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The Australian National Security State and the Third Sector: Who is Really Protecting Australia's National Security?

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Abstract

This paper will consider the implications of the Australian Government's recent national security and anti-terrorism legislation for its relations with Australian citizens and with third sector organisations, like those comprising the community legal sector, that seek to promote and defend citizens' civil, political and social rights. The series of bills enacted by the Australian Parliament since September 11 2001, the culmination of which has been the Anti-Terrorism (No. 2) 2005 Bill, removes many of the freedoms and rights that Australians have for many years been able to take for granted. The 2005 Bill's detention and control orders, for example, degrade the importance of the role of formal trials and the production of credible evidence by the prosecution in the administration of justice in Australia. It also includes a newly-defined crime of sedition that empowers the Australian Government and the national security authorities to invoke the sedition provisions when they merely suspect a person of seditious intent to use or threaten the use of force. The 2005 Bill, and the many other national security and anti-terrorism acts, has placed a great burden of responsibility on third sector organisations which seek through their activities to enhance the inclusiveness and cohesiveness of the Australian community. They will increasingly be called upon, particularly by 'suspect' groups and individuals, to ameliorate the harmful social and psychological effects of intimidation, victimisation and persecution perpetrated by the authorities in the name of protecting Australia's national security. At the same time, these organisations will have to deal with a society turned against itself in which differences of language, ethnicity and religion have become a frontier separating the included and protected from the excluded and feared. This paper will consider the impact of these trends and developments on third sector organisations committed to fostering a more tolerant, inclusive and cohesive Australian society. It will focus in particular on the likely implications of the national security legislation for the community legal sector. The sector is characterised by its commitment to the objective of improving access to justice and ensuring equality before the law for all Australian citizens and residents. It thus plays an important but largely unheralded role in protecting Australia's genuine national security from the potentially corrosive effects of the Government's national security and anti-terrorism legislation.

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The Australian National Security State and the Third Sector:
Who is Really Protecting Australia's National Security?

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This paper will consider the implications of the Australian Government's recent national security and anti-terrorism legislation for its relations with Australian citizens and with third sector organisations, like those comprising the community legal sector, that seek to promote and defend citizens' civil, political and social rights. The series of bills enacted by the Australian Parliament since September 11 2001, the culmination of which has been the Anti-Terrorism (No. 2) 2005 Bill, removes many of the freedoms and rights that Australians have for many years been able to take for granted. The 2005 Bill's detention and control orders, for example, degrade the importance of the role of formal trials and the production of credible evidence by the prosecution in the administration of justice in Australia. It also includes a newly-defined crime of sedition that empowers the Australian Government and the national security authorities to invoke the sedition provisions when they merely suspect a person of seditious intent to use or threaten the use of force. The 2005 Bill, and the many other national security and anti-terrorism acts, has placed a great burden of responsibility on third sector organisations which seek through their activities to enhance the inclusiveness and cohesiveness of the Australian community. They will increasingly be called upon, particularly by 'suspect' groups and individuals, to ameliorate the harmful social and psychological effects of intimidation, victimisation and persecution perpetrated by the authorities in the name of protecting Australia's national security. At the same time, these organisations will have to deal with a society turned against itself in which differences of language, ethnicity and religion have become a frontier separating the included and protected from the excluded and feared. This paper will consider the impact of these trends and developments on third sector organisations committed to fostering a more tolerant, inclusive and cohesive Australian society. It will focus in particular on the likely implications of the national security legislation for the community legal sector. The sector is characterised by its commitment to the objective of improving access to justice and ensuring equality before the law for all Australian citizens and residents. It thus plays an important but largely unheralded role in protecting Australia's genuine national security from the potentially corrosive effects of the Government's national security and anti-terrorism legislation.

Biography: Mark Rix is a Senior Lecturer in the Graduate School of Business at the University of Wollongong.

Introduction

Since the attacks of 2001, Australia has brought in a whole suite of anti-terrorism legislation containing provisions that it is unusual for a liberal-democratic regime to adopt when not at war (Rix 2006). The provisions include exceptional measures permitting the detention in secret of non-suspects merely for questioning. In allowing for the detention without trial, evidence or charge of non-suspects, the Australian legislation abandons some of the most fundamental principles of the rule of law such as the prohibition on arbitrary detention and the right to remain silent (Michaelson 2005 and 2005a). The legislation also compromises the democratic values, human rights and civil liberties which the Australian Government affirms its legislation is intended to protect from the threat of terrorism (Williams 2003, Head 2005, Hocking 2005, Nettheim 2005).

This paper will consider the implications of these and other features of the legislation for third sector organisations that are committed to upholding the rule of law and the protection of Australia's democracy and its citizens from excessive state power. Such organisations take seriously the view that the ability of individuals freely to go about their day-to-day business without harassment, persecution or fear of falling foul of the law is absolutely fundamental to any democracy. The Howard Government's view that, by weakening or removing the rights and liberties of the individuals who constitute the polity, national security is enhanced is a very debatable and highly controversial one. For, the security and liberty of the person is the foundation of a democracy and is an underpinning element of national security. In putting substantial impediments in the way of civil society organisations being able to act to keep the state and its agencies under scrutiny when they claim to be taking measures to protect Australia's national security from the threat of terrorist attack, the anti-terrorism legislation makes it extremely difficult for these organisations, and the media, to protect the security and liberty of persons against the arbitrary exercise of state power. Thus, it also makes it very difficult for them to protect Australia's genuine national security. The paper will consider in particular how the anti-terrorism legislation will affect the ability of the community legal sector, through its community legal education and legal policy and law reform activities, to inform citizens of their rights and protect their personal security from state intrusion. A vibrant democracy is dependent on third sector organisations like the community legal sector being able to undertake such activities free from state control, harassment or intervention. The paper considers whether and to what extent the sector's reliance on Commonwealth funding will impede its ability to continue to do so in the heightened security environment that has emerged since September 11, 2001.

Australia's anti-terrorism and national security legislation

Commenting on the refusal of defence lawyers to submit to personal security checks mandated under Australia's new anti-terrorism laws, Attorney-General Philip Ruddock commented "If people of very eminent stature and of such credibility regard it as being inappropriate to simply accept the law and adhere to it, I find that strange (Ruddock interviewed by Daniel Hoare on ABC Radio Programme 'AM' 2 June 2006)." Under the anti-terrorism legislation, defence counsel must receive security clearances in order to qualify for legal aid funding to appear for suspects in terrorist cases. Mr Ruddock was referring to the lawyers representing the 21 men arrested in Sydney and Melbourne as part of Operation Pendennis, a joint Victoria Police, NSW Police, Australian Federal Police and Australian Security Intelligence Organisation operation which commenced in late 2005. The men have been charged with various offences under the new anti-terrorism laws. A number of the lawyers involved will be taking the case to the High Court to test the constitutional validity of

the requirement that lawyers representing terrorist suspects seek and obtain security clearances before appearing for their clients.

The Operation Pendennis case is an interesting and worrying one, but the particulars of it are beyond the pale of this paper. What is of interest here is the ground breaking nature of Australia's recent anti-terrorism and national security legislation. As Lex Lasry, the Barrister who represented the recently-convicted Jack Thomas, remarked the requirement to submit to security clearances "arms the executive arm of Government with information about individual lawyers, who are defending in terrorist cases, that has at least the potential to be misused (Lasry interviewed by Daniel Hoare on ABC Radio Programme 'AM' 2 June 2006; Thomas was convicted of terrorism offences, later released on appeal to the Victorian Court of Appeal but then almost immediately made subject to a control order)." As will be seen below, the requirement that defence counsel appearing for suspects in terrorism cases must first receive a security clearance is not the only unsettling aspect of the suite of anti-terrorism legislation that has been enacted since September 11 2001. There is no doubt that Philip Ruddock was surely correct in pointing out, whether it was his intention to highlight the draconian nature of Australia's anti-terrorism legislation or not, that eminent and credible figures in the community find this aspect of Australia's anti-terrorism legislation "inappropriate". Many more people in the wider community also view this and the other aspects of the legislation with great concern and alarm.

The review of Australia's anti-terrorism laws that follows does not investigate the entire suite of anti-terrorism and national security legislation in detail for, considering the quantity of such legislation, this would take far too much time and divert attention from the paper's main concerns. Instead, it selects for discussion and analysis those acts, and sections of acts, that are most representative of the tendency of the Federal Government to flagrantly disregard the rights and liberties of Australian citizens in the name of protecting the country's national security.

Before reviewing the Australian anti-terrorism legislation (and leading into it), the paper will first briefly consider the manner in which the Federal Government has introduced the legislation into Parliament and consider its implications for the continued vitality and validity of Australia's parliamentary democracy. For, not only does the legislation compromise the genuine national security of Australia, and the security of its citizens against unwarranted state encroachment on their rights and liberties. In enacting its anti-terrorism laws the Government has treated the Parliament as an obstruction that it seems to believe has no right to scrutinise the objectives, intent and likely effects of its legislation much less to amend it.

At the conclusion of its Australian hearing into counter-terrorism laws, the Eminent Jurists' Panel on Terrorism, Counter-Terrorism and Human Rights, an initiative of the International Commission of Jurists (ICJ), observed that "During the hearing the Panel's attention was drawn to the large number of laws enacted since 2002 as part of Australia's strategy to counter terrorism (EJP 2006: 1)." In an earlier publication, ICJ Australia had pointed out that "As at September 11, 2001, there was in place a patchwork of some 35 pieces of Commonwealth legislation in Australia relating to terrorism, dealing with issues including air navigation, police powers, chemical and biological weapons, criminal offences, hostages, immigration, border protection, intelligence, nuclear non-proliferation, proceeds of crime, telecommunications, and weapons of mass destruction (ASICJ 2004: 1)." Justice Michael Kirby called attention to the fact that since the attacks of September 2001 "17 items of legislation restricting civil freedoms have been adopted by the federal Parliament" with complementary State legislation also being passed (Kirby 2005: 226). It is not only the sheer

volume of legislation that is of concern. As President of ICJ Australia John Dowd commented in the ICJ Australia's denouncement of the Anti-Terrorism Bill (No. 2) 2005 (which is analysed below) "The indecent haste with which the government seeks to pass these laws through Parliament's systems of review, including the Senate, also strikes at the heart of our Westminster system of democracy (Dowd 2005: 1)." Questioning what the Government had to fear from community consultation and parliamentary review, he pointed out that "Surely that is what democracy is all about." Dowd also observed that ICJ Australia had "serious objections to substantive policy matters" not merely concerns with "minor drafting issues" (Dowd 2005: 1). These substantive policy matters include the 2005 Bill's preventative detention and control order provisions and the new sedition offences created by it.

The anti-terrorism bills introduced by the Government in 2002-2003 and passed into law by the Parliament included a number of elements that established a clear pattern for its subsequent legislation and the manner in which it pushed the bills through:

the use of sprawling, omnibus legislation by which multiple Acts are amended in a complex web of interlocking changes within a single amendment Bill, which makes extensive debate and parliamentary supervision difficult; an absence of appropriately argued justification for such significant changes; minimal time for consideration of the legislation by parliamentary committees; and, finally, a determination on the part of the Government to implement its original proposals in the face of parliamentary and community concerns (Hocking 2004: 322)."

Hocking's final point, the Coalition Government's insistence on pushing its bills through both houses of Parliament despite community and parliamentary misgivings, is a particularly important one which goes to the heart of Federal Parliament's ability effectively to scrutinise and amend bills introduced by the Government. When first introduced by the Government into Parliament, the Security Legislation Amendment (Terrorism) Act 2002 for example, contained provisions enabling the Executive to proscribe so-called 'terrorist organisations' by allowing the Attorney-General to issue just such a proscription on his own authority. After community consultation and parliamentary review a compromise was reached whereby "an attenuated form of the power [of proscription] was introduced which allowed provision for the proscription of organizations listed by the United Nations as 'terrorist organisations' (Hocking 2004: 321)." However, as Hocking notes, the Government effectively circumvented the Parliament and challenged its authority by including the power of ministerial proscription in the Criminal Code Amendment (Terrorist Organisations) Act 2004. The Government's impatience with the Parliament, and eagerness to speed up the proscription process and act outside of UN sanction, was also demonstrated by the legislation it pushed through outlawing organisations that it regards as terrorist threats. The Criminal Code Amendment (Hizbollah) Act 2003 and similar legislation proscribing Hamas and Lashkar-e-Tayyiba passed later in the same year are indicative of this trend (ASICJ 2004: 3). The Al-Qaida and Taliban Sanctions Committee of the UN Security Council added Lashkar-e-Tayyiba to the Consolidated List of individuals and groups belonging to or associated with Al-Qaida on 2 May 2005 (the List also includes individuals and entities belonging to or associated with the Taliban) (UN 2005). Neither Hamas nor Hizbollah is included on the Consolidated List (for the current Consolidated List see UN 2006).

Other aspects of the Security Legislation Amendment (Terrorism) Act 2002 are also worthy of mention. The Act amends the Criminal Code Act 1995 thereby modernising treason offences and creating new terrorism offences and offences relating to "membership or other specified links to terrorist organisations" ('Australian Laws to Combat Terrorism' n.d.)." It defines a 'terrorist act' so broadly that it criminalises, and subjects to severe penalties, any

actions taken in support of a political movement which engages in “physical resistance” against an existing government (in Australia or overseas). Thus, members of Australian human rights or development organisations who, for example, meet with representatives of the GAM separatist movement in the Aceh province of Indonesia or the Liberation Tigers of Tamil Eelam in Sri Lanka would be committing a criminal offence (ASICJ 2004: 2). By denying Australians the right to associate with such movements, the Act “threatens to undermine the very democracy which these offences seek to protect (Jackson 2005, 138).”

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (the ASIO Act) was the outcome of a lengthy process of community consultation, inquiries conducted by several parliamentary committees such as the Parliamentary Joint Committee on ASIO, ASIS and DSD, and wider parliamentary debate. Improvements were made to the bill’s original harsh provisions such as those allowing for incommunicado detention and preventing independent legal representation for suspects during detention (this begs the question of why a democratically-elected government would include these provisions in a draft bill in the first place). Nevertheless, the insertion of the ministerial proscription power in to the Criminal Code after it had been removed from the Security Legislation Amendment (Terrorism) Act in the course of parliamentary review and debate obviously provided the Government with a precedent. Barely 18 months after the passage of the ASIO Act 2003, the Government reintroduced and gained passage of a number of the Act’s original provisions that the Parliament had initially rejected, in particular, those relating to executive proscription and restrictions on independent legal representation for suspects (and non-suspects) held in custody. But even this was not enough for the Government, for “In late 2003, the Government introduced further amendments to the newly empowered ASIO Act, seeking stringent secrecy provisions in relation to public disclosure of the implementation of its detention regime and still further expanded interrogation powers” including the doubling of the questioning period to 48 hours if an interpreter had been present at any stage of the interrogation (Hocking 2004: 328).

The ASIO Act gives ASIO the power “to obtain a warrant to detain and question a person who *may have* information important to the gathering of intelligence in relation to terrorist activity (‘Australian Laws to Combat Terrorism’ n.d.; emphasis added).” The Act defines a warrant “issuing authority” as a person appointed by the Minister, who can be a federal magistrate or judge or “another class of people nominated in regulations” (Michaelson 2005, 326) As Christopher Michaelson points out, this act empowers ASIO to “detain people without judicial warrant for up to seven days and interrogate them for up to 24 hours within that seven-day period (Michaelson 2005a: 178).” Thus, persons can be detained without charge, and do not even have to be suspected of having committed any offence to be taken into custody. Jenny Hocking observes that “Australia remains the only liberal-democratic nation to have proposed the detention and interrogation of non-suspects in this way (Hocking 2004: 321).” While being interrogated, a detainee has to answer all questions and provide all the information or material requested of them. A detainee also has to prove that they do not have the material requested. If the detainee is unable to do so and does not provide the material they can be imprisoned for up to five years. Michaelson concludes that “In effect, these provisions abandon several fundamental principles of the rule of law: they dilute the prohibition of arbitrary detention, they obliterate the right to habeas corpus, they remove the right to silence, and they reverse the onus of proof (Michaelson 2005a: 178).”

To complete this brief review of Australia’s anti-terrorism legislation up until August 2005, the National Security Information (Criminal Proceedings) Act 2004 was amended by the National Security Information Legislation Amendment Act 2005 extending the protection

from disclosure of “security sensitive information” in criminal cases to include any such information in “certain civil court proceedings” (Australian Laws to Combat Terrorism’ n.d.). The National Security Information (Criminal and Civil Proceedings) Act 2004 is the result. The amendments to the original national security information bill have only served to strengthen its provisions severely restricting the disclosure of information that is allegedly related to national security. As Patrick Emerton notes, “The purpose of the Bill...is to permit the prosecution and conviction of individuals on the basis of information which, for reasons of national security, is not itself tendered in evidence against them at trial (Emerton 2004, 143).” Amongst other things, the Bill also allows for partially, or even completely, secret trials, evidence to be censored, and defendants and their lawyers to be excluded from trial proceedings (Head 2005, 211).

The Anti-Terrorism Bill (No. 2) 2005

Beneath the list of key pieces of legislation to combat terrorism on the Australian government’s national security website comes a disclaimer and stern warning: “Because the global security environment is dynamic, the Australian Government is continually responding to ensure our legislative regime is current, comprehensive and appropriate” such that “at any time, further initiatives may be under consideration by Parliament” (‘Australian Laws to Combat Terrorism’ n.d.). One of the latest, and certainly one of the most draconian, additions to the list of ‘Australian Laws to Combat Terrorism is the Anti-Terrorism Bill (No. 2) 2005.

On the evening of 6 December 2005 Coalition and Opposition (and Family First) Senators voted together to pass the Anti-Terrorism Bill (No. 2) 2005. This capitulation by the Opposition was hardly surprising given that on September 28, then Labor leader Kim Beazley had announced that in the Opposition’s view the new anti-terrorism laws proposed by the Government “did not go far enough” (Beazley quoted in Hocking 2005). Mr Beazley had also recommended even stronger powers ““allowing police to lock down entire suburbs and carry out house, vehicle and people searches without judicial approval”” (Beazley quoted in Nettheim 2005, 7). Greens and Democrat Senators voted against the Bill, but they were heavily outnumbered. In a Press Release announcing the passage of the Bill through both houses of the Australian Parliament, Attorney-General Philip Ruddock described it, and the measures it includes, as a “proportionate and appropriate response” to the terrorist threat facing Australia. According to Mr Ruddock, the new bill and related legislation “place Australia in a strong position to prevent new and emerging threats and to stop terrorists carrying out their intended acts (Ruddock 2005a)”. The Bill’s “key features” include:

- a regime that will enable courts to place controls on persons who pose a terrorist risk to the community
- arrangements to provide for the detention of a person for up to 48 hours to prevent an imminent terrorist attack or preserve evidence of a recent attack
- an extension of the stop, question and search powers of the Australian Federal Police (AFP)
- powers to obtain information and documents designed to enhance the AFP’s ability to prevent and respond effectively to terrorist attack (Ruddock 2005a).

The 2005 Bill’s preventative detention, control orders and sedition provisions

Unfortunately, the Attorney-General omitted from his Press Release important aspects of the “key features” that are rather more disquieting than his bland statement would suggest. For example, in issuing a control order a court can impose conditions on an individual including a requirement that the person wears a tracking device, a prohibition or restriction on the person talking to other people including their lawyer, and a prohibition or restriction on the use of a telephone or the internet by the person (Walton 2005, 4). As for preventative detention, the

police can detain without charge a person who they suspect will carry out an imminent terrorist act or is planning to carry out such an act. They can also hold someone who they suspect “has a ‘thing’ that will be used in an imminent terrorist act (Walton 2005, 4).”

Prior to the passage of the Anti-Terrorism Bill (No. 2) 2005 through the Parliament, Attorney-General Ruddock announced that the Government had accepted amendments suggested by the Senate Legal and Constitutional Legislation Committee and “other government members” (comprising a special backbench committee) that would “improve and strengthen” the Bill (Ruddock 2005). There is not the time or space here to run through all the amendments, but several of the most important will briefly be discussed.

The amendments to the Bill’s preventative detention and control orders that were accepted by the Government will require anyone that is subject to a continuing order to be provided with a full statement of the allegations that led to the invoking of the orders in the first place. However, for John North, immediate past President of the Law Council of Australia, these amendments would still not pass a crucial legal test. While the amendments would give a person subject to preventative detention and control orders the ability to repudiate the orders, because there is insufficient evidence to formally charge them with an offence they would not know precisely what they were opposing or challenging (North 2005). In other words, even with the amendments the inclusion of these orders in the Bill is tantamount to the legalisation and legitimisation of detention without evidence or trial. And in an important caveat, the provision allowing for a person subject to a control order to be informed of about why the restrictions were imposed “would not require the disclosure of any information that is likely to prejudice national security, be protected by public interest immunity, put at risk ongoing law enforcement or intelligence operations or the safety of the community” with similar requirements applying to an AFP request for variation of a control order (‘Details of Amendments’; attachment to Ruddock 2005).

Even though the Bill was subjected to sustained criticism from within and outside the Government (not including then Opposition Leader Beazley) for its inclusion of a newly-defined crime of sedition, the sedition provisions were retained in a ‘softened’ form. The softening of these provisions makes it clear that a so-called seditious intention in essence involves the intention to use or threaten the use of force or violence to achieve a specified outcome. Another significant amendment removed the phrase “‘by any means whatsoever’ in the offences of urging a person to assist the enemy and urging a person to assist those engaged in armed hostilities”. The government also accepted an amendment allowing for an “additional good faith defence in relation to publishers of material who do so in good faith and in the public interest” (‘Details of Amendments’; attachment to Ruddock 2005). Nevertheless, critics of the Bill still remain concerned that the crime of sedition is open to abuse and misuse by the Government just as it has been in other countries.

In a lame concession to opponents of the Bill, Attorney-General Ruddock also announced that the crime of sedition would be subject to “detailed review” by the Australian Law Reform Commission. On 29 May this year, the Australian Law Reform Commission released its Discussion Paper 71 ‘Review of Sedition Laws’. The Discussion Paper calls for the removal of the term ‘sedition’ from the Federal statute books and a redrafting of the offences relating to urging force or violence against the government or groups in the community (ALRC 2006). In a recommendation specifically relating to policy transfer, the ALRC also rejected the need for the creation of an offence of ‘glorification of terrorism’ such as had been introduced in Britain.

Commenting on the sedition offence contained in the Anti-Terrorism Bill (No. 2) 2005, George Williams pointed out that “It punishes people with up to seven years’ jail not for what they do, but for what they say, such as if they *urge* another person to forcibly overthrow the constitution or government (Williams 2006; emphasis added).” It includes sweeping bans on free speech and expression and allows for very few defences against the charge of sedition. Williams regards it as one of “worst examples of the history of law-making in the history of the Federal Parliament” and almost without precedent in that “[i]t is hard to think of another example where a law targeting something as fundamental as free speech has been enacted as quickly with as many people from all sides of politics recognising that it needed to be amended even as it was being enacted (Williams 2006).” Chris Connolly remarks that “no modern democratic nation has used sedition provisions for 50 years (Connolly 2005: 14).” Countries that have repealed sedition laws, or which are in the process of doing so, include Canada, Ireland, Kenya, New Zealand, South Africa, Taiwan, and the United States. In introducing sedition laws, Australia joins China, Cuba, Malaysia, North Korea, Singapore, Syria, and Zimbabwe (Connolly 2005: 14; see also ALRC 2006a, Chapter 6, Sedition Laws in Other Countries).

The issue of whether or not a ‘glorification of terrorism’ offence modelled on the British antecedent should be introduced in Australia suggests raises the question of just how this country’s anti-terrorism legislation does compare with that of its allies and mentors. Is it really as exceptional as has been claimed by its detractors or have these critics more been concerned with embarrassing the Howard Government than the protection of Australia’s national security? As will be seen in the following section, in some respects and not surprisingly, Australia has been a follower just as it has been throughout its history, taking the lead from Britain (and, the United States) in developing its security policies and, more recently, anti-terrorism legislation. In other significant respects, Australia has been very much a trailblazer particularly when it comes to introducing legislation that removes the human rights and civil liberties of its citizens and which contravenes internationally recognised principles of the rule of law and administration of justice.

Australia’s anti-terrorism legislation and the counter-terrorism legislation of its allies: how do they compare?

Commenting on the preventative detention, control order and other provisions contained in the Anti-Terrorism Bill (No. 2) 2005 about a month before it was passed by the Parliament of Australia, Alastair Nicholson drew some interesting parallels between it and the British Prevention of Terrorism Act 2005. In doing so, he referred to an article written by David Neal which appeared in *The Australian* of 28 October. The first noteworthy point for Nicholson (citing Neal) is that the British legislation contains more human rights protections than the Australian bill. In Britain, the police can apply for a control order in a preliminary hearing without the controlled person being present but, if the control order is granted, a full hearing must be held within seven days of the order being made. The police are required to provide the court with all the relevant evidence before the full hearing is held and “subject to security” the controlled person must also be given a copy of the evidence. Before the full hearing takes place, the controlled person must also provide the court with all the relevant evidence. Should the court confirm the order, the person in question has the right to appeal “on the basis of legal error”. Neal remarks, “Extraordinarily, given that the English (*sic*) legislation is supposed to be best practice and the model on which the Australian bill is based, the Anti-Terrorism Bill 2005 contains nothing of the sort” and asks the fairly obvious question “Why is a full hearing possible in England (*sic*)—with all the threats it faces—but not in Australia (Neal 2005 cited in Nicholson 2005, 4)?”

The Senate Legal and Constitutional Committee reviewed the provisions of the Anti-Terrorism Bill (No. 2) 2005, and in Chapter 3 of its report focused in particular on the Bill's preventative detention provisions. As it noted in the report, "The committee understands that the Bill's provisions were modelled in part on the counter terrorism laws enacted in the United Kingdom (UK) (SLCC 2005: 21)." One important difference between the Terrorism Act 2000 (UK) and the Australian Bill is that while the former "does not require reasonable suspicion of a specific criminal offence and may not necessarily result in a charge" it does not allow for "preventative detention *per se*". Rather "the UK detention regime is....better described as pre-charge detention which is explicitly linked to the investigation of terrorism offences (SLCC 2005: 22)." The Australian Bill, in contrast to its British precursor, "permits an application to be made for a preventative detention order even against persons who are not expected to engage in terrorist acts or who possess a thing connected with its preparation (SLCC 2005: 26)."

As both the Senate legal and Constitutional Committee and Neal suggest, the Anti-Terrorism Bill (No. 2) 2005 was based on its "English" precursor which supposedly served at least "in part" as a model of "best practice" for anti-terrorism legislation in Australia (and, presumably, elsewhere). This, then, is a clear case of policy borrowing from abroad remarkable for the fact that the Australian bill contained fewer human rights safeguards than the British model. "One might surmise", remarks Nicholson, "that in England the Legislature was forced to have regard to human rights norms in preparing this legislation (Nicholson 2005, 4)." Again, a fairly obvious question is 'Why didn't the Australian Parliament have regard for human rights norms in preparing its anti-terrorism bill?' The following will seek to provide an answer.

Jenny Hocking identifies two waves of counter-terrorism that have taken hold in Australia over the last 40 years, the first commencing in the late 1960s and extending into the 1990s, and the second dating from 11 September 2001 (Hocking 2003). It is of no great surprise that these counter-terrorism waves also took hold in other liberal democracies, notably Great Britain and the United States, at about the same time. Nevertheless, Australia stands out from its peers in the lengths it has gone in abandoning a number of the key principles associated with the rule of law. In the first wave, counter-subversion measures were strengthened but were "reconfigured" as terrorism increasingly displaced subversion as the main threat to national security. Hocking also distinguishes between two models of counter-terrorism in the first wave. The first of these is a "militarised strategy" that draws heavily on the theory and practice of counter-insurgency treating terrorism "as a war-like domestic insurgency (Hocking 2003, 358)." The second model views terrorism as essentially a criminal offence occurring at a time when the country is at peace. While Australia took the lead from England in developing its own counter-terrorism measures, there are some important differences. The British involvement in Northern Ireland meant that its counter-terrorism model was a militarised one emphasising five key elements of counter-insurgency strategy: "the use of exceptional legislative measures; the maintenance of vast intelligence collections; the development of pre-emptive controls on political activity; military involvement in civil disturbances[:]; and the development of a strategy of media management in times of crisis (Hocking 2003, 358)." The British Terrorism Act (2000) "placed many of the (temporary) emergency provisions of the 1970s and 1980s on a permanent footing (Michaelson 2005b, 133)." In contrast to Britain, until September 11 the Australian counter-terrorism model continued to be based in existing criminal law and therefore did not employ the military and other exceptional measures characterising the British model. What has changed since September 11 is that Australia has demonstrated a marked and growing tendency to adopt and

use “exceptional powers” “which would ordinarily be neither proposed nor accepted within the existing criminal justice system”. Provisions allowing for detention without trial, evidence or charge in Australia’s recent anti-terrorism legislation are emblematic in this regard as is the “expansion of executive power through a process of non-judicial executive proscription or banning of specified ‘terrorist organisations’ (Hocking 2003, 359).”

There are other interesting parallels and divergences between Australian and British anti-terrorism legislation that are worthy of mention. For example, the provisions defining the new and “modernised” treason offences introduced in the Security Legislation Amendment (Terrorism) Act 2002 were largely based on the equivalent sections of the British Terrorism Act 2000 (Hocking 2003, 356). The Human Rights and Equal Opportunity Commission goes further, commenting that the definitions of ‘terrorism’ and ‘terrorist act’ contained in the Act are not only based on those in the British Act but are “in almost identical terms” (HREOC submission cited in SLRC 2006: 56). However, as Christopher Michaelson points out, the the ASIO Act goes further than similar legislation in the Great Britain (Terrorism Act 2000), the United States (Patriot Act 2001) and Canada (Anti-Terrorism Act 2002) in allowing the detention of persons who are not even suspected of having committed an offence (Michaelson 2005, 326). The ASIO Act specifies a “prescribed authority” who watches over a person held in detention for questioning as a federal magistrate or member of the Administrative Appeals Tribunal (AAT). The AAT, “whose members (other than presidential members) are appointed for fixed periods and dependent on the favour of the executive if they wish to be reappointed”, therefore cannot be regarded as a judicial body. ICJ Australia describes the AAT as a “quasi-judicial body” which lacks the full independence of the judiciary (ASICJ 2004: 3). It is inferior in this respect to the Special Immigration Appeals Commission (SIAC) that was established in Britain in the wake of the European Court of Human Rights ruling in *Chalal v. United Kingdom* 1996 (Michaelson 2005b, 137). The AAT is rather more similar to the British ‘three wise men’ body that was superseded by SIAC. In the *Chalal* case, the ECHR ruled that the non-judicial body known as the ‘three wise men’, which up to then had reviewed decisions of the Home Secretary to remove people from England whose presence in England was regarded as “not being conducive to the public good” for reasons of national security, was in contravention of the European Convention on Human Rights (House of Commons 2003). Furthermore, notes Michaelson, “the ‘prescribed authority’ as established in the ASIO Act can not be considered a ‘court’ or ‘officer authorized by law to exercise judicial power’ within the meaning of Articles 9(3) and 9(4) of the ICCPR [International Covenant on Civil and Political Rights] (Michaelson 2005b, 137).”

Unlike Australia, “neither the United States nor the United Kingdom have (*sic*) felt compelled to introduce legislation that facilitates the detention of non-suspects for mere questioning purposes” (Michaelson 2005b: 136), and in contrast to the US, Britain and Canada, “[o]nly Australia has sought to legislate the *detention in secret of non-suspects* (Williams 2003, 7; emphasis in original).” The contrast between Australia’s anti-terrorism legislation and the comparable legislation in these three countries and becomes even more stark when some of the details of the respective bills are considered:

In the United Kingdom and Canada, the police may detain suspected terrorists (in the United Kingdom for 48 hours extendable for a further 5 days, and in Canada for 24 hours extendable for a further 48 hours). The United States legislation provides for the detention of ‘inadmissible aliens’ and any person who is engaged in any activity ‘that endangers the national security of the United States’ (detention is for renewable 6 months periods). While the *Guidelines of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism* recognise that detention for up to seven days may be justifiable, this is only for suspects after their arrest.

There is no suggestion that the detention of non-suspects to assist with intelligence gathering can be justified (Williams 2003, 7).

Given these significant contrasts in the anti-terrorism and national security legislation it is timely to pose the question as to why Australia is so out of step with its allies and mentors? Australia has not been reluctant to learn lessons, in particular, from Great Britain but has tended to do so by taking the British precursors and models further, removing the human rights safeguards contained in British legislation and ignoring an authoritative ruling of the European Court of Human Rights. George Williams and Alastair Nicholson offer a compelling reason both pointing out that Australia does not possess a Bill of Rights or even an effective human rights framework which could curb the excesses of its policy makers and legislators (Williams 2003 and 2005; Nicholson 2005). Noting that Great Britain has enacted its own human rights legislation, Nicholson points out that so also have Canada (taking the form of a Constitutional Charter) and New Zealand. And the 18th Century American Bill of Rights “nevertheless continues to provide real protection against governmental excesses (Nicholson 2005, 4).” Moreover, Australia is not a party to binding international instruments like the European Convention on Human Rights and its five protocols as are many European countries Great Britain included. The Convention enables the citizens of European countries “to appeal to the European Court of Human Rights if domestic legislation or law is thought to be in breach of that Convention [just as in the Chalal case cited above] (Nicholson 2005, 3).” The Eminent Jurists’ Panel of the ICJ noted in this regard that Australia has yet to enact federal legislation incorporating international standards into national law, a move which “would help to establish a clear human rights framework based on international standards (EJP 2006: 3).” For Amnesty International Australia (AIA), international human rights standards “constitute the bare minimum necessary to protect the safety and integrity of individuals from abuse of power (AIA 2005: 5-6).” Greg Carne points out that UN human rights bodies, such as the High Commissioner for Human Rights, the Commission of Human Rights, the Secretary-General, the Secretary-General’s Policy working Group on the United Nations and Terrorism, amongst many others, have long advocated a “more holistic approach” to human rights to ensure that “human rights values are fully integrated with responses to terrorism (Carne 2004: 543).”

Civil society and the protection of national security

Civil society organisations, such as ethnic community groups, human rights organisations and those providing independent legal advice and assistance to members of the community, along with the various organs of the media, play a crucial role in protecting the safety and integrity of individuals from abuses of power by the state and its agencies. In protecting individuals from the state, these organisations are in fact protecting national security. This is a particularly important role in situations where, in the name of protecting national security, a government enacts legislation which severely curtails or even removes altogether the longstanding rights and liberties of its citizens with respect to, for example, the administration of and access to justice. In these circumstances, civil society groups become a bulwark against the state buffering and deflecting where possible the impact of the legislation on the ability of individuals freely to go about their day-to-day business without harassment, persecution or fear of falling foul of the law. This basic freedom is a fundamental requirement of any democratic society.

Legislation which erodes the rights and liberties of citizens is bad enough, but it is of even greater concern when the same legislation not only prevents civil society groups from playing this role but effectively makes it unlawful for them to do so. Such legislation greatly privileges state security over national security and the security and liberty of the individual.

For, national security is at its most basic founded upon the individuals who make up society having and being able to enjoy security and liberty of the person. Thus, the rule of law not only protects the individual it also protects the security and freedom from repression of society and polity as well. Bringing down his judgement in the case of several Palestinians who challenged the legality of the security fence being constructed through Palestinian land by the government of Israel, President of the Israel Supreme Court Aharon Barak commented “There is no security without law. Satisfying the provisions of the law is an aspect of national security (Barak J cited in Kirby 2005: 238).” And, he might have added, an absolutely fundamental one. As this case also demonstrates, the separation of powers is no less a fundamental requirement for the rule of law, the security and liberty of the person, and national security.

The view that, by weakening or removing the rights and liberties of the individuals who constitute the polity, national security is enhanced is a very debatable and highly controversial one. It is not at all clear, for example, how removing the procedural rights and protections of non-suspects held in detention affords any protection against attack from Al-Qaida, Jemaah Islamiyah or any other terrorist organisation. “A policy that does not respect human rights in the first place”, comments Christopher Michaelson, “cannot legitimately claim to protect these rights against transnational security threats in times of emergency (Michaelson 2006: 6).” And, it is as if the government believes that non-suspects are not entitled to these rights and protections precisely because they *are* non-suspects, in other words that only suspects have any claim to these entitlements. In any event, it is clearly not a statement of fact or truth that security is enhanced by removing procedural rights and protections. While restricting individual liberties and removing human rights protections does not obviously or necessarily equate to increased security and protection from terrorist attack, it is clearly the case that such measures do diminish personal and national security *against* the state (see Michaelson 2006 for a similar argument).

In its submission to the inquiry of the Parliamentary Joint Committee on ASIO, ASIS and DSD into the operation, effectiveness and implications of Division 3 of Part III of the ASIO Act (formerly the Australian Security Intelligence Organisation Act 1979, amended on 23 July and 18 December 2003), Amnesty International Australia (AIA) made a number of observations that are pertinent to this paper. This part of the Act contains sections dealing with, amongst other things, requesting and issuing warrants, detention of persons, giving information and producing things, and secrecy of warrants and questioning. As noted above, the Act imposes stringent secrecy provisions making it an offence while a warrant is in force to disclose information about the issuing of the warrant, the questioning and detention of a person detained under a warrant, and to disclose what is described as ‘operational information’ for two years after a warrant has expired. The secrecy provisions prevent public scrutiny of the Act’s warrant regime and therefore render ASIO unaccountable for any human rights violations committed while a warrant is in force. As AIA warns, “It is impossible to monitor the application and use of the Act and hence there is essentially a secret system operating without the scrutiny of civil society (AIA 2005: 25).” While the Act permits a person held in detention to have access to the Inspector General of Intelligence and Security and the Ombudsmen, “there is no ability for third parties to act on their knowledge of detention to assist a detainee (AIA 2005: 26).” The human rights of individuals held in detention, whose ability themselves to exercise the right to make a complaint of abuse or inhuman or degrading treatment is severely restricted, can only be protected when a person acting as their independent representative can take action for and on their behalf. *Habeas corpus* becomes for all practical purposes a dead letter without such safeguards. But the Act has even more far-reaching implications. By authorising the detention of non-suspects for

interrogation merely to enable ASIO to collect information that may be related to terrorist activity, the Act “marks a significant transformation in relations between the citizen and the state” (Carne 2004: 525) and, in weakening or removing procedural rights and protections, gives the Australian state some of the defining attributes of an authoritarian regime.

The Eminent Jurists’ Panel of the ICJ observed that Australia is widely regarded and admired “as a country with longstanding democratic practices” in which “[t]he independence of the judiciary, respect for the rule of law, the rights of the accused and an accountable justice system are well established (EJP 2006: 1).” It also noted that both civil society and the media are “active and vibrant”. Taken together all these factors “provide an important protection against the arbitrary use of powers (EJP 2006: 1).” However, the EJP also sounded a note of caution:

Members of civil society and the legal community questioned whether many of the new laws were indeed required. They stressed the need to complement counter-terrorism laws with the ability to effectively test them in court for compliance with international human rights standards. Concerns were raised regarding provisions that have introduced broadly defined offences, allowed retrospective application of the law, expanded powers of the executive branch of government and constrained avenues of judicial review and due process of law (EJP 2006: 2).

The vibrant nature of civil society in Australia is amply demonstrated in the concerns that civil society members have with Australia’s anti-terrorism legislation as reported to and by the EJP. At least as significant as the concerns raised by the members of civil society is that, in putting substantial impediments in the way of civil society organisations being able to act to keep the state and its agencies under scrutiny when they claim to be taking measures to protect Australia’s national security from the threat of terrorist attack, the anti-terrorism legislation makes it extremely difficult for these organisations, and the media, to provide protection against the arbitrary use of power. In short, the legislation at least in this respect makes civil society much less vibrant and active than it has been in the past.

The community legal sector, national security and Australia’s anti-terrorism legislation

The community legal sector is made up of community legal centres (CLCs), state and territory associations of CLCs such as the NSW Combined Community Legal Centres’ Group and the Federation of Community Legal Centres (Victoria), and the National Association of Community Legal Centres. There are more than 200 CLCs across Australia, approximately 129 of which are funded under the Commonwealth Community Legal Services Program (CCLSP) to provide legal services to people on low incomes and individuals and groups with “special needs”. According to the Program Guidelines, CLCs are “community based, independent non-profit organisations” (AGD 2005: 5).

The sector, which provides independent legal advice and information, casework, legal education, and related services to poor and otherwise disadvantaged or excluded members of the Australian community, is an important civil society actor. While it readily acknowledges the fundamental importance of these services to the well being and social belonging of individual clients and to the overall inclusiveness of Australian society, the sector generally regards its main mission as the improvement of access to justice and equality before the law of *all* Australians (Rix 2006). In providing these essential legal services and seeking to improve access to justice and equality before the law, the sector plays an important role in maintaining social order and preventing social fragmentation. Improving access to justice and equality before the law gives the sector’s clients, and the community generally, a greater stake

in the legal system and more confidence in the law and thus a greater willingness to comply with it. This is important, for the law underpins and provides a framework shaping society and its character. However, the community legal sector's reliance on Government funding—mainly Commonwealth but with a component provided by the states—seriously compromises its independence and constrains its capacity for self-determination.

In a 2004 paper dealing with 'Australia's Legislative Response to the Ongoing Threat of Terrorism', Attorney-General Ruddock asserted that the focus of measures to combat terrorism should be on "creating 'human security' legislation that protects both national security and civil liberties (Ruddock 2004: 254)." Recognising that "[t]he tightening of security will have some effect on certain rights", he assured his readers that "it is our duty to ensure that we employ measures to minimise the impact of counter-terrorism laws on human rights (Ruddock 2004: 254)." In the paper, Ruddock also responded to criticisms that the Government's anti-terrorism "efforts" had failed "to adequately protect our civil liberties (Ruddock 2004: 255)." While these criticisms were based "on the false assumption that counter-terrorism legislation is inevitably at odds with the protection of fundamental human rights", Ruddock did nevertheless have to admit that "the Government has sometimes compromised on these points to achieve the overriding goal of enacting new laws to combat terrorism (Ruddock 2004: 255)." There is not the time or space here to deal in detail with Ruddock's claims and assertions. But, it can be said that Ruddock was certainly correct in coyly admitting that tightening security had had an effect on some rights, and that the legislation had at times been at odds with the protection of human rights. Nowhere did he mention in his paper the measures contained in the legislation preventing civil society organisations from playing their indispensable role of protecting Australian citizens and residents from the arbitrary use and abuse of state power. However, in a more recent paper Ruddock did venture into this territory with explicit reference to the community legal sector.

In a submission to the Spring 2006 issue of *the PartyRoom* ("a journal designed to promote new policy discussion by showcasing the breadth of ideas amongst current members and senators who make up the Party Room within the Federal Coalition"), Ruddock stressed the need for 'Community Legal Centre reform'. He began his piece with an ominous pronouncement: "Legal centres must restore their focus on their clients, rather than political causes (Ruddock 2006: 4)." "Unfortunately", the Attorney-General averred, "some centres devote valuable resources to running political campaigns and the promotion of ideological causes, rather than providing legal advice and assistance to Australians in need (as per their Charter) Ruddock 2006: 4; Ruddock should know that there is no such thing as a legal centre "Charter")." Here, Ruddock turned his sights on the Federation of Community Legal Centres (Victoria) which had produced a manual on "political campaigning" for its member centres and their staff. The manual urged Victorian community legal centres "to build capacity to 'take on' the Howard Government over its anti-terrorism legislation (Ruddock 2006: 4)." According to Ruddock, it is "positively Orwellian" to use the term "community education" to describe such activities. Concluding the *PartyRoom* sermon, he sounded an even more ominous note than he had at the beginning:

In future, the Government will adopt a model for assessing the adequacy of Community Legal Centre funding which focuses not on inputs, but on the outcomes delivered to clients. Centres must focus on serving clients, not running private political agendas. It is time for reform (Ruddock 2006: 5).

Notwithstanding the Attorney-General's misgivings, community legal education (CLE) and law reform and legal policy (LRLP) work—what he disparagingly refers to as "political campaigning"—are among the most important of the activities performed by CLCs. Indeed,

CLE and LRLP are two of the five Service Standards that directly determine the core service activities undertaken by CLCs. Accordingly, both Service Standards are included in the Commonwealth Community Legal Service Program (CCLSP) Guidelines and in the Service Agreement with the Commonwealth (the agreement is in effect a template document that prescribes the services which must be provided by CLCs funded under the Program, adapted at the margins to account for the particular circumstances of an individual CLC). CLE encompasses activities undertaken by a CLC that involve “the provision of information and education to members of the community on an individual or group basis about the law and legal processes” and also refers to the process “of increasing the community’s ability to participate in legal processes by utilising community development strategies (AGD 2005: 21).” Naturally, CLCs design community development strategies that are appropriate for the clients and communities they serve. LRLP refers to a range of activities undertaken by a CLC that, like CLE, are designed to increase the community’s participation in and understanding of the legal system. These activities contribute to the process of bringing about, where needed, changes in the law, legal processes and legal or welfare service delivery. Seen in this light, the community legal sector would not be meeting two of its most crucial Service Standards if it did not involve itself in so-called “political campaigning”. For, according to the CCLSP Guidelines, one of the key objectives of the Program is to provide legal services to assist individuals, groups and “the community overall” and to direct legal assistance “towards people who experience some form of systemic or socio-economic barrier to accessing legal services and/or *whose interests should be pursued as a matter of public interest* (AGD 2005: 5; emphasis added).” CLE aims to provide “people, service providers and other agencies” with an enhanced ability not only to “understand and critically assess the impact of the law and the legal system on themselves” but also to “use the law, legal system and other regulatory mechanisms where appropriate” while LRLP gives CLCs the capacity “to meet the priority needs of the target groups and communities with whom they work (AGD 2005: 6).” In other words, both CLE and LRLP improve access to justice and equality before the law for Australian citizens and residents—and the community overall.

As Attorney-General Ruddock’s criticisms of the community legal sector’s “political campaigning” make clear, the Howard Government opposes the CLE and LRLP work of the sector when the anti-terrorism legislation and its provisions are in the spotlight. His remarks also suggest that the Government is not comfortable with third sector organisations like the community legal sector informing and educating the Australian public about the implications of the legislation for their personal liberty and security. And, the Government obviously does not wish to be held to account by these organisations. This clearly indicates that the Government does not want to encourage a vibrant civil society which, to quote the late Don Chipp out of context, seeks to “keep the bastards honest” by exposing aspects of the legislation that the Government would prefer remain secret and hidden from view. It is difficult to accept that CLE and LRLP work carried out by the sector devoted to publicising and educating individuals and groups about the preventative detention and control order and sedition provisions of the 2005 Act, or the provisions of the ASIO Act allowing for the detention in secret of non-suspects simply to enable ASIO to collect information, is not meeting the relevant Service Standards. After all, such work provides information and education about the anti-terrorism laws and associated legal processes and increases the ability of individuals and groups to participate in legal processes surrounding the operation of these laws. Moreover, it is very hard to believe that CLE and LRLP work in these areas is not genuinely in the public interest. Informing individuals about the laws and their operation serves to protect people from falling foul of them and to avoid, where possible, becoming ‘persons of interest’ to national security authorities. However, the Attorney-General’s remarks about the need for a funding model which focuses on outcomes delivered to clients suggests

that in future Commonwealth funding to the community legal sector will be made conditional on its ceasing to undertake CLE and LRLP work to inform and educate the Australian public about the anti-terrorism legislation. This is in spite of the fact that such work falls under two of the core Service Standards contained in the Program Guidelines and the Service Agreement. In all likelihood these Service Standards will either be amended to meet the Government's demands or removed altogether.

Conclusion

It is unremarkable that it is members of Muslim communities and individuals and groups of Middle Eastern origin who are likely to be most at risk from the persecution, harassment and arbitrary detention permitted in the legislation under the pretext of preventing terrorism and protecting national security. The same groups and individuals will be at greatest risk should the Government and national security authorities choose to invoke the sedition provisions of the 2005 Anti-Terrorism Bill. Journalists, lawyers and others who seek to represent and defend these groups and individuals are also likely to fall victim to persecution, harassment and intimidation. Requiring defence counsel in terrorist cases to submit to security clearances is just one recent manifestation of such victimisation. But in adopting measures that compromise democratic values, the rule of law and human rights and civil liberties, Australia's anti-terrorism legislation not only targets such 'suspect' groups and individuals. The legislation also weakens Australian democracy by reducing the vibrancy of civil society and the organisations that belong to it. The legislation makes it very difficult for these organisations to monitor the treatment of non-suspects held in custody by shielding from scrutiny the activities of the national security authorities when they claim to be acting to protect Australia's national security from terrorist attack. The Australian Government has also demonstrated that it does not want organisations like the community legal sector to inform and educate the Australian public about the legislation and its implications for personal security and liberty. The future could be bleak for the community legal sector should it continue to seek to do so. So also could Australia's national security.

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