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Star or black hole? Australia and the international transfers of anti-terrorism policy

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Star or Black Hole?
Australia and the International Transfer of Anti-Terrorism Policy

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Abstract
This paper investigates the role that Australia is playing in the international transfer or diffusion of anti-terrorism policy. It is widely believed that those Western states that actually have been the target of homeland terrorist attacks, in particular the United States and Britain, have led the way in enacting harsh national security and counter-terrorism legislation. It is further assumed that other states have followed the lead of these vanguards in adopting and implementing their own legislative response to terrorist threats to national security. There is some merit in this view. In the wake of the September 11 attacks of 2001 the United States, for example, was quick to act introducing the Patriot Act in 2001 and the Homeland Security Act in 2002. These acts certainly provided a model for other states keen to bolster their own powers to deal decisively with terrorist suspects and national security threats. Nevertheless, Australia’s law makers have hardly been laggards and have actually gone further than their counterparts in the United States and Britain by adopting legislation enabling the detention without charge or trial of individuals who are merely suspected of possessing information relating to a terrorist activity or of planning such an activity. In other words, individuals can be detained even when there is no evidence to charge them with a criminal offence. Thus, Australia may be leading its counterparts in a ‘race to the top’ where ‘the winner’ is the state which has in place the harshest and most far-reaching anti-terrorism legislation. This paper will accordingly consider whether Australia has been a ‘star’ radiating anti-terrorism and national security policy initiatives to other countries or if, on the other hand, it has been more of a ‘black hole’ collecting and adapting such initiatives from its mentors.

Introduction
This paper considers the role that Australia has played in the international transfer or diffusion of anti-terrorism and national security policy. It is generally taken for granted that those Western states which have experienced the horror of homeland terrorist attacks, in particular the United States and Britain, have been pioneers in the adoption of stern policies to deal with the threat of foreign and home grown terrorism. A closely related assumption is that other states have followed the lead of these vanguards by simply imitating and copying them when developing their own anti-terrorism legislation. The US Patriot Act (2001) and Homeland Security Act (2002) and the British Terrorism Act (2000) did undoubtedly provide a model for other states such as Australia which wished to demonstrate that they were also dealing decisively with the threat of terrorism. However, Australia’s law makers have gone considerably further than their American and British counterparts in enacting laws which, for example, allow for detention without charge, trial or evidence of
terrorist suspects. Thus, Australia may be at least as much a leader as a follower when it comes to the enactment of draconian anti-terrorism legislation. Accordingly, this paper will consider whether Australia has been an anti-terrorism star or national security black hole in relation to its counterparts.

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 and human rights which the Australian Government affirms its legislation is intended to protect from the threat of terrorism (Williams 2003, Head 2005, Hocking 2005, Nettheim 2005).

Thus, Australia’s anti-terrorism legislation is exceptional in at least three respects: 1. it contains measures that compromise democratic values and human rights; 2. in dealing with the terrorist threat Australia’s major allies, who are at far greater risk of terrorist attack, have not found it necessary to adopt these measures; and, 3. the inclusion of the measures in the legislation is an over-reaction to the threat of terrorism currently facing Australia. This paper is accordingly concerned to understand and explain why the Australian Government believes exceptional legislation is needed to safeguard the country from the terrorist threat. It will also consider why anti-terrorism has become such an imperative for Australia’s policy makers, effectively relegating democratic values and human rights to the status of secondary considerations in the policy making process.

The first section of the paper provides an overview of Australia’s anti-terrorism and national security legislation, focusing on the exceptional aspects of the legislation. The second section examines international policy transfer, identifying the structures, mechanisms and institutions involved in the process. On the basis of the conceptual framework for explaining the process of policy transfer that is introduced and developed in this section, the third section investigates the role that Australia has played in the international transfer of anti-terrorism and national security policies since September 11 2001. It will focus on how such policies that have been transferred from abroad have been adapted to Australian conditions and circumstance and seek to explain why the Australian legislation discards many of the human rights safeguards contained in the transferred policies effectively undermining the values the legislation is supposed to protect.

**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).” The requirement that defence counsel appearing for suspects in terrorism cases must first receive a security clearance is not the only worrying aspect of the suite of anti-terrorism legislation that has been enacted since September 11 2001. Philip Ruddock is surely correct in pointing out, whether it was his intention or not, that eminent and credible figures in the community find this aspect of Australia’s anti-terrorism legislation “inappropriate”. Many people in the wider community find other aspects of the legislation at least as inappropriate and menacing.

The following review of Australia’s anti-terrorism laws does not investigate the entire suite of anti-terrorism and national security legislation in detail. Instead, it selects for discussion and analysis those acts, and sections of acts, that are most representative of the worrying tendency of the Federal Government to trample on the rights and liberties of Australian citizens in the name of protecting the country’s national security.

The Anti-Terrorism Act 2004, for example, amongst other things amends the crimes Act 1914 “to strengthen the powers of Australia’s law enforcement authorities, setting minimum non-parole periods for terrorism offences and tightening bail conditions for those charged with terrorism offences” (‘Australian Laws to Combat Terrorism’ n.d.). It introduces the new offence of training with a terrorist organisation that has been proscribed, an offence that carries a maximum penalty of 25 years imprisonment. The Anti-Terrorism Act (No. 2) 2004 amends the Criminal Code Act of 1995 making it an offence “to intentionally associate” with someone who is a member of a listed terrorist organisation. It thus builds on the provisions of the Security Legislation Amendment (Terrorism) Act 2002 which is analysed below. For its part, The Anti-Terrorism Act (No. 3) 2004 amends the Passports Act 1938, the Australian Intelligence Security Act 1979 and the Crimes Act 1914 with a view to improving the Australian legal framework relating to counter-terrorism (‘Australian Laws to Combat Terrorism’ n.d.).

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 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. 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).”

The Security Legislation Amendment (Terrorism) Act 2002 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.). In amending the Commonwealth Criminal Code, the Act creates the offence of associating with a terrorist organisation. Power is granted to the Governor-General (the executive arm or branch of the Australian state) “to make regulations (delegated legislation) declaring an organisation to be a ‘terrorist organisation’ (Jackson 2005, 134).” The Act 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). 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 already much-amended Crimes Act 1914 is further amended by The Crimes Amendment Act 2005 with the effect of enabling participating Commonwealth agencies “to request assumed identity documents from State and Territory issuing agencies in accordance with legislation in force in those jurisdictions (‘Australian Laws to Combat Terrorism’ n.d.).” The National Security Information (Criminal Proceedings) Act 2004 was amended by the National Security Information Legislation Amendment Act 2005 to extend the protection from disclosure of “security sensitive information” by including “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. 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.). As it happens, one of the key, and certainly one of the most draconian, pieces of anti-terrorism legislation has only recently been included on the national security website.

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, 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, 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 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 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 the need for the introduction of a ‘ glorification of terrorism’ offence along the lines of the British offence bearing that name puts in high relief the question of whether Australia has been a leader or follower in enacting legislation to deal with foreign and domestic terrorist threats to national security. In some respects, and not surprisingly, Australia has been very much a follower just has it has been throughout its history, taking the lead first from Britain and then the United States in the formulation and implementation of its foreign and defence policies. In other significant respects, Australia has been a trailblazer particularly when it comes to introducing legislation that tramples on the human rights of its citizens and which contravenes the principles of the rule of law.

The next section will consider the process of policy transfer, looking at the actors involved in the process, the mechanisms, structures and institutions that facilitate it, and the voluntary and coercive aspects of transferring knowledge and policy. Building on the conceptual framework introduced and developed in this section, the third section of the paper will investigate Australia’s place and role in the international transfer of anti-terrorism and national security policy. The third section will consider the exceptional nature of Australia’s anti-terrorism legislation, seeking to understand and explain why Australian policy makers believe such legislation is necessary to protect Australia from the terrorist threat.

The policy transfer process: mechanisms, structures and institutions
Viewed broadly, policy transfer is ‘a process in which knowledge about policies, administrative arrangements, institutions etc. in one time and/or place is used in the development of policies, administrative arrangements and institutions in another time and/or place (Dolowitz and Marsh 1996, 344).’ Dolowitz and Marsh identify nine main categories of political actors engaged in the process of transfer: ‘elected officials, political parties, bureaucrats/civil servants, pressure groups, policy entrepreneurs and experts, transnational corporations, think tanks, supra-national governmental and nongovernmental institutions[,] and consultants (Dolowitz and Marsh 2000, 10).’ According to Evans and Davies, Dolowitz and Marsh’s conceptual model draws together ‘a general framework of heterogeneous concepts including policy diffusion, policy convergence, policy learning and lesson drawing under the umbrella heading of policy transfer (Evans and Davies 1999, 363).’ These concepts can be described as different dimensions of policy transfer: ‘Thus lesson-drawing is categorized under the sub-heading “voluntary transfer” and structured
change is categorized within “voluntary”, “perceptual” and “direct” or “indirect” coercive policy transfer (Evans and Davies 1999, 363).

Policy transfer, then, is a broad term that encompasses many different kinds of processes in which knowledge developed in one location is applied in another often being adapted to local circumstances. Application and adaptation can be direct or indirect, voluntary or involuntary and can take place quickly or over a period of many years. Frequently, formal or ad hoc feedback mechanisms can lead to reverse transfer of knowledge and experience. Indeed, given a more or less unlimited capacity for learning and adaptation possessed by many supra, national and sub-national-organisational units the feedback process can be often continuous and open-ended. Anthony Giddens some years ago coined the term ‘reflexive monitoring’ to describe just such a pattern of behaviour displayed by states in the interstate system (Giddens 1985).

Noting that policy transfer analysis ‘can provide a context for integrating common research concerns of scholars of domestic, comparative and international politics’, Evans and Davies develop an ‘analytical ensemble’ that integrates ‘international structure and agency and the epistemic community approach’, domestic structure and agency, policy network analysis and formal policy transfer analysis (Evans and Davies 1999, 362 and 363; see also Cerny 2001 and Sahlin-Andersson 2002). One of the most compelling features of Evans and Davies’ conceptual framework theoretical framework is its ability to account for the effects of structure and agency at all levels of governance.

Following Rose’s (1991 and 1993) lead, Evans and Davies define policy transfer as an “action-oriented intentional activity”. The merit of this definition is that it applies “equally to the voluntary and coercive dimensions of policy transfer since intent may be ascribed both to those who seek to borrow and to those who seek to impose (Evans and Davies 1999, 366).” They develop an approach to the analysis of policy transfer “which both recognizes the importance of global, international, transnational and domestic structures and their ability to constrain and/or facilitate policy development and also understands that policy transfer may purely be a product of interorganizational politics (Evans and Davies 1999, 367).” As a tool of research and analysis, the value of policy (or, inter-organisational) transfer lies in its ability to identify and account for the “discernible and remarkable features” of the processes of policy change. As a framework of analysis intra-organisational transfer, on the other hand, does not have the capability to identify and account for changes brought about by transfers of knowledge between different organisations. Four assumptions underpin this conception:

1. Policy transfer analysis provides a model of policy change and, therefore, is primarily concerned with accounting for change processes. Intra-organisational transfer, on the other hand, is most suited to measuring continuity and change within organisations.
2. Because policy transfer focuses on identifying and analysing remarkable phenomena—in other words, transfers of knowledge between different organisations over a period of time—diffusion of knowledge within organisations does not come within its ambit. Thus, it is assumed that such diffusion is routine and unremarkable as both process and fact. The explanatory frameworks provided by organisational behaviour and management studies analyse and account for intra-organisational diffusion. These frameworks cannot fully account for policy transfer.
3. It follows from the above that putatively remarkable intra-organisational transfers will in fact be extra-organisational in origin rather than intra-organisational.
4. International policy transfer is remarkable precisely because it is beyond the pale of other (that is, intra-organisational) explanatory frameworks (adapted from Evans and Davies 1999: 367).

In light of the foregoing, Evans and Davies’ conclusion seems entirely unremarkable: ‘….it may be concluded that the great majority of remarkable policy transfers will occur between distinct organizations at the international or transnational levels (Evans and Davies 1999, 367-368).’
Notwithstanding its strengths, there is a degree of tunnel vision in Evans and Davies’ conceptual framework. It fails to deal adequately with the interstate system as a system comprising different organisations interconnected in a myriad of ways. By definition, systems are able to sustain inter-organisational policy transfers. By definition, then, they are also able to sustain remarkable policy transfer. Their conceptual framework discounts this possibility. This is a problem of levels of analysis and therefore also of definitional inclusiveness or exclusivity. For, if federal and unitary national state systems can be defined or classified as organisations—which is one of the inferences that can be drawn from the conceptual framework of Evans and Davies—then so can the interstate system and other global, transnational and international structures. Conceptualised in this way, these systems or structures qua organisations are capable only of intra-organisational or unremarkable transfers of policies and knowledge. This is very unconvincing.

Given time and word length constraints, there will not be the opportunity in this paper to seek to remedy these deficiencies in Evans and Davies’ approach to the analysis and explanation of the policy transfer process. Their approach, nevertheless, does include a number of important insights and provides a useful framework for understanding and explaining the remarkable phenomenon of international policy transfer. Accordingly, the next section will evaluate Australia’s performance in the international transfer of anti-terrorism policy beginning with the premise that the transfer of anti-terrorism and national security policy between national states is a remarkable phenomenon which requires explanation using, amongst other things, Evans and Davies’ conceptual framework. It will seek to account for the exceptional nature of Australia’s anti-terrorism legislation and to explain why anti-terrorism has become such a priority for Australia’s policy makers downgrading democratic values and human rights to at best secondary considerations.

**Australia and the international transfer of anti-terrorism and national security policies**

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 Neal (and Nicholson) 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 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 is 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 which includes more human rights safeguards, “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 transfer 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 Legislature have regard for human rights norms in preparing its anti-terrorism bill?’ It seems that in this case Australia was both a follower, “policy learning” or “lesson drawing” from the mother country, but at the same time and in perverse way a “leader” removing many of the human rights protections that were contained in the model British bill. It is of some concern that this was not the first or only time that Australia had been out of step with its great and powerful friends—and, not only Britain.

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, especially 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) (SLAT) 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 SLAT 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 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (hereafter 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”, cannot be regarded as a judicial body being 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 this 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’ on grounds 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 great and powerful friends and other allies? 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 [as in the Chalal case cited above] (Nicholson 2005, 3).”

Not having a bill of rights and the lack of an effective human rights framework, and not being a party to binding international instruments provide a partial answer to the question of why Australia’s anti-terrorism and national security legislation treats the human rights of its citizens and the principles of the rule of law with such abandon and contempt. The factors cited certainly do help to explain Australia’s failure to ‘policy learn’ and draw important lessons from its peers when it comes to safeguarding the human rights of its citizens. But the question still requires a more definitive answer especially when it is remembered that, as events since September 2001 have demonstrated, the United States, Great Britain and Canada are all at far greater risk of terrorist attack than is Australia. This returns the discussion to the exceptional nature of Australia’s anti-terrorism legislation and why the Australian policy makers believe this legislation is needed to safeguard the country from the terrorist threat.

It is unremarkable that members of Muslim communities and individuals and groups of Middle Eastern origin are at most 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 and human rights, Australia’s anti-terrorism legislation not only targets such ‘suspect’ groups and individuals. The legislation also downgrades the meaning and significance of Australian citizenship for all Australians irrespective of their ethnicity, national origins or religion. In so doing the anti-terrorism legislation reinforces the economic rationalist welfare and social policies that have already been enacted by the Howard Government. The Howard Government’s welfare and social policies have dramatically transformed the relationship between government and citizens and have ‘hollowed out’ Australian citizenship by drastically reducing the range and number of social rights that it encompasses (Rix 2005, Rix 2005a). Seen in this light, Australia’s anti-terrorism legislation may not be so exceptional after all for it has also hollowed out Australian citizenship by diminishing the range and number of human and civil rights, and associated legal safeguards, that it encompasses. Thus, a new mode of Australian citizenship appears to be emerging under the combined impact of the social and welfare and anti-terrorism policies that have been introduced, one from which many of the rights and entitlements that Australian citizens were long able to take for granted have been stripped. The profound implications of the emergence of this new mode of citizenship for Australian democracy, nationhood and society are beyond the scope of this paper. However, what can be said here is that understanding the factors accounting for the emergence of this new mode of citizenship would no doubt also help to account for the absence of an Australian bill of rights and an effective human rights framework along the lines of those of some of its closest allies. For, the lack of a bill of rights and human rights framework greatly diminish the meaning and significance of Australian citizenship—they are, in effect, two sides of the same coin.

**Conclusion**

Australia has been both a leader and a follower, star and black hole, in respect of the legislation it has enacted in response to the threat of terrorism. It has generally followed its allies and peers, learning and drawing lessons from them as it develops its own legislation for dealing with the terrorist threat. As it does so, however, it has tended to go well beyond what has been deemed acceptable and necessary by its overseas counterparts, adopting exceptional legislation that severely
compromises the civil and human rights of its citizens and residents and drastically curtailing many of the associated legal safeguards.

In combination with the Government’s social and welfare policies, the anti-terrorism legislation has dramatically changed the relationship between government and citizens and seriously downgraded the meaning and significance of Australian citizenship. Whether of not the anti-terrorism legislation would actually protect Australia’s way of life, its democratic institutions and citizens’ rights and freedoms from an actual or potential terrorist attack is perhaps a moot point. But what is not beyond doubt is that these have already come under sustained attack from the legislation that is supposed to safeguard them. Much more enlightened lesson drawing and policy learning from abroad are urgently called for. From the perspective of respect for democratic values and human rights, it would be much preferable for Australia to be a black hole than a star.

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