervention and detention powers that do not recklessly compromise the integrity of democratic traditions, processes and institutions.

Critics of terror laws have respond by claiming that not only do expanded executive powers too often fail to offer a best-practice response to real or perceived threats but the Government's focus has not been matched with the development of realistic safeguards to limit abuse or error. Extraordinary anti-terrorism laws, such as preventative detention, are linked to various assertions concerned about the violation of long-standing democratic arrangements that have allowed the protection of basic human rights and due process. For example, Michael Pearce claims that the introduction of emergency police search powers to conduct warrantless searches under Rudd have not been justified and are excessive. "The search powers seem to have come out of the blue. There has been no evidence that police are unduly limited by the requirement to get a warrant" (cited in Pearlman, 2009). It can also be argued that the creation of unproductive, disproportionate laws might actually cause more damage than good by alienating moderate communities whose cooperation will remain vital in combating terrorism and countering the appeal of radical ideologies.

The primary aim of this paper is to examine developments in Rudd government's counter-terrorism program with an emphasis on detention regimes and the existing mechanisms that are in place to assure that the security sector conducts its business in accordance with the law, national intelligence priorities and the protection of fundamental human rights. The central focus

of the paper is on Australia's domestic intelligence agency ASIO and its detention powers as well as the preventative detention orders that may still be sought by the Australian Federal Police (AFP). As such, this paper will highlight key provisions within the *Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003* (Cth) and changes to the Criminal Code within the *Anti-Terrorism Act (No.2) 2005* (Cth). In order to ensure that Australia's counter-terrorism efforts remain effective and appropriate, it will be argued that checks and balances, particularly better judicial oversight, should be treated as an important instrument not only to enable a clearer legal mosaic but to provide for a culture of accountability and consultation that will go a long way toward the protection of basic human rights.

### Australia's legislative landscape

Since the tragic events of 9/11, Australia's counter-terrorism strategy has been completely remodeled due to the gravity of evolving terrorist threats. For some, the failure of law enforcement and intelligence agencies to forecast terrorist-related patterns, and forestall attacks such as the London and Bali bombings, was a powerful confirmation of the need for wholesale reform to legislative frameworks. Reflecting such a mindset, the former Howard Government (1996-2007) displayed a determination to create a more mobile, flexible, and intelligence-driven response. Indeed, since 9/11, the Australian government passed more than 30 bills and 44 terror laws to dismantle terrorist networks and to prevent terrorists from carrying out their plans. Such a challenge has included the creation of a range of far-reaching arrangements such as preventive detention and detention without charge for questioning (see Williams and Lynch, 2006).

Former PM John Howard had been eager to extend executive authority and a range of legislative initiatives to enhance law-enforcement and intelligence powers, in part, based on international obligations such as Security Council Resolution 1373 (2001) that had been adopted soon after 9/11. Resolution 1373 intended to restrict the movement, organization and fund-raising activities of terrorist groups. Security experts like Ross Babbage added that the Australian Government had a unilateral duty by remove rigid operational and legal boundaries to ensure that the intelligence community could swiftly act against those preparing or planning terrorist violence. The security sector needed "...to be restructured to permit the full weight of technical and human resources to be applied against priority targets, whether they be international, domestic or both" (cited in Walters, 2009). And given the primary responsibility of government to protect its

citizens and their right to life in borderless world, others extend this argument by admitting that the introduction of anti-terror powers will inevitably distort traditional constitutional practices and the democratic freedoms traditionally embedded in Western legal systems (see Etzioni 2004).

After the Labor Party won federal election in late 2007, PM Kevin Rudd set about to differentiate himself from his predecessor by promoting an overhaul of security methods to deal with terrorism. Nonetheless, in many ways, his fundamental approach to international or domestic threats has not proven to be a stinging indictment of the former Government. Rudd's counter-terrorism response has exposed a strong degree of consistency and cosmetic change rather than 'out of the box' thinking. The Rudd team has maintained several key dimensions of the Howard world view, including the elevation of perennial "...threats that are inherent to the transformational view of the strategic environment" such as international terrorism and non-state actors (see Clarke 2008, 272). In February 2010, Rudd's tough line approach to national security broadened ASIO's powers beyond the prevention of terrorism to border protection and the targeting of people-smuggling gangs (Narushima and Pearlman, 2010). Legislation had incorporated a proposed a new offence of providing material support for people smuggling that would involve 10 years jail and/or a fine of \$110,000.

The Rudd government's national security efforts (cited in Shape 2009) have been driven by the message that the "...threat of terrorism is alive and well and this requires continued vigilance". As such, a successful fight against difficult to identify enemies has been directly linked to the collection of intelligence, the desirability of extended surveillance and the ability to make good intelligence product. Not surprisingly, Rudd has remained highly receptive to projecting his strong national security bona fides and operational insights in debate about terrorism and how to counter it. "There's a bit of a danger that we all get numbed to the terrorist threat...It's a word which is used, and people have become so used to it over the last near decade, that it no longer bites home" (Rudd, 2010). On the other hand, the conduct of Rudd government has shown examples of a greater degree of appreciation than the former Government in the merits of integrating national responses, parliamentary processes and listening to public feedback, at various levels, as a regular part of the policy development stage (Peatling, 2009).

In December 2008, the Rudd government had announced its formal response to a number of inquiries that had examined modern components of Australia's counter-terrorism landscape. For all practical purposes, the response approved a majority of recommendations that had been previously identified by parliamentary committees and other independent inquiries, including a public investigation by John Clarke into the mishandled case of Dr Mohamed Haneef. In July 2007, Haneef had been falsely accused of assisting a terrorist organization and detained without charge for 12 days before the charges were dropped (Pearlman, 2009). The Haneef case had reinforced some concerns about whether counter-terrorism laws were consistent with human rights standards. The case also highlighted the need to ensure adequate safeguards and review mechanisms to guarantee that new laws did not escalate the potential for abuse or error or illegality or that intelligence advice was not manipulated by policymakers. It was later revealed that ASIO had reported to officials that Haneef had no terrorist connections (Shanahan 2008). AG Robert McClelland stated that mistakes had been "totally unacceptable" (cited in Pearlman and Moore, 2008). Stephen J. Keim, former barrister for Haneef noted that "...if you create legislation that when you write it you don't actually know what it means - and then you extend and extend it - ultimately a case like Dr Haneef's case will happen because no body knew what the legislation meant" (cited in Kellett, 2009).

Key aspects of proposed changes included:

- Creating an independent National Security Legislation Monitor to review the operation, effectiveness and implications of counter-terrorism laws on an annual basis. The Monitor would be based along the lines of Britain's Independent Reviewer of Terrorism Laws.
- Implementing parliamentary oversight of the AFP by the establishment of a Parliamentary Joint Committee on Law Enforcement.
- Extending the mandate of the Inspector-General of Intelligence and Security (IGIS) to enable the IGIS, by direction of the Prime Minister, to extend inquiries to cover other agencies such as the AFP.
- Changing the title of the sedition offence in federal laws from "sedition" to "urging violence", clarifying and modernising the elements of the offence, and repealing provisions enacted in the 1920s proscribing "unlawful associations".
- Accepting and implementing all 10 recommendations of the Clarke Inquiry "to improve the operation of relevant legislation and promote cooperation and information sharing between government departments and agencies in counterterrorism measures". (McClelland, 2008a).

In August 2009, the Rudd government released a 452-page discussion paper of draft laws to update national security and counter-terrorism legislation. It stated that the measures outlined in the discussion paper were intended to "...give the Australian community confidence that our law enforcement and security agencies have the tools they need to fight terrorism, while ensuring at the same time that our laws and powers are balanced with appropriate safeguards, and are accountable" (McClelland 2009). Overall, many of the proposed amendments, such as modifying the pre-charge detention regime by expanding the length of time of individuals can be held without charge and without judicial oversight to a maximum of 7 days (and 20 hours of investigation time), had been anticipated. Sally Neighbour (2009) observed that Rudd government's recycled goals aimed "... to bolster and circumscribe the existing laws. Its target, in short, is to keep Australia safe from terrorism while removing some of the most glaring flaws in the hope of avoiding future debacles such as the Haneef case". Richard Ackland (SMH, 2009) claimed that the Rudd government's approach "...seems to be about softening a few things at the edges...and cranking up other powers". Nicola McGarrity (2009) concluded that several proposals were simply "tinkering around the edges".

In February 2010, Rudd, after much delay, released the government's white paper on counter-terrorism. While some such as terrorism expert Clive Williams (cited in ABC News, 2010) labelled the paper as "predictable", it was also true that clear differences with the former Howard Government were less significant than might have been expected. In releasing its national security blueprint, the white paper confirmed an expansive view of the executive power. It reinforced the dangers of terrorism as a continuing and permanent strategic threat. And a core focus appeared to be a judgment about the changing nature of the terrorist threat to Australia and the escalating radicalisation of individuals in the Australian community – the rise of the so-called home-grown terrorists (see Ungerer 2010). Such a reemphasis, in part, had been motivated by a series of high-profile police raids and arrests in Melbourne and Sydney to disrupt a potential terrorist attack. Under revised terrorism laws, in February 2010, five men had been sentenced to maximum terms ranging from 23 to 28 years for 'conspiring to commit acts in preparation for a terrorist act or acts'.

Despite the specific circumstances surrounding the counter-terrorism case, some cautioned that Rudd, like the previous Howard Government, was in danger of over-exaggerating the threat of



home-grown terrorism. “I think the focus on home-grown terrorism in the white paper and in the Government’s presentation of it is a little bit confected...We always knew that home-grown terrorism was a significant issue (but) I don’t see anything in the policy prescriptions in the document that indicate the Government’s actually going to do much serious about it” (White, 2010). Significantly, the so-called war on terrorist networks had no clear endpoint. Neither the White paper nor discussion papers expanded discussion into the enhanced role for judicial review in controversial law such as preventative detention regimes without charge or conviction or ASIO’s ongoing ability to grab and detain individuals who are not suspected of any offence. Despite some positive steps to address past mistakes, the maintenance of contentious detention powers have not been matched by any particular special protections, especially in regard to extended judicial oversight, to ensure security agencies operate professionally and with propriety. “The main advantage of having oversight by someone like a judge is that it keeps the police on their toes” (cited in Pearlman and Banham 2009).

### ASIO Detention

In contrast to powers in the US and the UK, ASIO has been given far-reaching powers to detain and interrogate persons not suspected of any particular offence, but who might have information important to the gathering of intelligence in relation to a “terrorism offence”, without charge or trial.

Previously, ASIO had no powers of arrest or interrogation. Based on the *Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003* (Cth), ASIO can require either a Questioning Warrant or a Questioning and Detention Warrant and hold an individual in detention for questioning without charge for no more than 168 hours (7 days) (ASIO Act 1979 ss. 34S). It is worth highlighting that the established detention powers would apply not only to terrorists or would-be terrorists but also to non-suspects with no clear ties to suspected terrorists; individuals who might have inadvertently come into contact with a person with knowledge about terrorist deeds.

Such detention may take place pursuant to a “warrant for questioning” issued by an “Issuing Authority” (ASIO 1979 s. 34AB). It is sufficient that the Issuing Authority - either a federal

magistrate or judge appointed by the Attorney-General (the Minister responsible for ASIO) – was satisfied that the Director-General of ASIO has obtained the Minister’s consent to the warrant and that there are “reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence”, even if no act of terrorism had occurred (*ASIO Act 1979* s. 34G(1)).

Once apprehended, the detainee can be questioned by ASIO in the presence of a “Prescribed Authority” - a person who has previously been a judge of the High Court, Federal Court, Family Court, Supreme or District Court of a State or Territory (*ASIO Act 1979* s. 34B). During this period, the detainee may be interrogated by ASIO agents for up to a total of 24 hours (*ASIO Act 1979* s. 34J). Continuous periods of questioning are at a maximum of three eight-hour blocks (*ASIO ACT 1979* s. 34R) unless a longer period is permitted by the Prescribed Authority before which the individual is being questioned. The Prescribed Authority may only permit questioning to continue if they are satisfied that there are reasonable grounds to deem that an extension will substantially assist the collection of intelligence that is important in relation to a terrorism offence and questioning of the person under the warrant is being conducted properly and without delay.

The questioning of the person must be videotaped (*ASIO Act 1979* s. 34ZA). The Inspector-General of Intelligence and Security may be present at the questioning or taking into custody (*ASIO Act 1979* s.34P). A person is permitted to contact a lawyer of his or her choice (*ASIO 1979* s. 34ZO). In some circumstances, questioning may start in the absence of that lawyer (*ASIO Act 1979* s. 34ZP). When a lawyer was present, they are not permitted to actively advise their client or interrupt or object to questioning except to “request clarification of an ambiguous question” (*ASIO Act 1979* s. 34ZQ(6)). The prescribed authority can direct the removal of a lawyer if deemed to be “unduly disrupting the questioning” (*ASIO Act 1979* s. 34ZQ(9)). In such a situation, the detainee is permitted to contact an alternative lawyer. (*ASIO Act 1979* s. 34ZQ(10)). Individuals can face a five-year jail term if they refuse to co-operate or answer questions or, to the individual’s knowledge, give false and misleading statements (*ASIO Act 1979* s. 34L).

## Preventative Detention

The *Anti-Terrorism Bill (No. 2) 2005* Bill had been passed on 7 December 2005. New powers would allow the AFP to apply for preventative detention orders for a short period of time. Then Attorney-General Philip Ruddock insisted that the laws were a "...further demonstration of the Government's commitment to the national security of Australia" (Ruddock, 2005). Anticipating more terrorist violence, the legislation sought to promote special mechanisms to allow detention without trial - that would eventually allow suspects to be held for up to 14 days.

New Division 105 of the Criminal Code provided for a regime that would allow the AFP to target suspects who had not committed a crime or had had any criminal involvement and take them into custody and detain them for a short period to prevent an imminent terrorist attack or to preserve evidence of a recent terrorist attack (ss. 105.1(1)). The Commonwealth preventative detention regime initially had provided for a detention regime for up to 48 hours in a terrorist situation. At a later COAG meeting, States and Territories were asked to allow for the detention of a person for longer detention periods of up to 14 days, for all practical purposes taking over from the Commonwealth due to constitutional restrictions on the capacity of the Federal executive. At the time, John Von Doussa (2005) considered that "...the government is clearly banking on the idea that the period of detention is so short under the Commonwealth legislation that this is all academic, particularly when the detention is 'preventative' rather than 'punitive', and giving the reasons for detention might be prejudicial to national security".

The principle of judicial oversight had been repeatedly enforced during the COAG 2005 meeting. Victoria Premier Steve Bracks stated that "...judicial oversight has been a principle which has been supported by the Prime Minister, the Premiers and the Territory leaders, and there is complete judicial oversight over these new criminal sanctions which will be in place. There's also legal representation for individuals, which is a principle which is a very important principle which needs to be supported" (Press Release, 2005). SA Premier Mike Rann concluded that "...the bottom line is that the safeguards are in the place, judicial review, and a series of accountabilities, a series of safeguards being established by statute" (Press Release 2005). Yet, despite such colorful rhetoric, the legislative framework remained inadequate in providing the basis for effective judicial study.

Preventative detention orders do not automatically require judicial authorization. The AFP is the initial applicant of the order and a senior AFP Officer is the issuing authority (ss 105.8). A person detained cannot be questioned except to confirm their identity or to enable safe detention (ss105.42) (2). Further, an individual could only ring their immediate family or advise an employer that they were safe but would not be able to be contacted for the time being. No further information was allowed to be given (ss. 105.35(2)). While a detained person may contact a lawyer for the purposes of obtaining advice or instructing the lawyer to act on their behalf (ss.105.36), the government is specifically exempted from having to provide the detainee with any information “if the disclosure of that information is likely to prejudice national security” (ss. 105.32(2)). A Continued Preventative detention order may be sought by an AFP officer and granted by an issuing authority - a Federal Judge or Magistrate appointed by the Attorney General (s105.2).

### Safeguards and the Security Sector

In 2009, Martin Scheinin, the UN Special Rapporteur on the protection of Human Rights, discussed the advancement of democratic principles in order to enhance respect for human rights and rule of law in times of public emergency. He urged all member states to reduce to a minimum the practice of arbitrary executive power and state secrecy. Scheinin (2009) stated that he was worried by the “...increasing use of State secrecy provisions and public interest immunities for instance by Germany, Italy, Poland, Romania, the former Yugoslav Republic of Macedonia, the United Kingdom or the United States to conceal illegal acts from oversight bodies or judicial authorities, or to protect itself from criticism, embarrassment and – most importantly – liability.” In 2006, a similar UN report had targeted restrictive conditions and a lack of key human rights protections in Australia. The report expressed a suite of concerns about notional safeguards within a system that had drastically changed the political and legal landscape by introducing a range of unprecedented counter-terrorism measures, including incommunicado detention (Scheinin, 2006).

In a post 9/11 world, while recognizing the growing reliance on anticipatory operational capabilities and good intelligence to protect national security, appropriate oversight and scrutiny remains indispensable to ensure quality control, uphold civil liberties, to restore legitimacy to

counterterrorism programs, to expose governmental malfeasances and to consider whether official secrecy requirements are warranted or counter-productive do remain essential. Frederic F. Manget (1996, 43) has used the term 'oversight' to describe a system of accountability in which those vested with the executive authority in an organization have their actions reviewed, sometimes in advance, by an independent watchdog who has the mandate to both check and appraise actions. Magnet (1996, 44-45) concluded that the role of independent courts remained highly relevant in judging the legality of government actions and policies and to prevent executive 'overreach' in democratic societies. Or as former Chief Justice of the Australian High Court commented, "...neither ASIO nor the Attorney-General is a suitable guardian of individual rights" (cited in Walters, 2005: 19). At the very least, as noted by A-G Robert McClelland, "Australians acknowledge that tough counter-terrorism arrangements are necessary, but they don't believe our security agencies should be given carte blanche in their application" (McClelland, 2008a).

Critics have warned about the inherent dangers of allowing the executive branch to bypass the courts, especially given the functioning of a massive secret bureaucracy for covert action. "The possibilities of abuse of such power are very real. For example, in the US, it was once revealed the FBI and the Justice Department had supplied "...false information in regard to more than 75 applications for search warrants and wiretaps' for terrorist suspects. Information had also been improperly shared with prosecutors in charge of criminal cases, thereby raising the issue of misuse of intelligence information to gain criminal convictions" (Williams 2002: 214). Another overseas studies into preventive detention programs that had been introduced, such as at the height of IRA bombings in Britain in the 1970s, do reveal a track record of blatant discrimination. "Of the 7072 (mostly Irish) people detained under the Prevention of terrorism Act between 1974 and 1991, only 14 per cent had charges brought against them. Many of the other 6087 were held for days at a time – left with the stigma of being an Irish person arrested on suspicion of being involved in terrorism" (Barns, 2005: 18). Interrogation and arrest often appeared crudely based on suppressing political dissent or lawful political protest. Interestingly, the British laws originally developed to fight the IRA are still described as only 'temporary' powers.

## Judicial Review

In examining the nature of the specific detention regimes in Australia, judicial review and oversight will not put a stop to detention. But it is clear that effective judicial safeguards against possible abuses or error are not always apparent. For example, AFP preventative detention requires that all communications between detainees and their lawyers be monitored by a police officer (ss. 105.38). The restrictions to legal representation violate the principle of client-lawyer privilege and the basic principle of confidentiality. Existing measures also place stringent constraints on access to lawyers and the right to useful legal council to ensure the protection of their client's rights. The person's lawyer is prohibited from disclosing the fact that a preventative detention order has been made, or that they are detained or any information the detainee gives during the contact, except for the purpose of Federal Court proceedings or a complaint to the Ombudsman (s105.38). In other words, the "...role of the lawyer is minimal, bordering on non-existent, merely a token gesture" (cited in Morris and Riley, 2003). Julian Burnside (2005) has expressed concern that limiting the capacity for legal representation might be used to intimidate detainees or led to wider circumstances of ill-treatment. "I don't think the safeguards are adequate because if you exclude or qualify the use of lawyers, then the potential for the misuse of power is increased. We've seen in other circumstances that the law enforcement authorities can make mistakes, and they can get a mistaken idea of what's going on and pursue theories that turn out to be ill-founded".

Given the importance of a security sector effectively tackle perceived threats to national security, the challenge for the Rudd Government to provide an accurate determination of the limits of law, as well as what is 'necessary and appropriate' to meet evolving threats, is a highly difficult task. But conditions for judicial review and oversight remain a crucial safeguard to ensure fairness and protection from arbitrary and/or over zealous police and government interference in a liberal democracy. In the case of existing laws such as preventative detention for suspects and 'criminal types', the threshold for detention remains very depleted – in effect, the gathering of raw intelligence data is accepted as an alternate for hard, direct evidence. Adding to concerning issues about the breadth of the legislation, Rudd suggested that the official definition of a terrorist act – which is already broad – should be expanded to include conduct that causes psychological harm as well as tangible physical harm (see Franklin, 2008).

The initial preventative detention order is authorized on the basis of wide ranging police discretion, not evidence that must be tested before a court. Given that a preventative detention orders is not made the courts, there are strong concerns such a process might create an environment that is conducive to the rise of arbitrary and/or politically motivated assessments (while being procedurally unfair). Indeed, the only information on which the issuing authority determines the application is provided by the AFP, and is untested by counter evidence or examination. Further, there is no obligation on the AFP to provide the detained person or their lawyer with anything other than a copy of the order (s105.29(7)), such as the reasons, information or material upon which the order was made (s105.28).

In regard to the ASIO act, the legal checks and balances against the misuse of government power again remain slight. Independent judicial review should be a principal mechanism for ensuring legal compliance and the protection of individual rights. Yet no thorough judicial scrutiny of ASIO's conduct is allowed. As mentioned, instead of vesting oversight power in all federal judges, the law allows the Attorney-General to appoint a judge or magistrate as an Issuing Authority. Counter-terrorism laws have created an unprecedented role for judges who now might find themselves not considering whether people were innocent or guilty of an offence but instead making estimates whether the order might prevent the future risk of terrorism. Judicial officers are essentially putting into effect an inherited policing function – a task of the executive.

The NSW Law Society previously expressed fears that the existence of such provisions could erode the pillar of judicial independence. The Government can engage in 'judge shopping' by handpicking judges who they believed might be most likely to simply rubber-stamp orders and who have a track record of being sympathetic to executive demands (Merritt, 2005: 6). It warned that judges needed to play a more sophisticated role than simply confirming existing paperwork at the request of the Government.

Current measures also do not allow a court to verify or test the accuracy of one-sided or open-ended intelligence information on which the detention order might be issued. The court would have no possibility of testing the information that is produced by authorities. In such circumstances, it would be highly unlikely that a judge would be prepared to attempt to

anticipate or predict the intentions of the AFP from a position of relative ignorance. In reality, the role of the judge appears to remain little more than simply checking that the technical requirements for issuing the order have been satisfied. Alternatively, a detainee has no ability to seek judicial review of the validity or terms of the ASIO warrant. Critically, individuals face the prospect of having to prove to ASIO that there is a reasonable possibility they do not possess certain information or material. The onus of proof is on the detainee to produce evidence to prove their innocence (*ASIO Act 1979* s. 34L(3)).

The ASIO and Anti-Terrorism Bills fundamentally altered a number of basic principles within Australia's criminal justice system. Rudd has ignored addressing such deficits that fail to ensure a greater degree of certainty and fairness. Detention powers depart from traditional legal positions like the presumption of innocence, the right not to be detained without charge and the normal common law 'right' to silence. As mentioned, those detained also have no right to know why they are being hauled off for interrogation. It can also be suggested that the existing preventative detention regime in Australia might violate the rights of citizens that are conferred in international law within article 9(1) of the ICCPR, which provides: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".

The wide scope of such anti-terror measures implicated for the 'war on terror', including preventative arrest and the detention of terrorist suspects, do carry significant legal, social and political implications. It is worth highlighting the increased emphasis on national security in locations such as the US and UK had been aimed at terrorists that while in Australia detainees did not need to be suspected of any offence (Michaelsen, 2003, 283). In considering the Australian government's desire to change the dynamic of 'law and order' politics to incorporate the detention of non-suspects, others wondered "...if the United Kingdom could survive the terrorism of the IRA without changing the fundamental nature of its legal system, the question must be asked what is there about al-Qaeda that now requires some of the fundamental values of...(Australian)...democracy to be overturned?" (cited in Dick, 2006, 11). Core elements of the Australian government's detention program are free of judicial scrutiny while undermining the time-honored doctrine of a separation of powers. "Without a doubt the greatest contemporary



challenge to relations between the arms of government, and to established civil and political rights, comes from the powerful expansion of security in the name of countering terrorism” (Hocking 2004, p. xi).

### Conclusion

In early discussions to meet the urgent requirements of national security, the Rudd government had set about to reinforce executive authority and maintain comprehensive law-enforcement and intelligence powers. While Rudd has set about to deliver a partial revision of Australia’s counterterrorism program, his government also has not endeavored to justify, or repair, continuing shortcomings in critical areas such as preventative detention. Indeed, thresholds for detention in Australia remain at a very low level.

Like the Howard era, the Rudd Government has placed a strong emphasis on enhancing the capacity for security and police organization to act decisively in emergency situations. Its legislative push has copied much of the Howard program by to aim at retain, and in some areas enhance, the ability for authorities to discharge broad powers at an early enough stage to defend likely targets and deny a violent act. The principal question is the extent to which the exercise of the discretionary and intrusive powers of the state is a justified, proficient and balanced response in dealing with terrorism. At the very least, there is an obvious need to reflect the conditions for human security, the nature of democratic principles applicable to the intelligence community and the proper accountability arrangements for organizations with an unprecedented scope of strategic priorities.

In many significant ways, as exposed by the problematic nature of detention regimes in Australia, Rudd’s approach failed to deal with deficiencies inherited from the previous Government. In order to ensure that Australia’s counter-terrorism efforts remain effective and well-adjusted, and recognizing the essential need to protect intelligence sources and methods, it can be argued that checks and balances, including extended judicial oversight, should be treated as an important instrument to ensure the protection of basic human rights and rule of law. The judiciary remains a vital check on the potential abuse of the executive and legislative powers. It is worth remembering that the motivations of many former laws were repeatedly delivered to

provide primary control on government actions rather than the governed. As Lucia Zedner (2005, 510-511) reflected:

Typically, conflicting interests are said to be 'balanced' as if there were a self-evident weighting of or priority among them. Yet rarely are the particular interests spelt out, priorities made explicitly, or the process by which a weight is achieved made clear. Balancing is presented as a zero-sum game in which more of one necessarily means less of the other...the experience of criminal justice is that balancing is a politically dangerous metaphor unless careful regard is given to what is at stake.

## References

- ABC News, 2010, *Australia under permanent terror threat: Rudd*, PM Radio, February 23.
- Ackland R, 2009, 'Law of war hides rule of law', *The Sydney Morning Herald*, August 14.
- Human Rights and Equal Opportunity Commission, 2004, *Isma - Listen: National consultations on elimination prejudice against Arab and Muslim Australians*, June.
- Beck, U, 1992, *Risk Society: Towards a new modernity*, London, Sage.
- Burnside, J, 2005, 'What price freedom? The legacy of 9/11?', *Precedent* 68.
- Clarke M, 2008, 'Issues in Australian Foreign Policy: July to December 2007', *Australian Journal of Politics and History* 54(2): 271-288.
- Dick, T, 2006, 'Ex-judge questions terrorism legislation', *The Age*, December 18.
- Etzioni, A, 2004, *How Patriotic Is the Patriot Act? Freedom versus Security in the Age of Terrorism*, Routledge.
- Franklin, M, 2008, 'Permanent monitor of terrorism laws', *The Australian*, December 24.
- Hocking, J, 2004, 'Protecting democracy by preserving justice: even for the feared and the hated', *UNSW Law Journal*, 27(2).
- Kellett, C, 2009, 'Terror leak smacks of Haneef', *Brisbane Times*, August 5.
- Manget, F, 1996, 'Another System of Oversight: Intelligence and the Rise of Judicial Intervention', *Studies in Intelligence*, 39(5).
- Mason, A, 2005, 'Democracy and the law', Law and Justice Address, Law & Justice Foundation of New South Wales, October 6.
- Merritt, C, 2005, 'Lawyers ask for terror bill boycott', *The Australian*, October 27.
- McGarrity N, 2009, 'Freedoms are losing out to fear', *The Age*, August 14.
- McClelland R, 2008a, Speech at the 3rd Annual Counter-Terrorism Summit, Melbourne, October 28.
- McClelland R, 2008b, "Comprehensive Response To National Security Legislation Reviews", Media Release, December 23.
- McClelland R, 2009, Press Conference, Canberra, August 12.
- McClelland R, 2009, "National Security Legislation Discussion Paper", Media Release, August 12.

- Michaelsen, C, 2003, 'International Human rights on trial – The United Kingdom's and Australia' Legal Response to 9/11', *Sydney Law Review*, 25.
- Morris, L. and M. Riley. 2003. 'ASIO laws may be tightened more: Ruddock' *Sydney Morning Herald*, December 11.
- Narushima, Y and Pearlman, J, 2010, Asylum-seekers spark change to ASIO mandate, *The Sydney Morning Herald*, February 24.
- Neighbour S, 2009, "Haunted by Haneef", *The Australian*, August 17.
- Pearlman J, 2009, 'Terrorism law revamp dumps Haneef charge', *The Sydney Morning Herald*, August 14.
- Pearlman J, and Banham C, 2009, 'Labor takes tough approach to anti-terrorism laws', *Sydney Morning Herald*, August 13.
- Pearlman, J and Moore, M, 2008, 'No grudges, and he may even return', *The Sydney Morning Herald*, December 24.
- Peatling S, 2009, 'War on terrorism is over ... in lexicon', *The Sydney Morning Herald*, July 7.
- Press Release, 2005, Transcript of joint press conference with heads of government, Parliament House, Canberra, September 27.
- Rudd, K, 2010, Transcript of joint press conference, Parliament House, Canberra, February 23.
- Ruddock, P, 2005, *Passage of Anti-Terrorism Bill (No. 2) 2005*, Media Release, December 7.
- Scheinin, M, 2006, Australia: Study on human rights compliance while countering terrorism, UN Doc A/HRC/4/26/Add.3, December 14.
- Scheinin, M, 2009, Report by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/HRC/10/13, February 4.
- Shanahan, D, 2008, 'Terror laws face revamp after Mohamed Haneef inquiry', *The Australian*, December 23.
- Sharp, A, 2009, 'Terror raids reminder of real threat: Rudd', *The Age*, August 4.
- The Anti-Terrorism Act (No. 2) 2005 (Commonwealth)
- The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Commonwealth).
- Ungerer, C, 2010, 'To beat terror, defeat its ideas', *The Australian*, February 24.
- Walters, P, 2005, 'It's a matter of no national scrutiny', *The Weekend Australian*, October 29-30.
- Walters, P, 2009, 'Counter-terrorism still needs to shape up', *The Australian*, August 8.

Williams, G, 2002, 'One Year On: Australia's legal response to September 11', *Alternative Law Journal*, 27 (5).

Williams, G, 2003, 'National security and Bill of Rights', *Australian Journal of Human Rights*, 8 (2).

Williams, G and Lynch, A, 2006, 'Fix-it later legislation no way to govern', *The Australian*, December 28.

White, H, 2010, "Home-grown terror risk 'overstated' in Government's terrorism white paper, says expert Hugh White", *Herald Sun*, February 24.

Zedner, L, 2005, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice', *Journal of Law and Society* 32(4).