The Impact of Australian Anti-Terrorism Laws
On
Fundamental Legal Rights

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This thesis is presented for the degree of Doctor of Philosophy of
The University of Western Australia

School of Social Sciences
Political Science and International Relations

2016
Abstract

This thesis examines the growth of anti-terrorism laws in Australia since 11 September 2001 and how they have impacted on fundamental legal rights. The questions investigated are: (1) To what extent have anti-terrorism laws introduced in Australia since 2001 involved unprecedented restrictions on fundamental legal rights?; (2) What consideration was given when anti-terrorism laws were enacted to the effectiveness of existing criminal laws, and to the consequences of restricting fundamental legal rights?; and (3) Has fear contributed to the enactment of anti-terrorism laws that have restricted fundamental legal rights? In answering these questions a critical contextual analysis has been provided. An examination of the historical and political origins of the anti-terrorism laws is made, along with a description of those human rights laws that are designed to stop law enforcement and the executive from abusing their power. The interdependent relationship between these laws, the enforcers of criminal laws and those who apply the laws is highlighted, along with consideration of the fragility of the relationship and how it is broken where rights do not exist. Within this context historical derogative precedents and the growth of the surveillance state are used to highlight the fragility of legal rights in Australia. Careful analysis is made of those anti-terrorism laws that most clearly remove rights, to show their extent and pervasive nature. The superficiality of the political reasoning used to support the laws is exposed, along with the evidence-less vacuum within which they were introduced. It is demonstrated that the anti-terrorism laws are an unprecedented attack on fundamental legal rights in Australia. They were enacted without relevant consideration of the effectiveness of the existing criminal laws and they have restricted rights to the extent that even non-suspects can suffer criminal penalties. Fear was used, as it has been historically, every time anti-terrorism laws were introduced. The result has been to create a parallel legal system that has extensive secrecy provisions and that would not be out of place in a police state.
Candidate’s Declaration

Having completed my course of study and research towards the degree of Doctor of Philosophy, I hereby submit my thesis for examination in accordance with the regulations and declare that:

- The thesis is my own composition, all sources have been acknowledged and my contribution is clearly identified in the thesis.
- The thesis has been completed during the course of enrolment in this degree at UWA and has not previously been accepted for a degree at this or another institution.
- This thesis contains only sole-authored work, some of which has been published under sole authorship. A short article was published the Australian Socialist Volume 21, No 3, 2015. Some extracts were taken from a number of chapters and modified for the purpose of explaining the approach I was adopting to the anti-terror laws. The article was not published prior to the thesis being completed, save some amendments prior to printing.

Robert Downie Cavanagh
Acknowledgments

Associate Professor Dr Roderic Pitty, my supervisor, has been of great assistance in the preparation of this thesis. He has read and advised on numerous drafts and offered continual encouragement. His task could not have been easy because of the on-going legislative changes that required regular updating and further analysis. Associate Professor Ray Watterson has also assisted in reading and commenting on a number of the drafts. His assistance in identifying areas that needed clarification is also much appreciated.

I also thank the many lawyers who have listened intently to long lectures from me about the anti-terrorism laws that now exist in Australia, and how they impact on the criminal justice system we were meant to serve, for their interest and concern. My special thanks to Karen Peplow and Catherine Cavanagh.
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<tr>
<td>ACP</td>
<td>Australian Communist Party</td>
</tr>
<tr>
<td>AFP</td>
<td>Australian Federal Police</td>
</tr>
<tr>
<td>AGO</td>
<td>Australian Geospatial-Intelligence Organisation</td>
</tr>
<tr>
<td>ALJR</td>
<td>Australian Law Journal Reports</td>
</tr>
<tr>
<td>ALR</td>
<td>Australian Law Reports</td>
</tr>
<tr>
<td>ANZUS</td>
<td>Australia, New Zealand and United States (military alliance treaty)</td>
</tr>
<tr>
<td>ASD</td>
<td>Australian Signals Directorate</td>
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<tr>
<td>ASIO</td>
<td>Australian Security Intelligence Organisation</td>
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<td>ASIS</td>
<td>Australian Secret Intelligence Service</td>
</tr>
<tr>
<td>CAT</td>
<td>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
</tr>
<tr>
<td>CIS</td>
<td>Commonwealth Intelligence Service</td>
</tr>
<tr>
<td>CLR</td>
<td>Commonwealth Law Reports</td>
</tr>
<tr>
<td>DIO</td>
<td>Defence Intelligence Organisation</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ETA</td>
<td>Euskadi Ta Askatasuna</td>
</tr>
<tr>
<td>HCA</td>
<td>High Court of Australia</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>INSLM</td>
<td>Independent National Security Legislation Monitor</td>
</tr>
<tr>
<td>IRA</td>
<td>Irish Republican Army</td>
</tr>
<tr>
<td>MCCOC</td>
<td>Model Criminal Code Officers Committee</td>
</tr>
<tr>
<td>ONA</td>
<td>Office of National Assessments</td>
</tr>
<tr>
<td>PKK</td>
<td>Kurdish Workers’ Party</td>
</tr>
<tr>
<td>RAAF</td>
<td>Royal Australian Air Force</td>
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<tr>
<td>SIB</td>
<td>Special Intelligence Bureau</td>
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<td>SIO</td>
<td>Special Intelligence Operations</td>
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Introduction

Between 2001 and 2015 an unparalleled number of anti-terrorism laws were passed by the Australian parliament. The laws were introduced on the false propositions that existing criminal laws could not deal with the threat of terrorism, and that terrorism was a new threat of crisis proportions. The most significant impact of the anti-terrorism laws has been on legal rights that are an integral part of the criminal justice system that aims to ensure that all people accused of a crime receive a fair trial. Many of the laws have removed or diminished fundamental legal rights including: the right to liberty, the right to silence, the presumption of innocence, the requirement that the prosecution prove its case beyond reasonable doubt, the right to legal representation and the right to know what evidence the prosecution is relying on for a criminal charge. There are other rights that impact less directly on the right to a fair trial that are also adversely affected, including: the right to trial in an open court and the right to privacy.

The anti-terrorism laws have also provided for dramatically increased powers for the Australian Security Intelligence Organisation which has a notorious history of invading the privacy of law abiding citizens. The Organisation has been given powers that move it from providing security clearances for government employees and surveillance state activities, to additional functions that involve crime investigation and enforcement. Its powers allow for agents to engage in criminal offending that is covered by secrecy provisions. The potential for abuse of rights is significant and secured from public view by the threat of imprisonment. Some of the secrecy provisions also apply to police forces which have a history of corruption, criminality and the abuse of fundamental legal rights.

The anti-terrorism laws were introduced as part of a broader ‘war on terrorism’ that involved engaging with the United States in an invasion of Iraq in 2003 and military interventions in Afghanistan. The narrative promoted by the proponents of the war was that nations were under threat of substantial immediate harm from terrorists and that preventative military actions and domestic laws were need to secure people from harm. The language of fear was used to promote the military interventions and the domestic
laws. In the case of domestic laws police and security agents were very influential in ensuring that the laws they wanted were enacted.

Fundamental legal rights that took hundreds of years to develop and that are supported by international treaties and conventions were curtailed. Although not unprecedented in Australian history, the removal of rights has now, for the first time, become a permanent feature of the legal system. The growth of the laws is ongoing with the most recent proposal including the removal of rights from children, and lowering the threshold for issuing preventative detention orders. While there has been some public discussion and academic commentary on the laws, there is a need for a sustained and detailed critical analysis of how the laws have affected fundamental legal rights in Australia.

The questions to which answers are sought are:

1. To what extent have anti-terrorism laws introduced in Australia since 2001 involved unprecedented restrictions on fundamental legal rights?
2. What consideration was given when anti-terrorism laws were enacted to the effectiveness of existing criminal laws, and to the consequences of restricting fundamental legal rights?
3. Has fear contributed to the enactment of anti-terrorism laws that have restricted fundamental legal rights?

This thesis contends that a binding interrelationship exists between the criminal law, fundamental legal rights and those who apply and enforce the laws. Where there is a diminution or corruption of one of these elements then fractures occur that adversely impact on those accused of a crime and the community as a whole. The evidence shown in this work establishes that the Australian anti-terrorism laws introduced since 2001 have created a number of breaks in the interrelationship, to the extent that a parallel legal system has been established. The breaks are caused by the removal or diminution of fundamental legal rights. Where rights and procedural safeguards have been removed the consequence is that the right to a fair trial is substantially abrogated.
The legislative changes are examined and an analysis of them clearly shows the extent to which rights have been removed. From 2001 to 2015 the reason given for the introduction of the laws was that they were needed to prevent terrorist attacks. The language repeatedly used by legislators was that of fear. A review of the anti-terrorism parliamentary debates shows that the use of the language of fear was so pervasive that it became a mantra. An analysis of the rationale for the laws also shows the suggested need for balance between security and rights is little more than cant used to allow the removal of rights that are an essential part of the criminal laws, and that where they are removed the security of all people is potentially undermined. Additionally, it is asserted that there is insufficient evidence available to establish: that the anti-terrorism laws are effective; whether the parallel system will become a permanent feature of the legal system; or if its features will permeate the traditional criminal justice system sufficiently to cause a paradigm shift.

The context of the anti-terror laws needs to be clearly understood, along with the claims for why these laws were introduced. This is the purpose of Chapter 1. It presents the focus of the thesis, and sets the context for it, which includes: analysis of the genesis of anti-terrorism laws; an overview of the primary justification given for their existence; and a review of some of the academic commentary that examines the justification for, and implications of, the laws.

The assessment of the impact of the laws on fundamental rights requires consideration of the historical development of the rights, their form and purpose and their social context. This understanding is provided in Chapter 2 which outlines fundamental legal rights and the purpose they serve. The right to liberty is highlighted as the most important of rights that can be protected by the criminal justice system through proper application of the right to a fair trial. There is also consideration of international treaties and conventions that protect rights and how they fit within the Australian legal system. This chapter establishes the importance of fundamental legal rights in the Australian legal system, which have been diminished or in some instances abolished by the anti-terrorism laws.
There also needs to be an assessment of the claims about a balance between security and rights. This involves consideration of several key factors, particularly the potential for abuses by law enforcement agencies which is examined in Chapter 3. The evidence provided in the chapter shows how easily corruption can subvert and fracture the interrelationship of those who apply the laws and fundamental legal rights, and how miscarriages of justice can occur as a result. The evidence also shows that where corrupt behaviour flourishes and rights are ignored, there is increased criminal activity by those vested with the power to enforce the criminal laws.

An historical assessment is needed to place in historical context the fragility of fundamental legal rights in Australia before 2001, and to assess what has changed since 2001. This assessment provides some explanation of how the removal of rights could be so readily accepted, especially where the memory of events is either suppressed or non-existent. This task is undertaken in Chapter 4 which provides an historical overview of restrictions of fundamental legal rights before 2001. This overview is provided to assist with understanding the inherent dangers posed by the anti-terrorism laws. The history of some of the successful and unsuccessful attempts to introduce laws that restrict fundamental rights since the white settlement of Australia in 1788 is examined. The final part of the chapter examines the establishment and growth of the Australian Security Intelligence Organisation, considering some of its abuses of power, to place in historical context the ease with which draconian powers could be provided to the Organisation.

Rather than adopting a broad brush approach, which does not show the true extent of the laws, there needs to be a detailed analysis of the most significant provisions of the anti-terrorism laws that have diminished rights. This is done in Chapters 5 and 6. Chapter 5 details and analyses the main anti-terrorism laws introduced since 2001 into the *Criminal Code* and *Crimes Act 1914* (Cth). The introduction of control orders and preventative detention orders shows how readily fundamental legal rights have been removed. The
The anti-terrorism laws chosen are the foundational laws and those that clearly show where rights have been diminished or removed. The analysis clearly shows the differences between these laws and traditional criminal laws and procedures. The differences are so great that the dependent interrelationship between different elements of the criminal justice system has been broken, and a parallel legal system established.

Chapter 6 details the anti-terrorism laws that have been introduced into the Australian Security Intelligence Organisation Act 1979, showing where they breach rights and authorise otherwise criminal behaviour by enforcement agents. The laws provide additional examples of a major shift away from the traditional criminal justice system with its respect for fundamental legal rights.

To assess whether the claims made by proponents of the laws are valid, parliamentary debates are assessed and the claims made therein are related to the broader assessment of the impact of the laws on fundamental rights. This is done in Chapter 7, which outlines the reasons why parliamentarians voted for the laws and analyses their views. This examination reveals an absence of evidence-based law making, coupled with the language of fear to promote the laws.

Finally, to assess the political context of the laws, special attention needs to be given to the role of fear in influencing parliamentarians to support the laws, which is the focus of Chapter 8. The Vietnam War and the invasion of Iraq in 2003 are key examples used to show how fear and lies can lead to large scale death and destruction. The language of fear is examined, and role of fear in contributing to the anti-terrorism laws is highlighted. The Conclusion provides a summary of the argument about the creation of a parallel legal system legitimised by fear, and discusses how the anti-terrorism laws could become a permanent feature of Australia’s legal system.

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1 Sedition and treason laws that were further developed after 2001 are beyond the scope of this work. An outline of the laws, their historical and political context and how they have been applied by governments to suppress dissent can be found in Michael Head, *Crimes Against the State: From Treason to Terrorism* (Ashgate, 2011).
The focus of this thesis is on the creation and implications of the parallel legal system that has resulted from the enactment of anti-terrorism laws in Australia since 2001, not on specific cases. The existence of this parallel legal system has diminished fundamental legal rights so much that terrorism trials conducted in it cannot be analysed in the same way as regular criminal trials, by looking in detail at the evidence presented in court. Analysing the transcript of a trial would be insufficient, because the secrecy that is inherent in the parallel system obscures important facts. The extent of the corruption of the legal process could not be readily revealed, because evidence can simply be withheld. Additionally, many of the breaches of fundamental legal rights occur outside the trial process. At the procedural level the foundational right of liberty can be lost without any trial, and without even the evidence on which allegations are based being revealed. It is the systemic corruption of the legal process, involving control orders, preventative detention orders, forced questioning and special operations, that requires a comprehensive analysis.

This comprehensive analysis provides the matrix that allows the research questions to be answered. The approach adopted in this thesis may be described as a critical contextual analysis of the implications for legal rights of the introduction of anti-terrorism laws in Australia since 2001. The method of analysis used is to investigate the significance of fundamental legal rights for the operation of criminal justice in Australia, then assess the historical fragility of those rights and then examine in detail how the main anti-terrorism laws have restricted those rights, before examining the justifications given by parliamentarians for supporting those laws and the role of fear in generating such support. The main argument of the thesis is that the anti-terrorism laws enacted in Australia since 2001 have created a parallel legal system with substantially reduced rights which has been legitimised not through rational debate and careful consideration of alternative responses, but through reliance on public acquiescence to greatly increase executive powers in a climate of politically-induced fear.

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2 A discussion of terrorism trials can be found in Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia’s Anti-terrorism Laws and Trials* (NewSouth, 2015).
Chapter 1
The Genesis of Anti-Terrorism Laws

This chapter outlines the genesis of the anti-terrorism laws that have breached or removed fundamental legal rights in 21st Century Australia and considers some of the political reasoning and academic commentary accompanying their introduction. The central thesis of this work, that distinguishes it from others, is that there is a positive binding interrelationship between the criminal law, fundamental legal rights and those who apply and enforce those laws, such that a diminution or corruption of one leads to the failure of the criminal justice system in ways that adversely impact on individuals and the community as a whole. In the case of anti-terrorism laws, the derogation of fundamental legal rights, new limits placed on courts, restrictions on the disclosure of the prosecution case against an accused and significant restrictions on defence lawyers, all affect the established traditional interrelationship. The thesis contends that the executive arm of government has inserted itself into the justice system beyond its traditional, more limited, role in the making of laws, and become part of the investigative and enforcement process. The extent of executive government control of the criminal justice system is most extensive in cases where the Australian Security Intelligence Organisation is involved.

The anti-terrorism laws, it is contended, have introduced a parallel criminal legal system that is based on the false premise that existing criminal laws and procedures are inadequate to deal with the threat of terrorism. Furthermore, assumptions that were made about the effectiveness of the anti-terrorism laws do not have a factual basis. The establishment of a parallel system, it is contended, cannot be considered in isolation from the pre-existing criminal justice system, because such an artificial approach would fail to recognise, amongst other things, that enforcement agencies cannot necessarily distinguish the motivations of individuals, and also that systems that require segregation inevitably produce injustice. The thesis includes the proposition that the anti-terrorism laws gained support from parliamentarians because they had little understanding of the existing criminal laws, and even less understanding of the anti-terrorism laws and their diminution of fundamental legal rights. The thesis also contends that fear permeates the debate about
the anti-terrorism laws in a way that blinds many to the inherent dangers contained within them.

An often overlooked feature of the legislative approach, adopted by successive governments since 2001, has been to make otherwise impermissible or criminal acts of law enforcement agents lawful. In some instances this was necessary to enable the removal fundamental legal rights. The decriminalization of overtly criminal acts introduces, as a matter of public policy, a feature that effectively disregards the rule of law.

Most of the commentators on Australian anti-terrorism laws, referred to in this chapter, have not provided a detailed analysis of existing criminal laws and how they apply. They also do not refer to the dependent relationship between the various components of the criminal justice system, some of them assuming that it can function effectively if one or more of its essential elements are removed or fettered. There is also no mention made by various commentators about the creation of a parallel criminal legal system and how this could impact on the traditional criminal justice system.

The promotion of anti-terrorism laws is based on a number of propositions that are usually unstated or not highlighted sequentially. The first such proposition is that terrorists are different from other criminals; their actions are motivated by religion, ideology, and politics singularly or in combination. The motivation of other people who commit crimes is different and therefore not requiring, to the same extent, the ‘preventative laws’ that have been introduced. The second is that, in order to identify terrorists, laws are needed that impinge on their otherwise existing legal rights and that, in order to catch terrorists everyone will have to accept that their rights must be curtailed. The third proposition is that those who are in charge of determining the extent of investigation and surveillance are limited to a very few trusted people, and that the trusted few can determine what happens because they are above reproach. The implied acceptance that a few individuals can be trusted but the community as a whole cannot, requires community acquiescence on the basis that law abiding citizens would accept that they need to have their legal rights
removed in order to be protected. The corollary is that there is no need to complain if you are not a terrorist.

The phrase ‘if you have nothing to hide’ has been used frequently by those promoting the anti-terrorism laws. Most recently Australian Federal Police Assistant Commissioner Tim Morris, speaking at a conference in the New South Wales Blue Mountains in support of the metadata laws, stated: ‘Your chances that your data will be viewed by law enforcement is low’. He added to this proposition: ‘Those with nothing to hide have nothing to fear.’ A much earlier use of the phase was by the American journalist Upton Sinclair in 1917. Sinclair used the phrase in the context of the invasion of his privacy by the state whose agents were spying on him and opening his letters. He provides a number of compelling reasons why people should be afraid of those who would invade their privacy, especially where this affects those opposing the government of the day. He states:

From my personal knowledge I can say that under the administration of President Taft the Roman Catholic Church and the Secret Service of the Federal Government worked hand in hand for the undermining of the radical movement in America. Catholic lecturers toured the country, pouring into the ears of the public vile slanders about the private morality of Socialists; while at the same time government detectives, paid out of public funds, spent their time seeking evidence for these Catholic lecturers to use. I know one man, a radical labor-leader, whose morals happened to approach those of the average capitalist politician, and who was prevented by threats of exposure and scandal from accepting the Socialist nomination for President. I know a dozen others who were shadowed and spied upon; I know one case—myself—a man who was asking a divorce from his wife, and whose mail was opened for months.

This subject is one on which I naturally speak with extreme reluctance. I will only say that my opponent in the suit made no charge of misconduct against me; but those in control of our political police evidently thought it likely that a man who was not living with his wife might have something to hide; so for months my every move was watched and all my mail intercepted. In such a case one might at first suspect one’s private opponent; but it soon became evident that this net was cast too wide for any private agency. Not merely was my own mail opened, but the mail of all my relatives and friends—people residing in places as far apart as California and Florida. I recall the bland smile of a government official to whom

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I complained about this matter: “If you have nothing to hide you have nothing to fear.” My answer was that a study of many labor cases had taught me the methods of the agent provocateur. He is quite willing to take real evidence if he can find it; but if not, he has familiarized himself with the affairs of his victim, and can make evidence which will be convincing when exploited by the yellow press. In my own case, the matter was not brought to a test, for I went abroad to live; when I made my next attack on Big Business, the Taft administration had been repudiated at the polls, and the Secret Service of the government was no longer at the disposal of the Catholic machine. (emphasis added)

The glib dismissal of protest about the invasion of privacy fails to mention that history is replete with examples of surveillance being used by dictatorial powers. Such powers regularly lead to death and destruction and are certainly not respectful of fundamental legal rights and peaceful co-existence.

The invasion of privacy by state surveillance can have a number of consequences including the obtaining of information for the purpose of political party advantage, commercial gain, but more importantly, it provides data that can be used to suppress individual and group dissent. The control of dissent is a typical approach adopted by totalitarian regimes and has also been used by less authoritarian regimes to enhance their grip on power. The data can additionally be used to identify individuals and groups for the purpose of stigmatising and isolating them through the use of political techniques. For example, the stigmatising and isolating of Jewish people in Europe; the use of homophobic rhetoric; the targeting of various ethnic groups; the political attack on Communists in Australia for a large part of the 20th Century; restrictions placed on Aboriginals throughout most of the history of Australia; the promotion of divisions amongst religious groups; these are among some historical and current examples of these techniques. An often overlooked aspect of these types of laws is their potential to allow easier control of people’s opposition to specific laws. For example, if data had been available about where women obtained abortions during the period of prohibition, law reform in this area would probably have been significantly delayed, if not stopped.

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4 Upton Sinclair, The Profits of Religion: An Essay in Economic Interpretation, Published by the Author, Pasadena, California, 1918, 144-146.
Another example of concern is how such data could be used to suppress opposition if it is utilized to identify and detain people who oppose war.

If the argument that there is nothing to fear because innocent people have nothing to hide does not get sufficient acceptance, the proposition that the laws will be used sparingly is brought out to defend their existence. Attorney-General Brandis, speaking about the introduction of new laws under the foreign fighters’ legislation, stated: ‘What we need to do is have every tool in the legal armoury available to us, but it doesn't follow from that that we'll necessarily be using these laws in every case, because we won't’. The comment that the laws would somehow have a limited application is presumably designed to offer comfort. The comfort offered is no more than that the Attorney-General will decide whether to prosecute or not. Brandis, it seems, did not offer any details about the basis for the exercise of his discretion. The metadata laws are but one example of the many anti-terrorisms laws that derogate rights.

The Beginning of the Move towards Limitations on Legal Rights

The destruction of the twin towers in New York on 11 September 2001 was the beginning of a new era where terrorists’ threats and actions were used as grounds for changing laws, and engaging in ‘preventative’ wars. The reaction to the twin towers attack came quickly from the Australian government. On 14 September 2001, Prime Minister John Howard issued a press release condemning the attack on the twin towers, and advising that his government had decided ‘in consultation with the United States, that Article IV of the ANZUS Treaty applies to the terrorist attacks on the United States’. When the House of

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7 Prime Minister John Howard, Press Release Announcing Application of the Anzus Treaty September 14, 2001. Article IV of the ANZUS treaty states: ‘Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes. Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when
Representatives resumed for the first time after the attacks the only business dealt with was a motion ‘expressing horror at the terrorist attacks’, conveying sympathy and condolences and stressing that the attacks ‘constitute an attack upon the United States of America within the meaning of Articles IV and V of the ANZUS Treaty’. The debate on the motion commenced at 2pm and concluded at 7.32pm and all those who spoke endorsed the motion. Along with other responses, anti-terrorist laws were rapidly placed on the Australian parliamentary agenda; and, mirroring the position adopted by the Bush Administration, ‘prevention’ was adopted as a necessary strategy to defeat terrorism.

The preventative war approach abandoned reliance on deterrence or defensive measures ‘to keep terrorists at bay’ and entailed taking the fight ‘to the enemy, to keep them on the run’. The doctrine was used to support military interventions in Iraq and Afghanistan. It can be distinguished from preemptive war, that when used to deal with an imminent threat can be regarded as ‘anticipatory self-defence’. According to Henry Kissinger, while the two concepts are sometimes merged to justify a preventative war when there is no imminent threat, they are essentially different. Others, including, Christopher Greenwood, are of the view that there ‘is no agreement regarding the use of terminology in the field’. Support for military interventions was based on the same reasoning as given for removing rights through anti-terrorism legislation. Abraham Sofaer provides a legal justification for preventative war (which he calls pre-emptive war) on the basis that: ‘The civilized world faces a grave threat from terrorism, especially from groups supported by states’. He claimed that globalization has meant that terrorists can travel, communicate and have money. Moreover they have the potential to use ‘weapons of mass

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9 Ibid, 30739-30800.
Sofaer claimed that the US was rich and vulnerable, and terrorists were a ‘formidable problem’ because: ‘Terrorist groups avoid detection by dispersing their members in highly decentralized cells; [and that] many are prepared to face death in pursuing their objectives. Success or victory for such people has a meaning alien to rational thought’. For Sofaer this means that ‘[p]roperly applied, pre-emption is an aspect of a state’s legitimate self-defence authority’. Although the words Sofaer used were designed to provide a basis for US intervention in Afghanistan, they are strikingly similar to those used by politicians who supported anti-terrorism laws.

Robert Cornall, former Secretary of the Commonwealth Attorney-General’s Department, provides an insight into reasons for the anti-terrorist legislation. A few days after the terrorist attacks on 11 September 2001 in New York and Washington, Cornall chaired ‘a whole of government review of Australia’s counter-terrorism arrangements’, which decided ‘current arrangements were grossly inadequate’. By the end of October a report had been handed to the National Security Committee of Cabinet that included four recommendations, one of which was the need to ‘introduce new laws to deal with a new type of terrorist threat’. This conclusion was reached with what may be regarded as striking speed, and the reason appears to have been based on the need to prevent terrorist attacks. Addressing the adequacy of existing laws, Cornall asserted that existing criminal laws required a criminal act to have been completed before action could be taken, and that the criminal law worked on the assumption that punishment was an effective deterrent. He characterized this view in these terms:

14 Ibid 209.
16 Ibid 225.
18 Ibid, 50.
19 Bernadette McSherry, in her work, ‘Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws’, (2004) 2 University of New South Wales Law Journal 27, notes ‘Because the legislation inserting new terrorism offences into the Criminal Code and the Bills concerning the ratification of the Rome Statute bypassed the usual MCCOC consultative process, a thorough analysis of the new crimes by criminal lawyers seems to have been precluded.’
Australia was a very safe country, protected by geography and social cohesion from disputes that lead to conflict, insurgency and terrorism in other, less fortunate, parts of the world. We did not need sophisticated anti-terrorism offences. We could rely – if necessary – on traditional State offences such as murder and causing grievous bodily harm.

But those offences are primarily directed at punishing an offender after the event. They are based on the assumption that, in most cases, the threat of conviction and punishment is an effective deterrent. In my view, they suffer from an almost fatal flaw when related to terrorism. They largely depend on the completion of an act – such as murder – before the offence is committed. How could the threat of imprisonment deter a suicide bomber?  

Cornall expresses a conventional view, often traditionally used to support the activities of security agencies. For example, in the 1970s, Justice Robert Hope, as Commissioner of the Royal Commission on Intelligence and Security, justified the existence of the Australian Security Intelligence Organisation on the basis that in most cases a crime had been completed before it could be investigated. He emphasised the need to watch people who may engage in espionage or subversion, stating: ‘It is not sufficient to await the commission of a crime against the nation’s security, and only then to take action to identify and take proceedings against the offenders’. However, Hope’s emphasis was different to that of Cornall, who was promoting a justification for the dramatic expansion of powers going well beyond surveillance state activities. By 2005 ASIO agents and police were given unprecedented powers to interrogate and detain people who may not even be suspects. A significant part of the justification for such powers is based on the reasoning espoused by Cornall.

Apart from the difference between surveillance and proactive enforcement, the suggested limitation of laws establishing criminal offences, as claimed by Cornall, is misleading. The criminal law is not ‘primarily directed at punishing an offender after the event’, it is directed at: establishing the elements that make certain behaviour a criminal offence;

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20 Robert Cornall, above n 16, 52.
21 At the time a Justice of the Supreme Court of New South Wales, and a former President of the Council for Civil Liberties. The Royal Commission was established on 21 August 1974 and concluded its work in 1977.
investigating and detecting crimes; arrest and detention; prosecuting; to some extent governing the admissibility of evidence at trial; and then, if convicted, sentencing. The first part that establishes the elements of an offence may, for example, create the offence of murder that also includes situations where there is an attempt to murder, or solicit to murder, or a conspiracy to murder. Second, to suggest that criminal laws are based on ‘the assumption that, in most cases, the threat of conviction and punishment is an effective deterrent’ is a simplistic overstatement that employs one sentencing principle, ‘deterrence’, to support the whole. The argument fails to properly distinguish between laws that establish a criminal offence, criminal procedural laws and investigative methods that are designed to gather evidence that can be used to prosecute a crime that has been committed and to prevent a substantive crime from being committed. Remarkably, the failure of Cornall to acknowledge the various functions of criminal laws is exacerbated by the additional failure to recognise that they can also apply before an act affecting anyone or thing has happened.

Cornall did not consider the substantive laws that allowed law enforcement to engage before the commission of an offence, or the investigative laws that allowed the identification of potential offenders. For example, dealing only with Commonwealth laws, the Criminal Code 1995 allowed for the criminal offences of: attempt, which involves more than just planning;23 complicity and common purpose, involving aiding, abetting, counselling or procuring the commission of an offence;24 joint commission, where an agreement is reached;25 commission by proxy;26 incitement;27 and conspiracy.28 The laws related to the gathering of evidence prior to the commission of an offence and after were also in existence. For example, law enforcement and intelligence agencies had the power to collect evidence by telecommunication interception;29 to use listening devices and gain

24 Ibid 11.2.
25 Ibid 11.2A.
26 Ibid 11.3.
27 Ibid 11.4.
28 Ibid 11.5.
29 Telecommunications (Interception) Act 1979 (Cth).
access to computers;\textsuperscript{30} and engage in undercover operations.\textsuperscript{31} Additionally there existed powers to search and seize.\textsuperscript{32}

Apart from the powers that the Australian Federal Police and ASIO agents had to engage in investigations to prevent crimes, the National Crime Authority had power to investigate serious and organised crime on a national basis.\textsuperscript{33} It could also disseminate information to law enforcement agencies. The avoidance of recognition of the broad scope of the criminal laws raises the reasonable possibility that the approach being adopted was designed to gain maximum political advantage in a period when it was claimed there was a crisis. The alternative to this proposition would be to suggest that the preventative approach was being promoted by those who were ignorant of the scope of criminal laws.

Nevertheless, it is appropriate to treat the propositions put forward by Cornall as a serious contribution to understanding the basis for government action in creating anti-terrorist laws. His propositions will be scrutinized in this thesis through an examination of the anti-terrorism legislation and relevant pre-existing criminal laws. It will be shown that the rhetoric used to continually promote increasingly oppressive legislation on the basis that criminal laws as they existed before the ‘War on Terror’ could not deal with the terrorist threat is unsupported by evidence. The lack of evidence about the effectiveness of the legislation, and the lack of any regular process of reviewing if the legislation has been effective or not, suggest that this legislation has been adopted to achieve a number of political objectives: objectives that would not be achievable without manufactured fear mongering, which avoids analysis of already existing laws.

The link between domestic laws that are designed to counter the terrorist threat and warfare is highlighted by Jude McCulloch who refers to a ‘growing overlap between waging war and fighting crime’.\textsuperscript{34} It is beyond the scope of this work to examine the abuses that occurred through American foreign interventions. However, the case of David

\textsuperscript{30} Australian Security Intelligence Organisation Act 1979 (Cth).
\textsuperscript{31} Crimes Act 1914 (Cth).
\textsuperscript{32} Crimes Act 1914 (Cth).
\textsuperscript{33} National Crime Authority Act 1984 (Cth).
Hicks is considered in Chapter 3, because it illustrates some of the methods employed by the Americans. The evidence suggests the Howard government was complicit in the human rights violations, as it was well aware of what the Americans were doing, and did not protest when an Australian citizen was subjected to torture and other cruel and degrading punishments. The use of torture involved years of criminal activity by state agents, either by direct assaults on individuals or through complicity in assaults that breached fundamental legal rights.

The Australian government embraced the American approach and did not need to be rallied to the cause by George W. Bush’s comments such as, ‘Either you are with us, or you are with the terrorists’. 35 Shapiro notes that the courts in the United States have traditionally shown deference to the executive branch of government when matters of national security were an issue, and claims about intelligence information were used to support executive actions that adversely impacted on civil liberties. He observes that:

. . . there is a concern about institutional competence. Judges are not trained as national security experts, and they have traditionally been hesitant to overrule military and political officials on issues where they are being told that the survival of the nation may hang in the balance. This is especially true when the executive branch claims, as it invariably does, that it has greater access to intelligence information than the judicial branch, and a greater ability to appreciate its significance.36

Australia followed the United States and the United Kingdom by engaging with them in wars in Iraq and Afghanistan, and by enacting legislation that was designed to supplement the military wars. The introduction of anti-terrorist legislation in the United States and the United Kingdom influenced the Australian government’s approach, which partly reflected a desire to follow the responses of its allies to the terrorist attacks in the US in 2001 and in London in 2005, as is evident from the parliamentary debate reviewed in Chapter 7. Yet the Australian legislation is not simply the same as either the USA Patriot Act or similar

35 Cited in Malcolm Fraser, with Cain Roberts, Dangerous Allies (Melbourne University Press, 2014) 190.
UK legislation. In one respect, in permitting the detention of non-suspects, it goes even further in derogating fundamental rights.

The approach adopted in the United States, United Kingdom and Australia was based on the assumption that terrorism was a new threat that could not be dealt with using conventional criminal laws. Yet terrorism was not a new threat in any of the countries that introduced anti-terrorism legislation in the 21st Century. The suggestion that terrorism is a new phenomenon is specifically criticised by Kirby J. in his dissenting opinion in the High Court case of *Thomas v Mowbray* and it is worth quoting at some length:

Terrorism is not a new phenomenon. Conduct sharing features now associated with "terrorism" has occurred for centuries. Before the passage of the Act in 2005, the Federal Parliament had addressed "terrorism" on a number of occasions. The clearest example followed a bombing that occurred at the Sydney Hilton Hotel during a Commonwealth Regional Heads of Government Meeting in February 1978. In response to that event, the Prime Minister, Mr Malcolm Fraser, announced the establishment of the Protective Security Review. Justice R M Hope was commissioned to conduct the review, which was to consider "the whole area of protective security in Australia, including measures to counteract terrorism" ("the Hope Review").

The Hope Review contained extracts from an opinion obtained from Sir Victor Windyeyer, a past Justice of this Court. The opinion addressed constitutional and legal questions:

"A crime ordinarily is a particular act, done voluntarily and with intent to perform it and, in some instances with also a specific purpose intended to be accomplished by it. But terrorism ... is not defined by reference to specific deeds, but in general terms, the 'use of violence'; and not with a specific intent, but with an ulterior object, 'for political ends', a most imprecise term - or for 'the purpose of putting the public or a section of the public in fear'. This would appear to make criminal responsibility depend upon an ulterior intention or motive, an unusual ingredient of a criminal act. It could be difficult to establish it in some cases if 'political ends' do not include sectarian antipathy, private revenge or the promotion of some cause unrelated to any apparent political purpose.

..."If 'terrorism' is to be a new entry in the list of crimes, and if putting the public in fear is a form of this crime, it would be better to provide that the offence consists of an act of violence that created such fear, or was

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[2007] HCA 33, paras 158, 161-162 (references omitted).
calculated to do so, rather than making a 'purpose' the essential criterion. The result, or the probable result, of a deed is usually readily apparent: but the purpose of the doer may not always be discoverable."

In this regard, Sir Victor Windeyer's opinion repeated the old warning that law should primarily attach to acts because "the devil himself knows not the thought of man".

As noted by Kirby, terrorism is not new. Conduct sharing features now associated with terrorism has occurred for centuries and it did not require specific laws to deal with the crimes committed. Apart from the Hilton bombing,38 other incidents that may be classed as terrorist attacks are: the 1972 bombing of the Yugoslav General Trade and Tourist Agency in Haymarket, Sydney; the assassination of the Turkish Consul-General in Sydney in 1980; the bombing of the Israeli Consulate and the Hakoah Club in Sydney in 1982; a bombing of the Russell Street Police Station in Melbourne in 1986; the bombing of the Turkish Consulate in Melbourne in 1986; and the bombing of the French Consulate in Perth in 1986. These incidents, although they occurred in Australia, did not result in anti-terrorism legislation as happened after the 11 September 2001 attacks in the United States. The existence of terrorist activities throughout the world is far from a new phenomenon. The anarchist movement in late nineteenth and early twentieth century in Europe and the United States was effective in killing heads of state and members of the public. Before September 2001 there were many well-known terrorist groups, including: The Stern Gang or Lehi (Fighters for Freedom in Israel); EOKA (The National Organisation of Cypriot Fighters); the Mau Mau in Kenya; the Red Brigades in Italy; the Bader-Meinhoff gang in West Germany; and the IRA, among others.

There have been continuous waves of anti-terrorism legislation enacted in the Australian parliament since 11 September 2001. By the end of 2014 at least 64 separate pieces of anti-terrorism legislation had become law.39 Since 26 March 2015 that number has increase to 65 pieces of legislation with the new metadata laws. Some of the legislation

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38 It should be noted that there remains doubt about this incident and the extent of involvement of security agencies: see Michael Head, ‘Thirty Years since Sydney’s Hilton Bombing: Unanswered Questions’ (2008) 12 Legal History 1.

can be regarded as of limited effect on fundamental legal rights; other laws have a substantial adverse impact on legal rights. Whilst the Australian parliament debated the introduction of anti-terrorist legislation, commentators debated the need for such laws. Some of the literature relevant to the debate involves generalities based on ideological positions, and focuses on how extensive the laws are, rather than on whether they are needed at all. Chapter 7 details and analyses the parliamentary debates from 2001 to 2014 and examines some views of individual parliamentarians. Here a range of views by academic commentators is considered.

The Commentators’ Contribution to the Debate
The political declaration claiming a need to meet the ‘new threat’ of terrorism with stronger laws was met by some academic commentators with the idea that a balanced approach was necessary. Christopher Michaelson describes the debate between those who promote the need to curtail civil liberties because of the ‘unprecedented threat’, and those who ‘maintain that in times of crisis that the liberal democratic state must adhere strictly to its defining principles’. Michaelson considers the argument that liberty needs to be balanced against the need for security, and makes the point that those advocating the balanced approach have no idea if the measures introduced reduce the threat of terrorism. He states:

. . . the image of balancing liberty against security is ambiguous for practical reasons. Even if one accepts that civil liberties and human rights can be balanced against national security, it is not clear whether the counter-terrorism measures introduced in the aftermath of the 9/11 attacks actually increase security, or merely diminish liberty. Indeed, it appears that those who advocate the balancing


approach often have no idea whether the counter-terrorism measures introduced actually reduce the threat of terrorism.⁴²

Michaelson’s assessment was based on proposed anti-terrorist legislation and the ASIO Legislation Amendment Act 2003 (Cth).⁴³ He criticises the ‘balance metaphor’⁴⁴ but does not identify where the anti-terrorist laws strike at civil liberties. The assessment he makes, when analysing the supposed need to balance security needs against the right to liberty, is a criticism of the parliamentarians who voted for the legislation and the commentators who did not oppose it.

Andrew Lynch and George Williams, at least in some of their work, promote the balanced approach:

There must be a balance between our national security and fundamental freedoms. The object of new terror laws cannot be national security at all costs. They can only be justified to the extent that they protect our democratic freedoms and way of life.⁴⁵

Along with Michaelson, Lynch and Williams provide only a very limited analysis of how the laws diminish fundamental legal rights. Bernadette McSherry describes how some of the anti-terrorist laws broaden the boundaries of the Commonwealth Criminal Code.⁴⁶ George Syrota analyses offences in Part 5.3 of the Criminal Code (Cth) and concludes that ‘many of them are dangerously wide and lamentably vague’.⁴⁷ His approach, whilst detailing a number of the difficulties that could arise in applying the sections, does not include an analysis of how the sections might adversely impact on an individual’s fundamental legal rights. His analysis is also restricted to the Criminal Code which forms only part of the anti-terrorist legislative approach.

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⁴² Ibid 18. According to David Lyon, Surveillance after Snowden (Polity 2015), p 111: ‘The frequency with which one hears of the “balance” or “trade-off” between privacy and security, or liberty and security, is matched only by its hollowness’.
⁴³ Michaelson, n 41 above, 18-19.
George Williams is probably the leading Australian academic commentator on the anti-terrorism laws. His views about need for anti-terrorism laws were clearly expressed in the 2014 Lionel Murphy Memorial Lecture. He noted that the laws reflected real concerns that terrorism ‘might occur at home’, and that it was ‘not possible as a citizen to have an informed knowledge of the exact nature of the threat’. He contended that the best that could be done was to ‘rely upon the blunt assessment provided by Australia’s National Terrorism Public Alert System’. This system sets a general level of threat. If this approach is accepted, then it is necessary to simply believe what the government says about threat levels and the need for the laws. Unless there is some compelling reason to rely on a system that is not open to public scrutiny, then there is good historical precedent for being sceptical. Williams does not consider the history of governments misleading the public about the need for legislative change and foreign interventions. Some of the misleading information supplied by Australian governments to its people in the 20th and 21st Centuries that have led to devastating consequences is considered in Chapters 4 and 7. His position is that those who say there is no need for anti-terrorism laws have a position that is ‘not sustainable’. He, in particular, sees the need for laws to try to stop the financing of terrorist acts.

Williams in general terms lists the anti-terrorism laws that exist and notes that some of the powers contained in them are ‘more at home in a police state, than in a democratic nation like Australia’. Where this thesis differs from the position taken by Williams is that it identifies those laws that breach fundamental legal rights and that impose secrecy, and provides reasons why they should not be supported. The mere inclusion of definitions of terrorism in criminal legislation does nothing more than introduce motive into criminal legislation. The definition of terrorism has also been criticised by United Nations, Special Rapporteur, Martin Scheinin, on the basis that it is too broad and should be limited to situations where the ‘conduct is accompanied by an intention to cause death or serious

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48 George Williams, Lionel Murphy Memorial Lecture, Wednesday 22 October 2014, 4.
49 Ibid.
50 Ibid.
51 Ibid 8.
bodily injury’. There can be little argument that stopping the financing of terrorist organisations should be supported, so long as it does not breach fundamental human rights. This thesis also poses the proposition that, before laws are introduced, there should be clear grounds for doing so, based on facts that are relevant and open to scrutiny, that there is evidence available to show the laws will be effective, that there are no laws already available to meet the need, and that the laws do not derogate from fundamental legal rights. The anti-terrorism laws that in many instances have been rushed through parliament do not meet these criteria.

Williams along with other academic commentators attempts to provide a justification for laws that need to be either repealed or so substantially amended that they would in effect be repealed. Williams and others note that many of the laws belong in a police state and yet they continue to suggest that somehow they are either acceptable or amendable. There is a real need for academic commentators, if they promote the need for the existence of the laws, to specify where existing criminal laws are inadequate in dealing with terrorism, to detail how the current anti-terrorism laws are effective, and to provide cogent reasons why governments and law enforcement agencies should be trusted to protect legal rights when they have been removed. The literature available about Australian anti-terrorism laws does not provide a detailed analysis of the need to divert from existing criminal laws.

Michael Head describes four features of the anti-terrorism laws introduced up to October 2005. The legislation he says ‘(1) defines terrorism in sweeping terms; (2) permits the banning of political groups; (3) allows for detention without trial; and (4) shrouds the operations of the intelligence and police agencies in secrecy and provides for semi-secret trials’. These features have not changed since 2005. The characteristics have become entrenched with each new anti-terrorism law. Head is critical of the positions taken by other liberal academic commentators, in particular Lynch, McGarrity and Williams, who in a law review article in 2009 argued that the state should have the power to ban

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organisations, deemed to be terrorist.\textsuperscript{54} Head’s opposition to the anti-terrorism laws is multifaceted, but in terms of their impact he relevantly notes that they ‘have provided governments and security agencies with new arsenals, capable of being deployed against anti-war and anti-government dissenters, as well as against supporters of foreign struggles against despotism’.\textsuperscript{55}

The introduction of laws that give greater powers to enforcement agencies to investigate and prosecute terrorism offences by removing legal protections creates a parallel legal system and promotes the idea that such offending can be isolated from other criminal offending. The logic for this segregation, as espoused by Cornall and others, is that terrorists need to be prevented. Thus the reasoning implies non-terrorist members of the community will be treated differently if it is alleged that they have committed an offence. This argument, of course, raises the issue of why other criminal offending that is more prevalent should be treated differently. Head’s contention that the anti-terrorism laws could be used against dissenters and thus their reach broadened is valid but does not reflect their potential range. Significant points are that liberty is a foundational substantive right that should be protected and that its diminution, in what seems to be an indefinite war on terror, could connote a cultural shift to a society that accepts authoritarian rule. Sangeeta Shah makes the point that securing the right to liberty and the right to a fair trial is an essential pre-requisite to all other fundamental human rights.\textsuperscript{56} The link between fundamental legal rights and human rights more generally is examined in Chapter 2.

Jenny Hocking produced the first substantive work on the Australian anti-terrorism laws that were introduced following 11 September 2001.\textsuperscript{57} Her analysis involves legislative changes up until 2004 and she is highly critical of those changes. Since that time the laws have become even more draconian. Hocking warned then that pre-emption was a military based doctrine that anticipates threats and constructs a state ‘of permanent crisis’, where

\textsuperscript{54} Michael Head, \textit{Crimes Against the State: From Treason to Terrorism} (Ashgate, 2011) 11.
\textsuperscript{55} Ibid 277.
\textsuperscript{57} Jenny Hocking, \textit{Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy} (UNSW Press 2004).
‘exceptional powers become routine or normalised’.\(^{58}\) As a consequence the state protects itself and controls political conflict and dissent.\(^{59}\) Hocking is critical of Williams, claiming he has a ‘fundamental misunderstanding’ about ‘the nature of legal protections’, viewing them as ‘obstructions to justice’, when ‘they are precisely the means through which justice is achieved’.\(^{60}\) She also notes the proposed movement of ASIO into a role of ‘pre-emptive security policing’.\(^{61}\) Sarah Sorial is another commentator who is concerned about the powers given to ASIO and poses the need to have a Bill of Rights to help meet the problem.\(^{62}\)

Laws that diminish fundamental legal rights have been criticised in the United Kingdom. The UK *Anti-Terrorism, Crime and Security Act 2001* was tested in *A and Others v Secretary of State for the Home Department and X and Another v Secretary of State for the Home Department* \(^{63}\) and found to be inconsistent with the United Kingdom’s obligation under the *European Convention on Human Rights and Fundamental Freedoms*. Laraine Hanlon contends that the case reveals ‘the diminution of democratic values’ and it ‘highlighted the erosion of basic human rights in the face of expanding executive power, providing evidence of an emerging culture of executive control under the guise of heightened democracy and the protection of the public from those who would destroy it’.\(^{64}\)

Sacha-Dominik Bachmann and Matthew Burt provide a description of laws introduced in the United Kingdom, Canada and Australia, and focus on the use of control orders.\(^{65}\) They accept the preventive approach with some reference to rights, but conclude that control

\(^{58}\) Ibid 236.  
\(^{59}\) Ibid 248.  
\(^{60}\) Ibid 235.  
\(^{61}\) Ibid 235.  
\(^{63}\) [2004] UK HL 56.  
orders are ‘here to stay’ and that there are ‘no clear alternatives which can effectively
“prevent” an individual from participating in terrorist related activity’.66 Their approach is
to suggest a 12 month time limit on control orders to ‘help strike a balance between the
liberty of an individual and the security of the nation’.67

There is no evidence to support the proposition that increasing executive power and
thereby authoritarian rule improves security for citizens, or increases the chances of
defeating the terrorist organisation. Indeed, the opposite can be seen in the case of the
Euskadi Ta Askatasuna (ETA),68 which opened its terrorist campaign in 1968 in part as a
consequence of ‘Franco’s continued brutality against the Basque region and culture’.69 As
Spain progressed to democracy ETA’s support and ability to do harm diminished.70

The Australian government has enacted legislation which in one striking instance has
gone further in abrogating human rights than that introduced in the United States, United
Kingdom, Canada or New Zealand. In 2003 legislation was enacted that allowed non-
suspect citizens to be detained incommunicado for questioning to see if they have any
information about terrorism offences.71

When looking to case law to find justification for substantive changes to the law, some
leading cases provide the historical background to laws as well as providing the legal
principles upon which the changes are based. The courts are often held out as providing a
fetter on the unbridled excesses of the executive. Michael Kirby makes this point when he
states:

Even in countries like Australia, that do not have an entrenched charter of rights,
courts are not without legal means to uphold fundamental civil rights. In
appropriate cases, they may apply settled principles of statutory interpretation that
require that laws depriving individuals of longstanding and basic rights must be

66  Ibid 166.
67  Ibid.
68  Basque for Basque Homeland and Freedom.
   Journal of Conflict Studies 1, 138.
70  Ibid 145.
71  ASIO Act 1979 (Cth) Division 3, Part III.
clear and without ambiguity. As well, there is an increasing realisation within the courts of Commonwealth countries that national laws should, where relevant, be construed so as to conform to the developing law of human rights.\(^{72}\)

Kirby expressed his disappointment with Australian judges when interim control orders were considered in *Thomas v Mowbray*, which is described later in Chapter 5. The courts have not stopped the growth in laws that remove basic rights, and many academic commentators have provided confused positions that have probably had no impact on parliamentarians or the public. A detailed understanding of the laws and how they impact on fundamental legal rights is needed if the flow of legislation is to be fully understood, let alone slowed.

**Conclusion**

The anti-terrorism laws introduced in Australia since 2001 have been based on dubious assumptions, including the claims that terrorists are different from other criminals, that fundamental rights must be curtailed in order to prevent terrorist acts, and that executive governments and enforcement agencies can be trusted to always use their increased powers appropriately. These assumptions require critical scrutiny, based on a detailed analysis of the anti-terrorism laws and their implications for fundamental rights. This chapter has reviewed the genesis of the anti-terrorism laws in Australia, noting the impact of terrorist acts in the United States and the United Kingdom in shaping the political context in which the laws were introduced. Criticisms of similar laws in the United States and the United Kingdom have been noted, and a review has been given of different academic assessments of the Australian anti-terrorist laws. This review highlights the need for a detailed critical assessment of the laws, which is undertaken in this thesis.

The next chapter considers fundamental legal rights as they have developed under the Australian Constitution and at common law, and how international treaties and conventions fit within the Australian legal system. It also stresses the importance of legal

rights and other human rights which derive from them, to ensure the integrity of the criminal justice system.
Chapter 2
The Purpose of Fundamental Legal Rights

The reason for the introduction and growth of anti-terrorism laws, as shown in the previous chapter, was the claim that existing laws did not safeguard against terrorist attacks and preventative laws were needed. As the debates progressed about the laws a theme developed that emphasised the need for balance between protecting people from terrorist attacks and fundamental freedoms. However, apart from reference to safeguards little attention has been paid by legislators to the actual rights being impacted. As will be shown in Chapter 7, the parliamentary debates are largely devoid of detailed analysis of fundamental legal rights and how they assist in ensuring the right to a fair trial and ultimately the right to liberty.

In the absence of an understanding of the role played by legal rights in the justice system, the claim that there needs to be a ‘balance’ between security and rights is a hollow proposition. None of the legislators or commentators explains what they mean by the word ‘balance’. Taking a generous view about what those who use the word mean, a definition is, ‘a situation in which different elements are equal or in correct proportions’ (Oxford Dictionary). From this definition it can be inferred that the proponents of the anti-terrorism laws believed the existing criminal laws were not balanced and preference was given to rights over security. Alternatively, where it is claimed that stronger laws are required to fill gaps in existing laws then ‘balance’ was needed in order to maintain some rights. Whichever position was taken the promotion of ‘balance’ as a way of developing anti-terrorism laws assumes that there is a conflict or incompatibility between security and rights. The reasons for advancing ‘balance’ as a way of developing anti-terrorism legislation appear to misconceive the role played by fundamental legal rights in the criminal justice system. Substantive and procedural rights are in fact inextricably linked to the criminal laws such that their removal or diminution simply creates laws that are repressive and dangerous to the extent that the security of the individual and the society is threatened.
An examination of the rights that are most impacted by anti-terrorism laws is undertaken in this chapter, and those areas where the rights protect the security of the individual and the community as a whole are highlighted. Rather than supporting the proposition that there is need for balance, it is proposed throughout this work that without fundamental legal rights there can be no security.

The legal rights outlined are particularly important in providing safeguards against abuses by governments and their agents. The fundamental rights, developed over hundreds of years, have been adopted in international treaties. Some of the rights along with the reasons for their existence are detailed to provide an understanding of their importance, and to provide the backdrop for the analysis in subsequent chapters that shows how fragile the rights are, and how attempts have been made to reduce the rights from colonial days and into the 21st Century.

The development of fundamental legal rights outlined in this chapter provides a context for the evaluation of the justifications provided by the legislators who introduced the laws that eliminate or significantly qualify existing common law and statutory rights. The rights form a fundamental part of the criminal laws, are significant when courts are determining how the law is applied, are relevant when lawyers both prosecution and defence make submissions to the court about admissibility of evidence and sentencing requirements, and need to be taken into account bylaw enforcement agents when they are investigating and apprehending suspects. A breach of a legal right at each level of the justice system can lead to a miscarriage of justice. Anti-terrorism laws introduced since 2001 have systematically disregarded fundamental legal rights or subordinated them to the claimed needs of evidence gathering and national security. The language of legislators

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73 The common law is rules of law and principles developed through individual cases in England and Australia. Francis Bennion describes its development as ‘respect for “our lady the common law”, whose earthly provenance is innumerable occasions of pragmatic justice. Thus is explained the judicial distrust of legislation, a form of law necessarily framed in the abstract and hopefully seeking to regulate by wise general language an always uncertain future’: Bennion on Statutory Interpretation (Lexis Nexis 2005) 29.

74 The statutory rights referred to can most often found in legislation that controls law enforcement and in the Evidence Act 1995 that contains laws covering the admissibility of evidence in trials. A number of statutory protections are referred to in Chapter 5.
that often accompanies the introduction of anti-terrorism laws is the language of fear. The need for anti-terrorism laws to meet the threat of terrorists is often expressed in terms of meeting ‘a crisis’, ‘imminent danger’ or ‘emergency’. The language of fear is not a recent phenomenon, but it has intensified since 2001. The language of fear is applied to convince the public of the need for unprecedented laws and it is used in submissions to the judiciary and by them when they are deciding whether laws are constitutionally valid or applying the anti-terrorist laws. The ‘threat’, it is continually suggested, requires dispensing with or limiting rights that form an integral part of the criminal justice system. This ongoing scenario also places the courts in a position where for the first time, in a sustained fashion, there is a requirement to consider whether long accepted rights can be maintained.

The right to life, the pre-eminent right, is referred to in an historical context because in Australia it can no longer be extinguished by the application of law. The rights that safeguard people from arbitrary detention are often described as substantive or procedural, although it is sometimes difficult to make this distinction. The substantive right to liberty is supported by a number of other substantive rights, such as the right to a fair trial, and procedural and quasi-procedural rights, such as the right to silence, which are necessary for a fair trial. The rights that are chosen for examination are those that are most obviously affected by the anti-terrorism laws. The rights discussed are found in the common law, statute laws and international treaties. So far as is consistent with the limits of this work, the rights that safeguard liberty are listed and discussed in this chapter. International treaties and conventions play a part in the protection of legal rights, but unless they have been adopted into Australian statutes their influence is often more morally persuasive on courts than legally compelling, depending on the inclination of the

75 See, for example, Callinan J in Thomas v Mowbray [2007] HCA 33; and Whealy J in R v Lodhi [2006] NSWSC 691.
76 The death penalty in Australia is considered in some detail in Chapter 4.
77 High Court Chief Justice Robert French lists rights that exist at common law as: the right of access to the courts; immunity from deprivation of property without compensation; legal professional privilege; privilege against self-incrimination; immunity from the extension of the scope of a penal statute by a court; freedom from deprivation of governmental immunity by a court; immunity from interference with vested property rights; immunity from interference with equality of religion; the right to access legal counsel when accused of a serious crime; no deprivation of liberty, except by law; the right to procedural fairness when affected by the exercise of public power; and freedom of speech and of movement: ‘Protecting Human Rights Without a Bill of Rights’, John Marshall Law School, Chicago, 26 January 2010, 26-27.
particular judges. The rights examined, as with all rights, can be ‘subject to the Constitution, modified or extinguished by Parliament’. 78

The rights established by the common law have no protection against removal by Parliament, as will be shown, unless the words contained in a statute lack specificity or they offend the powers given to courts by Chapter III of the Constitution which vests judicial power in the High Court, federal courts created by Parliament and State courts that are entrusted with federal jurisdiction. The rights that can be protected by the courts, because they are part of the judicial power provided by Chapter III, are very limited and are implied rather than expressed. Although not closed, the only right currently interpreted as given the protection of Chapter III, and that relates directly to the application of criminal laws, is the right to a fair trial.

The chapter is divided into a number of sections. The first section details those treaties and conventions that are designed to protect fundamental legal rights. Then there is an examination of the power of the judiciary allowed for in the Constitution, and how it is exercised so far as ensuring a fair trial, independently of the power of the parliament. The limitations on the judiciary’s power to protect fundamental legal rights are also described. The right to liberty and its supporting rights of legal representation, the right to a fair trial that includes the right to silence, the presumption of innocence and disclosure are described and their interlocking purposes are examined.

**International Treaties, Conventions and Fundamental Rights**

There are a number of international treaties and conventions that Australia has endorsed that are designed to assist with the protection of fundamental rights against the behaviour of governments that want unfettered powers. The fundamental rights are given protection under the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture and Cruel, Inhuman and Degrading Treatment or Punishment (CAT).

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78 Ibid 27.
Australia has traditionally accepted that there are a number of rights that are important and should be acknowledged. The ‘right to life’ was acknowledged by Australia when it voted for the Universal Declaration of Human Rights in the General Assembly of the United Nations on 10 December 1948. It is also a party to the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, with entry into force on 23 March 1976. Article 6 clause 1 of the Covenant states: ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’. The death penalty is no longer imposed in Australia, but the option remains for it to be reintroduced, and the common law tradition has not viewed the imposition of the death penalty, subject to the individual receiving a trial, as a fundamental breach of the right to life. The killing of people is still, however, used by the Australian government when it engages in aggressive foreign interventions. Such activity is not subject to Australian criminal laws, and so far as can be discerned from media sources, does not appear to be of significant concern to the majority of Australians, so long as state authorised killing is carried out by Australians in other countries that are not allies. However, in Australia the right to life can be regarded as a non derogable right.

Australia acknowledged its long standing acceptance that the right to ‘liberty’ is a fundamental, if derogable, right when it became a party to Article 3 of the Declaration of Human Rights, and also Article 9 that states, ‘No one shall be subjected to arbitrary arrest, detention or exile’. Australia also accepted the importance of the right to liberty when it became a party to the International Covenant on Civil and Political Rights, adopting Article 9 of the Covenant which states:

**Article 9**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 9 of the Covenant basically adopts the common law position traditionally followed in the criminal law jurisdictions in Australia. However, the introduction of anti-terrorism legislation in the 21st Century means the article and the common law are not followed where such laws are used for investigative questioning and detention. The Covenant links arrest with the trial proper, thus highlighting the importance of pre-trial procedures that are essential for ensuring a fair trial. Chapters 5 and 6 list those sections of anti-terrorism legislation that abrogate the pre-trial’s protections that are incorporated in international law and that had previously been accepted by the common law and in the criminal law statutes in Australia.

The right that ‘No one shall be subjected to torture or to cruel or degrading treatment or punishment’ is contained in Article 5 of the Universal Declaration of Human Rights. It is also a right accepted in Article 7 of the International Covenant on Civil and Political Rights, which states: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation’. The right is also incorporated in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is a non derogable right even during times of national emergency. There
are a number of instances where this right has been accepted in Australian statute law,\(^79\) and it is part of the common law tradition. Whilst the right is accepted by governments and courts at both state and federal levels, it has been ignored by Australian governments when its citizens have been subjected to torture by allies. The right is fragile and where abuses occur or where other rights are abrogated it cannot be guaranteed.

The right to a fair trial can be found in Article 10 of the Universal Declaration of Human Rights, it states: ‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him’, and Article 11 which states:

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

The ICCPR also stresses the importance of a fair trial and in Article 14 it provides for a number of elements necessary for a fair trial:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre

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\(^79\) For example, section 138 of the Evidence Act 1995 allows for the exclusion of evidence that has been improperly obtained and it refers to breaches of the International Covenant on Civil and Political Rights as one of the factors the court can take into account. Section 138 states, \textit{inter alia}: 138 Exclusion of improperly or illegally obtained evidence

1. Evidence that was obtained:
   (a) improperly or in contravention of an Australian law, or
   (b) in consequence of an impropriety or of a contravention of an Australian law,
   is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights. . . .
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

   (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
   (c) To be tried without undue delay;
   (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
   (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
   (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The impartiality and independence of the courts, the presumption of innocence, the right to silence, the right to legal representation, and the right to examine prosecution witnesses contained in Article 14 of the Covenant are all considered in this and subsequent chapters.

On 13 August 1980 Australia agreed to be bound by the ICCPR subject to reservations. Australia agreed to be bound by the First Optional Protocol to the ICCPR, on 25 September 1991. Australia’s joining recognised the Human Rights Committee of the United Nations and its function to receive and consider communications from people who claim violation by Australia of their covenanted rights. The findings of the Human Rights Committee are not enforceable.

The ratification of the International Covenant on Civil and Political Rights (ICCPR) was an executive act that does not incorporate it into Australian law in a way that binds, and, unless the Parliament passes legislation specifically adopting the provisions, then it cannot be used to force the legislature or the courts to protect fundamental rights. Under the Australian Human Rights Commission Act 1986 (Cth) the Australian Human Rights Commission was established and is responsible for monitoring Australia’s compliance with the ICCPR. Its role is advisory.

The ratification of these treaties means that Australia has voluntarily agreed to protect the rights contained in them. However, without the rights being adopted in a Charter of Rights (such a charter does not exist in Australia) they can be derogated through legislation, thus removing their relevance or significantly limiting their application. Attempts have been made through the federal parliament to introduce a statutory Bill of Rights. The first attempt was in 1973 but opposition to it ensured it was not enacted. In 1985 a Bill passed the House of Representatives but was defeated in the Senate. In 1988 a referendum was

defeated that would have extended rights to religious freedom, compensation for the acquisition of property and trial by jury. The Australian Capital Territory enacted the *Human Rights Act 2004* which declares a number of rights. Victoria enacted the *Charter of Human Rights and Responsibilities Act 2006* which also declares a number of rights. Neither Act binds the respective parliaments.

The difficulty in entrenching any right by way of a statutory Bill of Rights or directly in the Constitution is primarily because it meets political resistance. Attempts to include an anti-discrimination clause in the *Constitution* could, for example, stop the federal parliament from successfully enacting statutes such as the *Northern Territory Emergency Response Act 2007* that pursuant to section 132 excluded the *Racial Discrimination Act 1975* from operation whilst it was in force. Then Prime Minister Tony Abbott perhaps reflected the position taken by many past and present parliamentarians who do not want to be restricted in removing rights when they want. They also do not want courts intervening when they remove rights. Abbott is reported as stating: what ‘none of us really want to see is the ordinary legislation of Government, the ordinary operation of the executive and legislative power too readily subject to second-guessing by non-elected judges, and that's the difficulty with trying to entrench that kind of a clause in the constitution’.\(^8\) Abbott’s reference to ‘non-elected judges’ who ‘second-guess’ the ‘ordinary legislative agenda’, is designed to assert the paramount position of the executive over the judiciary whilst dismissing its judicial role as essentially anti-democratic.

The way Australian governments treat their obligations under the treaties is referred to at some length throughout this work. Suffice to say at this point that governments have been willing to ignore the treaties when it suits them. The rights expressed in the treaties have some limited support in the Australian Constitution and the common law. The limited support finds expression through the concept of the separation of powers where the judiciary is independent from the executive arm of government, thus allowing it to

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interpret the Constitution and provide some protection for substantive and procedural rights. The High Court is the final court of appeal and has jurisdiction over all other courts. While all courts are meant to consider fundamental legal rights, when, for example, they are determining admissibility of certain types of evidence, the High Court and other federal courts established under the Constitution are the only ones that can claim that they cannot be directed by legislation when it comes to the exercise of judicial power.

**Separation of Powers**

Chapter III of the Constitution provides for the judicial power of the Commonwealth to be vested in the High Court. Section 80 provides for trial by jury for any indictable offence against the law of the Commonwealth. It is one of the few rights clearly stated in the Constitution that cannot be removed by Parliament. However, it is a right that is receding at State level where trial by judge alone is allowed.

Section 71, which vests judicial power in the High Court, has been consistently interpreted by the Court as requiring judges to decide cases independently of the executive government. French CJ., in *South Australia v Totani*, highlights the prevailing view of the judiciary, as expressed in decided cases, that the courts are independent of executive government when he states:

> Courts and judges decide cases independently of the executive government. That is part of Australia's common law heritage, which is antecedent to the Constitution and supplies principles for its interpretation and operation. Judicial independence is an assumption which underlies Ch III of the Constitution, concerning the exercise of the judicial power of the Commonwealth. It is an assumption which long predates Federation.\(^82\)

French CJ found this way in 2010, but there had been no doubt, at least in the minds of the majority of the justices of the High Court, that it has an independent role from the executive and that it determined contentious issues regarding fundamental rights including...

\(^{82}\) [2010] HCA 39; (2010) 242 CLR 1, [1].
life and liberty. Griffith CJ., over a hundred years before French CJ., made the point in *Huddart, Parker & Co Pty Ltd v Moorehead*, stating about judicial power:

> I am of opinion that the words "judicial power" as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.\(^83\)

The approach adopted by the High Court is that statute law is to be interpreted consistently with the common law. This has been a long held position and can be first found in *Potter v Minahan* when O’Connor J in 1908 referred with approval to Maxwell on *The Interpretation of Statutes*.\(^84\) He stated:

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness 32 Cranch., 390.; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.\(^85\)

The requirement was that taking away of a common law right required the legislature to show it intended the consequence by ‘express words or necessary implication’.\(^86\) In this case it was decided that every British subject born in Australia, whose home was Australia, had a right to enter and leave Australia. Such a limit on executive or parliamentary power goes no further than requiring the Parliament to use express words if it wants to remove a right. The only way this could be stopped is if the Constitution was interpreted in a way that showed the right was protected by it.

Chapter III provides a framework for the High Court as the judicial arm of government. However, attached to judicial power, by way of judicial interpretation, there have

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\(^83\) [1909] HCA 36; (1909) 8 CLR 330.
\(^84\) PB Maxwell, *The Interpretation of Statutes*, (Sweet and Maxwell 1905) 122.
\(^85\) [1908] HCA 63; (1908) 7 CLR 277.
\(^86\) Ibid.
developed a number of fundamental legal rights and due process rights. These rights and processes, which are designed to allow access through the courts to a substantive right, have grown very slowly over hundreds of years and have occasionally been incorporated in statutes. In the High Court case of *Re Tracey; Ex parte Ryan*, Deane J found that section 71 was the only guarantee of due process rights, stating, to ‘ignore the significance of the doctrine or to discount the importance of safeguarding the true independence of the Judicature upon which the doctrine is predicated is to run the risk of undermining, or even subverting, the Constitution's only general guarantee of due process’. The procedural rights that are part of the process which the courts find necessary for their functioning have been regarded as an area upon which the Parliament cannot trespass. The process involves natural justice and is founded on the separation of powers. Mason C.J., Dawson and McHugh JJ., in *Leeth v Commonwealth*, make the point ‘that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power . . .’.88

The *Communist Party Case*,89 examined in Chapter 4, is an example of where the High Court found that an Act dissolving the Communist Party and allowing the Governor-General to declare specified people disqualified from holding office in trade unions was an attempt to take over judicial power.

In the High Court case of *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs*, Brennan, Deane and Dawson JJ., found that the Constitution did not allow the executive government to make laws which were inconsistent with the essential character of a court or that was of a nature of judicial power. They stated:

Thus, it is well settled that the grants of legislative power contained in s.51 of the Constitution, which are expressly "subject to" the provisions of the Constitution as a whole, do not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth. Nor do those grants of legislative power extend to the making of a law which requires or authorizes the

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87 [1989] HCA 12, 2; (1989) 166 CLR 518.
89 [1951] HCA 5, 50,51; (1951) 83 CLR 1.
courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power. 90

The question of what is judicial power was answered by Jacob J in the High Court case of *R v Quinn; Ex parte Consolidated Food Corporation*, where he found the judicial power concerned basic rights that were inherited and protected by an independent judiciary. He stated:

[T]he rights referred . . . to are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example. But there are a multitude of such instances. 91

Ultimately the purpose of the rights and processes are linked to protecting the right to liberty and to ensuring that individuals receive a fair trial.

A tension arises when the executive government imposes its will on what is otherwise the domain of the courts. This is especially the case where the criminal laws and procedures are amended by statute to remove or derogate rights and the procedures that are designed to protect those rights. Although there is often a convergence of breaches of fundamental legal rights involving the substantive criminal law and due processes, the derogations should be distinguished, as the latter involves the executive in venturing into the province of the courts: thus impinging on the doctrine of separation of powers.

The separation of powers is said to advance two constitutional objectives, these being, judicial independence and liberty. In *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs ("Hindmarsh Island Bridge case")* Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ., stress the nexus between the separation of powers, judicial independence and liberty, stating: ‘The separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty

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and, to that end, the independence of Ch III judges’. 92

The independence and impartiality of the judicial arm of government has been stressed in a number of cases, and without it the court is not exercising the judicial power of the Commonwealth. In North Australian Legal Aid v Bradley, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ refer to previous cases and stress the need for impartiality if public confidence in the judicial system is to be maintained. 93 However, the boundaries of the power of the judiciary 94 seem to be limited mainly to conducting a fair trial. The only power the High Court seems to acknowledge that it possesses to ensure a fair trial is the power to stay the trial. This limitation allows the Parliament to introduce laws that remove the right to liberty and to dispense with all those rights which are the framework that allows basic rights to be protected by the courts. The only requirement, if pre-existing rights are removed, is that the removal does not affect a fair trial, or where it does that the judiciary is not involved in the process. Even this requirement is not absolute where national security legislation limits procedural rights such as disclosure.

Australian judges are far from isolated in their view that judges should be impartial and independent. The Basic Principles on the Independence of the Judiciary (‘Basic Principles’) and the Bangalore Principles on Judicial Conduct (‘Bangalore Principles’) were endorsed by the United Nations. 95 The Basic Principles, Articles 1 to 7 states:

**Independence of the judiciary**

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

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93  [2004] HCA 31, 27; 218 CLR 146; 206 ALR 315; 78 ALJR 977.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

The Bangalore Principles refer to a series of values. In terms of independence the principle called Value 1 states: ‘Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects’. In respect of impartiality the principle called Value 2 states: ‘Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made’.

The Interconnection between Fundamental Legal Rights
The overarching right to which all other fundamental legal rights are linked is the right to liberty. The right to silence, the presumption of innocence, and the right to legal representation provide some of the procedural rights that assist with preserving personal
liberty. The tension between individual liberty and the desire of governments to control citizens manifests itself in laws restricting individuals and groups. The right to liberty applies most obviously in the criminal justice system where freedom from arbitrary arrest and detention is an example of the right.

**Liberty**

The right to liberty is a concept that has gradually developed in the common law world. It has grown to become a foundation of the common law: from the *Magna Carta* 1215, *Habeas Corpus Act* 1679, the *Petition of Right* 1628, the *Bill of Rights* 1689 and the *Act of Settlement* 1701. It has been accepted as the most important of common law rights by Australian courts. In the High Court of Australia in the case of *Williams v The Queen*, Mason and Brennan JJ endorsed the propositions that personal liberty was the most important of all common law rights, and that its arbitrary removal would soon lead to the end of all other rights. They stated:

The right to personal liberty is, as Fullagar J. described it, "the most elementary and important of all common law rights" (*Trobridge v Hardy* [1955] HCA 68; (1955) 94 CLR 147, at p 152). Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England "without sufficient cause" (*Commentaries on the Laws of England* (Oxford 1765), Bk.1, pp.120-121, 130-131). He warned:

"Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper ... there would soon be an end of all other rights and immunities."

That warning has been recently echoed. In *Cleland v The Queen* [1982] HCA 67; (1982) 151 CLR 1, at p 26, Deane J. said:

"It is of critical importance to the existence and protection of personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed."

The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes.97

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96 The gradual development often involved violent struggles including the English revolutions of the 17th century.
The fundamental importance of the right to personal liberty has not been disapproved of in any subsequent High Court case. However, it has been abridged by the Parliament by laws designed to focus on crimes committed for ideological, religious or political reasons, the subject of examination in later chapters. The extent to which the High Court will disallow anti-terrorism laws that take away the right to liberty and to a fair trial remains a moot point. However, the case of *Thomas v Mowbray* referred to previously and in Chapter 5, found that laws providing for control orders were allowed.

The High Court of Australia is far from alone when it stresses the importance of liberty. Apart from the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, the Fifth Amendment to the United States Constitution, which is part of the Bill of Rights, also recognises the importance of liberty:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Many European countries have also recognised the importance of liberty. Article 5 of the European Convention on Human Rights provides that everyone has the right to liberty and security of person, and that any arrest, conviction and detention has to be lawful.

The historical development of ‘liberty’ as a concept within the legal systems of the common law world is but one small part its story. The 18th Century concluded with the French Revolution’s *Declaration of the Rights of Man and of the Citizen*, a *Bill of Rights* in the United States, anti-slavery campaigns and revolutions against arbitrary government. The fight had gone on from earlier times when people struggled for liberty of conscience and liberty in politics. Once restricted by the Divine Right of Kings and later by dictators and executive governments, liberty has been at the core of an ongoing fight against
absolutism. If legal protections are removed then the form of government will matter little because the right to liberty will be at the whim of the ruling group.

As recently as 1992, Brennan, Deane and Dawson JJ., in *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs*, held that the involuntary detention of a citizen, except in a limited number of exceptional cases, was a Chapter III function and therefore the exclusive role of the courts. They found that the Chapter III function of ‘adjudgment and punishment of criminal guilt’ was a matter of ‘substance not mere form’, and that ‘the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt’. This was the case except in exceptional circumstances that involved: awaiting trial and this to be under the supervision of the courts; in cases of mental illness or infectious disease; the traditional powers of Parliament to punish for contempt; and punishment for breaches of military discipline. The court found that aliens could be detained for the purposes of deportation and to allow for determination of admission to the country.

The High Court in 1997 added to the number of exceptions to court supervised detention listed in *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* when it included Aboriginal children taken from their families. The Court concluded that the number of exceptions to court supervised detention is not closed. In *Kruger v Commonwealth* ("Stolen Generations case") Toohey, Gaudron and Gummow JJ., rejected the argument by the plaintiff that the forced removal of Aboriginal children from their families without court order was ‘punitive’. Gummow J. said: ‘The powers of the Chief Protector to take persons into custody and care under the 1918 Ordinance were, whilst that law was in force, and are now, reasonably capable of being seen as necessary for a legitimate non-punitive purpose (namely the welfare and protection of those persons) rather than the attainment of any punitive objective’.

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98 The fight against absolutism is described in A.C. Grayling, *Towards the Light* (Bloomsbury, 2007).
100 Ibid.
Gaudron J went further and found that judicial supervision of involuntary detention was not a part of the powers given to the courts under Chapter III of the Constitution. She stated:

[I]t cannot be said that the power to authorise detention in custody is exclusively judicial except for clear exceptions. I say clear exceptions because it is difficult to assert exclusivity except within a defined area and, if the area is to be defined by reference to exceptions, the exceptions should be clear or should fall within precise and confined categories.

Once exceptions are expressed in terms involving the welfare of the individual or that of the community, it is not possible to say that they are clear or fall within precise and confined categories. More to the point, it is not possible to say that, subject to clear exceptions, the power to authorise detention in custody is necessarily and exclusively judicial power. Accordingly, I adhere to the view that I tentatively expressed in Lim, namely, that a law authorising detention in custody is not, of itself, offensive to Ch III. (emphasis added)

This approach accepts a restriction on liberty where it is claimed not to be punitive because aliens and welfare issues are involved. The reasoning is a shift away from the principle of liberty as an absolute right as clearly stated in R v Williams, although not a denial of its importance. Because the categories of unsupervised court detention are not closed, it remains to be seen how far the High Court will go to allow for it.

In 2004 the majority of the High Court in Al-Kateb v Godwin followed Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs. It found in Al-Kateb’s case that, because he was an alien, in his case a stateless person, he could be held indefinitely because the detention was administrative not punitive. Gleeson CJ, Gummow and Kirby JJ, in the minority, found that, because the purpose of section 196 of the Immigration Act 1958 could not be carried out, he should be released.

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102 Above n 97.
103 [2004] HCA 37.
Gleeson CJ found that the Migration Act 1958 provided for the administrative detention of un-lawful non-citizens, and that ‘unlawful non-citizens are aliens who have entered Australia without permission, or whose permission to remain in Australia has come to an end. In this context, alien includes a stateless person, such as the appellant. Detention is mandatory, not discretionary’. However, whilst not excluding indefinite mandatory detention, he construed the Act in a way that did not allow for it.

Whether involuntary detention requires judicial supervision is now a moot point especially in the light of anti-terrorism legislative changes in the 21st Century. The treaties that Australia has signed are not enforceable in Australia and no Bill of Rights exists that would allow the courts to restrict the arbitrary use of power by Parliament.

The one area where there appears to be no doubt of the powers conferred by Chapter III of the Constitution on the courts is the right to ensure a fair trial, which is also one of the non-derogable rights contained in the ICCPR. As part of enabling a fair trial there are a number of procedural rights that are accepted as necessary if there is to be a fair trial. Those procedural rights to varying degrees have been attached to Chapter III of the Constitution. They include: the right to legal representation in certain circumstances; the right to silence; the presumption of innocence; the right against self-incrimination; that the burden of proof in criminal trials rests with the prosecution; that the standard of proof in criminal trials is beyond reasonable doubt; and that an accused has the right to the disclosure of evidence both in favour of the prosecution and in favour of the defence in criminal cases. Some of these rights could fall into the category of quasi-substantive rights.

**Right to Legal Representation**

An important right that has become recognised as a due process right protected by Chapter III of the Constitution, through the implied right to a fair trial, is the right to legal representation. This right is crucial in ensuring that individuals have access to legal assistance during legal proceedings, thereby safeguarding their rights and interests. The right to legal representation is enshrined in various international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR).

The right to legal representation is not merely a procedural safeguard; it is a substantive right that is essential for the fair and impartial administration of justice. It is a fundamental guarantee that protects individuals from being deprived of their legal rights and freedoms without due process. The right is also a guarantee that the state will not act arbitrarily or unjustly in the enforcement of its laws. It is a cornerstone of the rule of law, which is the foundation of democratic societies.

In the context of immigration law, the right to legal representation is particularly important. It ensures that individuals, especially those from non-English speaking countries or those who are not fluent in the language of the legal proceedings, are not marginalized or disadvantaged. It allows them to understand their legal rights, challenges, and potential defenses, and to effectively communicate with their legal representatives. This is crucial in administrative detention cases where the administrative authority has the burden of proof and the individual has to defend against any allegations.

The right to legal representation is not only a guarantee of fairness in the legal proceedings but also a means of protecting the individual’s basic human rights. It is a fundamental principle that underpins the rule of law and the protection of individual freedoms. It is a right that must be respected and upheld in all legal proceedings, regardless of the nature of the case or the status of the individual involved.
representation in certain circumstances. In *Dietrich v R*, Mason CJ, and McHugh J., with whom a majority of the court agreed, found that at common law an accused person did not have a right to the provision of a lawyer at public expense. However, they recognised that courts had power to a stay proceeding where the proceeding would result in an unfair trial and that in most cases where a person was charged with a serious offence the representation of an accused was essential to a fair trial.\(^\text{107}\)

They referred to previous cases that found the right to a fair trial ‘according to law [is] a fundamental element of our criminal justice system ((1) Jago v. District Court (N.S.W.) [1989] HCA 46; (1989) 168 CLR 23, per Mason C.J. at p 29; Deane J. at p 56; Toohey J. at p 72; Gaudron J. at p 75.),’ and that ‘the inherent jurisdiction of courts extends to a power to stay proceedings in order "to prevent an abuse of process or the prosecution of a criminal proceeding ... which will result in a trial which is unfair" ((4) Barton v. The Queen [1980] HCA 48; (1980) 147 CLR 75, at pp 95-96; Williams v. Spautz [1992] HCA 34; (1992) 66 ALJR 585; 107 ALR 635.).’\(^\text{108}\) They proceeded to note that there ‘has been no judicial attempt to list exhaustively the attributes of a fair trial. . . because, in the ordinary course of the criminal appellate process, an appellate court is generally called upon to determine, as here, whether something that was done or said in the course of the trial, or less usually before trial ((5) Reg. v. Glennon [1992] HCA 16; (1992) 173 CLR 592.), resulted in the accused being deprived of a fair trial and led to a miscarriage of justice’.\(^\text{109}\)

In order to provide support for their proposition that there are due process rights that should be found in Australian law, Mason and McHugh JJ referred to the ‘various international instruments and express declarations of rights in other countries have attempted to define, albeit broadly, some of the attributes of a fair trial. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") enshrines such basic minimum rights of an accused as the right to have adequate time and facilities for the preparation of his or her defence ((6) Art.6(3)(b).) and

\(^{108}\) Ibid 7.
\(^{109}\) Ibid 8.
the right to the free assistance of an interpreter when required ((7) Art.6(3)(e)). Article 14
of the International Covenant on Civil and Political Rights ("the ICCPR"), to which
instrument Australia is a party ((8) Australia signed the ICCPR on 18 December 1972 and
ratified it on 13 August 1980), contains similar minimum rights, as does s.11 of the
Canadian Charter of Rights and Freedoms ((9) Pt 1 of the Constitution Act 1982, enacted
by the Canada Act 1982 (U.K.)). Similar rights have been discerned in the "due process"
clauses of the Fifth and Fourteenth Amendments to the United States Constitution’.110

Mason and McHugh JJ referred to the history of legal representation and noted: ‘It is little
more than one hundred and fifty years since legislation was enacted to provide that all
accused persons be permitted to be represented by counsel. Prior to the passage of The
Trials for Felony Act 1836 . . . the common law of England did not recognize the right of
a person charged with a felony to be defended by counsel. This prohibition . . . appears to
date back beyond the limits of legal memory. . . ’.111

Whilst the right to legal representation may now be part of the common law, enshrined in
certain circumstances, as part of the fair trial process in the Constitution, the right is
limited and its application to representation prior to a trial commencing can be limited or
non-existent. The acceptance by the High Court of the right to legal representation
acknowledges the worth of such representation to an accused person. It also in effect
acknowledges the dependent interrelationship between the judiciary and legal
representatives. Those who represent accused people have a duty to robustly defend them,
and they are also officers of the court bound by a number of ethical obligations including
the requirement that they not mislead the court.

In Chapters 5 and 6 a number of instances where the Parliament has allowed the exclusion
of legal representation where a person has been arbitrarily or involuntarily detained for
the purpose of interrogation are provided. At most the High Court has introduced a
limited right that only applies to one stage of the trial process in serious criminal matters.
Whilst it can be regarded as a positive protection, the effectiveness of a legal

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110  Ibid.
111  Ibid 11.
representative is contingent upon there being substantive and procedural laws that protect fundamental legal rights. Otherwise the lawyer is simply advising a person confronting the law that he or she has very few rights and can be kept under arrest, interrogated and must answer the questions. Where some of the provisions contained in anti-terrorism legislation apply, a defence lawyer would also be required to advise a client that if they did not answer the questions of the interrogators that they could be charged with an offence that carried a significant custodial penalty.

**Right to Silence**

The origin of the right to silence, viewed from the modern perspective, can be seen to have developed from the laws relating to the admissibility of confessions in criminal trials and related legal rights that have developed over the centuries. The laws related to admissions are intertwined with a number of fundamental legal rights including: the right to silence; the presumption of innocence; the right against self-incrimination; and the guarantee against inhuman and degrading treatment.

Torture developed as part of the fact gathering process in the jurisdictions applying Roman-canon law. Common methods of torture included the rack and the thumbscrew. In England trial by ordeal was gradually replaced by trial by jury. The English courts did not initially require an accused to submit to trial by jury. The passing of the Statute of Westminster 1275 allowed those charged with capital offences who did not plead to be subject to ‘*peine forte et dure*’. This involved placing progressively heavier stones on the chest of the accused until a plea was entered or death resulted. *Peine forte et dure* was not abolished by statute until 1772.

In *Rees v Kratzmann*, Windeyer J noted the common law traditional objection to compulsory examination and forced self-incrimination and linked it to a hatred of the Star Chamber and ‘the cherished view of English lawyers that their methods are more just than are the inquisitional procedures of other countries’.112

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112 [1965] HCA 49; (1965)114 CLR 63, 3.
The gradual elimination of torture as an acceptable means of gathering evidence is described in leading United States case of *Miranda v Arizona*. Chief Justice Warren, delivering the opinion of the Court, stated:

Over 70 years ago, our predecessors on this Court eloquently stated: ‘The maxim nemo tenetur seipsum accusare had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.’ *Brown v. Walker*, 161 U.S. 591, 596 -597 (1896).

Over centuries it has become established that the right to silence is a necessary part of the criminal justice system designed to limit the power of the state to extract confessions. It is also understood to be linked to the privilege against self-incrimination. The development of the right to silence is not adequately described in the cases; there was a merging of the concept of beyond reasonable doubt, Christian theology, the development of jury trials and how facts and guilt were found. Indeed, it was not until 1898 that prisoners were

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113  384 U.S. 436 (1966); see also *Ullmann v United States* [1956] 350 US 422 [100 L. Ed. 511].
allowed to give sworn testimony, and substantive acceptance of cross examination was allowed, and representation of an accused took all of the 19th Century to develop.\footnote{115}{J H Baker, An Introduction to English Legal History (Butterworths, 1979) 416 – 418.}

Torture to obtain confessions was common place in the early part of 19th Century in New South Wales. Woods notes, ‘The fact that torture to obtain confessions was illegal seems not to have been obvious to the magistrates of New South Wales before 1825 or else the fact had been simply ignored’\footnote{116}{G. D. Woods, A History of Criminal Law in New South Wales (Federation Press, 2002) 171.} The Evidence Law Act 1858 should have assisted the magistrates in overcoming their ignorance. Section 11 of the Act stated:

\begin{quote}
No confession which is tendered in evidence on any criminal proceedings shall be received which has been induced by any untrue representation or by any threat or promise whatever and every confession made after any such representation or threat or promise shall be deemed to have been induced thereby unless the contrary be shewn.\footnote{117}{22 Vict. No. 7 (1858) s 11.}
\end{quote}

If there was any doubt about the right to silence in Australia it should have been settled when the majority in the High Court of Australia in \textit{Petty} \& \textit{Maiden} \textit{v} \textit{R} stated:

\begin{quote}
A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played. That is a fundamental rule of the common law which, subject to some specific statutory modifications, is applied in the administration of the criminal law in this country. An incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right of silence or to render it valueless.\footnote{118}{[1991] HCA 34, para 2; (1991) 173 CLR 95.}
\end{quote}

Section 89 of the Evidence Act 1995 (NSW) substantially reflected the common law position outlined by the High Court in \textit{Petty}'s case. This has now been amended and the amendments allow for an adverse inference to be drawn in certain circumstances. The obvious consequence of weakening the right to silence, as has happened with the anti-
terrorism legislation of the 21st Century, is that it effectively allows agents of the state to threaten an accused if silence is maintained. Whilst this type of threat is limited and does not allow for torture, it does involve a reactionary process that is more in tune with times when torture was common. In the English case of *Lam Chi-Ming v The Queen*, the idea that a person could be compelled to engage in self-incrimination was regarded as behaviour that did not belong in a civilised society. It was found that wrongful acts by the police can render a confession involuntary and inadmissible.119

The number of Australian cases supporting the right to silence is numerous;120 the number of instances where parliaments have removed or limited the right is growing. As found by Gibbs CJ in *Sorby v Commonwealth*, the fundamental common law right against self-incrimination was not protected by the Constitution ‘and like other rights and privileges of equal importance it may be taken away by legislative action’.121

The use of torture and other physical and psychologically violent coercive techniques to gather confessions has been modified since the days when ‘peine forte et dure’ was the norm, but techniques involving the use of force have not ceased and vigilance is required to stop such coercive practices from flourishing. There are many examples supporting the proposition that the police should not be relied upon to ensure that pre-trial procedures do not involve coercion, especially if a fundamental legal right is removed. The Final Report of Royal Commission into the New South Wales Police Service contained the following observation: ‘In the course of the Royal Commission, evidence has been received from a number of police acknowledging their involvement in assaults and in various forms of larceny. The concern generated by the evidence, is that only the tip of an iceberg has been revealed’.122 The removal of the right to silence at the pre-trial stage reduces one of the fetters on investigative police, thus making it easier for abuses to occur. The removal of

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the right, however, also has consequences during a trial; it introduces the requirement for judges and juries to draw an adverse inference if a person remains silent. There is abundant evidence to support the proposition that judges will comply with the requirement to draw an adverse inference where the law demands it. They have no distinguishing qualities that make them immune from unfair prejudicial reasoning.

Moreover, the criminal justice system is fragile when it comes to its ability to ensure a fair trial. The examples of the fragility are many, ranging from failed investigations that have led to wrongful arrests and detentions,\(^\text{123}\) to a combination of failed investigations and trials that were later found to be flawed.\(^\text{124}\) These and other examples are considered in Chapter 3. Wrongful convictions are not the sole prerogative of the Australian criminal justice system. The United Kingdom in recent times has had a number of high profile cases that resulted in wrongful convictions.\(^\text{125}\) In the United States the number of cases where people have been wrongfully convicted is too numerous to warrant listing in this work.\(^\text{126}\) The extra pressure that is applied by the removal or restriction of fundamental legal rights places additional pressure on a system that not infrequently fails to provide a fair trial.

The anti-terrorism legislation of the 21st Century enacted by the Australian Parliament in its questioning and detention procedures excludes the right to silence and requires those subject to it to answer or be criminally charged. In summary the right to silence became part of the laws controlling procedure and the admissibility of evidence. Its existence at the pre-trial stage assists in ensuring the integrity of the justice system. It also aids in promoting the reliability of evidence brought before the courts. A person forced to answer

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\(^{145}\) See, for example, Report of the Royal Commission into The Arrest, Charging and Withdrawal of Charges Against Harold James Blackburn and Matters Associated Therewith, June 1990.


on penalty of imprisonment or under some other form of duress, may well call a stop to the harassment by giving an answer regardless of its accuracy or truth. This would equally apply to a person who might be able to provide relevant evidence as to one who could not.

**Presumption of Innocence**

The presumption of innocence is often promoted by politicians, especially when they are asked to comment on the alleged criminal behaviour of one of their colleagues.\(^\text{127}\) The presumption of innocence stays with an accused until such time as a tribunal of fact finds the accused guilty; this is said to have the effect of maintaining the burden of proof with the prosecution throughout the trial. The presumption is found in the English common law and has grown to be accepted as a necessary part of pre-trial and trial procedure. In *Woolmington v DPP*, Viscount Sankey LC states:

> If at any period of a trial it was permissible for the judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case and not the jury, which is not the common law.\(^\text{128}\)

In *Tumahole Bereng v R* the court explained the link between the presumption of innocence and the right to silence. It stated: ‘To hold otherwise would be to undermine the presumption of innocence in a manner as repugnant to the Proclamation of 1938 as to the common law of England’.\(^\text{129}\) In *R v Manunta* the presumption stressed as a ‘basis principle of law’.\(^\text{130}\) In *Momcilovic v The Queen*,\(^\text{131}\) French CJ stressed the importance of the common law presumption of innocence, and described it as ‘an important incident of

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\(^\text{127}\) For example, in 2013 then Trade Minister Craig Emerson defended Labor colleague Craig Thompson, who was facing a number of allegations involving corrupt practices as a trade union official. Emerson is reported as saying: ‘Let the investigative processes continue without political interference,’ he told Sky News, adding that Mr Thomson was entitled to the presumption of innocence. ‘There has been no finding of guilt against Mr Thomson.’: Kate McClymont, ‘Craig Thomson arrested by fraud squad’, *Sydney Morning Herald*, 31 January 2013; www.smh.com.au/federal-politics/political-news/craig-thomson-arrested-by-fraud-squad-20130131-2dmnn.html.

\(^\text{128}\) [1935] AC 462, 480.

\(^\text{129}\) [1949] AC 253, 270.

\(^\text{130}\) 20 December, 1988, SC (SA) unreported.

\(^\text{131}\) [2011] HCA 34.
the liberty of the subject'. 132

The standard direction given to a jury is, ‘a person charged with a criminal offence is presumed to be innocent unless and until the Crown persuade a jury that the person is guilty beyond reasonable doubt’. 133 The presumption of innocence cannot reasonably be said to apply where the right to silence is limited, because the onus of proof is shifted, at least to some degree, to a defendant. The erosion of the presumption of innocence occurs as less emphasis is placed on the requirement that the prosecution prove its case beyond reasonable doubt. Where there is a derogation of one of the fundamental legal rights, be it the right to silence, the privilege against self-incrimination, or the presumption of innocence, each one of them is necessarily damaged and as a consequence the right to liberty as protected by the requirement for a fair trial is undermined. Bound to the presumption of innocence is the requirement that the prosecution prove its case beyond reasonable doubt; this places the onus of proof on the prosecution. The approach adopted by governments for over 200 years in Australia has been, when it suits a political agenda, to reverse the onus of proof, thus negating the presumption of innocence and the right to silence. The removal of the presumption of innocence is examined in Chapters 5 and 6.

An analysis of the cases suggests that so far the High Court has refused to give away the power it says it possesses under Chapter III of the Constitution to ensure a fair trial, and its one method to ensure that right: that being by way of staying cases. However, the Parliament could legislate to remove the need for a criminal trial. The High Court acknowledges this power when it decides that there is no equality before the law. McHugh J makes this point very clear when he states: ‘The cumulative effect of the judgments of Dawson, Gaudron and Gummow JJ and myself in *Kruger* appears to mean that the “doctrine of legal equality” suggested by Deane and Toohey JJ in *Leeth* has been decisively rejected’. 134 The way the Parliament has drafted its anti-terrorism legislation points very clearly to it agreeing with McHugh J.

132 Ibid 44.
The one case that may give the parliamentarians some pause for thought before they dispense with the need for trial at all is the case of *Kable v Director of Public Prosecutions (NSW)*, where the New South Wales Parliament enacted the *Community Protection Act 1994* that empowered the Supreme Court to make preventative detention orders. The *Act* applied to Gregory Kable who was in gaol for the manslaughter of his wife. Whilst in gaol he wrote threatening letters to his children and his wife’s sister. In this case the High Court held that the State could not legislate in a way that would violate the principles underlying Chapter III. In Kable’s case the *Act* undermined the public confidence in the impartial administration of justice by the Supreme Court. McHugh J said, ‘ordinary reasonable members of the public might reasonably have seen the Act as making the Supreme Court a party to and responsible for implementing the political decision of the executive government that the appellant should be imprisoned without the benefit of the ordinary processes of law. Any person who reached that conclusion could justifiably draw the inference that the Supreme Court was an instrument of executive government policy’.

Toohey J held the *Community Protection Act 1994* incompatible with Chapter III of the Constitution. Gaudron J also held that the Act was incompatible with the Constitution. Gummow J held in a similar way, making the comment that the judiciary would just be seen as an arm of the executive.

**Disclosure**

It has long been considered a fundamental right that a person not be convicted of a crime until he or she has received a fair trial according to law. One of the essential components of a fair trial is that the individual know what the allegation is and receive

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136  I appeared for Gregory Kable at his sentencing hearing.
137  Ibid 40.
138  Ibid 32.
139  Ibid 14.
140  Ibid 36.
from the prosecution the evidence it says shows the elements of the offence alleged and also such other evidence that may show the accused did not commit the offence. ¹⁴²

In *Grey v The Queen*, Gleeson CJ, Gummow and Callinan JJ note the importance of disclosure and link it to what could have been made of the material if it had been supplied to the defence during cross-examination. They stated:

> It is not difficult to imagine a fertile area of cross-examination that could have been tilled by the appellant on the basis of this false statement to whose makers Mr Reynolds was patently beholden. The letter should have been provided to the appellant, as is correctly conceded in this Court by the respondent. Its revelation and admission into evidence could have put a quite different complexion on the case for the appellant and the way in which it was conducted. ¹⁴³

Disclosure is a very clear example of the dependent relationship between those who apply the law and those who enforce it. If, for example, the police withhold relevant evidence from the prosecution that could point to the innocence of an accused person, the prosecution may never know and certainly the defence is even less likely to know. Similarly, if the prosecution has evidence that points to the innocence of an accused person and does not disclose it, the defence may never know. Although the defence can subpoena documents through a court process, the restrictions are not minor ¹⁴⁴ and the law enforcement agency, if behaving corruptly, can simply deny the existence of the evidence sought, or claim public interest immunity ¹⁴⁵ based on false propositions.

The substantive and procedural rights provide the necessary rules by which courts should operate and that parliaments should understand and incorporate into legislation or at least not abrogate by statute. However, none of the rights are safe where those vested with the

¹⁴² *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467.
duty to enforce the law or prosecute behave corruptly and lie and or otherwise deceive when preparing and presenting a case. The non-disclosure of relevant evidence is a clear example of corrupting procedural rights that perverts the administration of justice. Additionally, none of the rights are safe if governments legislate to detain people outside the traditional criminal trial process, or specifically exclude or modify a substantive right.

**Conclusion**

The substantive and procedural rights outlined have been chosen because they represent some of the most important rights that have been undermined by anti-terrorism legislation. They are by no means the only rights that have been derogated by the legislation, for example, the requirement that a court be open when evidence is being given has also been largely removed. This and other derogations will be referred to in Chapters 5 and 6. When the substantive and procedural rights described above are removed, this causes a breach in the criminal justice system, such that those who apply the law, as distinct from those who enforce it, have a much reduced role and can become mere administrative agents rather than people who can play an integral part in assisting to ensure that an accused person receives a fair trial. Chapter 3 examines a series of Australian cases where corruption displays the fragility of fundamental legal rights.
Chapter 3
Abuses of the Law by Enforcement Agencies

Australian history is replete with examples of death linked to the corruption of one or more of the elements (criminal laws, police, legal practitioners and judiciary) that form the justice system. There are also many examples of the deprivation of liberty as a consequence of the failure of enforcement agencies to operate within their lawful and ethical boundaries. This chapter reviews Royal Commission and Inquiry findings that show systemic police corruption\textsuperscript{146} and it also examines a select number of cases where adverse consequences to individuals have been caused by corrupt and criminal practices by police. It highlights some cases where verdicts have been reached which were miscarriages of justice as a result of false information supplied by the police. The Royal Commission reports reviewed are the most recent and the cases chosen are those that most clearly provide examples of blatant disregard for the right to liberty. It is beyond the scope of this work to review or even list all the reported cases where corruption has occurred and it is assumed that those that have been exposed do not reveal the full extent of the problem.

The object of criminal laws in Australia is to protect individuals and the community, punish offenders, and to some extent to rehabilitate offenders. The application of the criminal laws commences with those agencies vested with the responsibility to enforce laws. At both state and federal levels the primary enforcement agencies are the police. The police are the main gatherers of evidence that is used by the prosecution; their role is therefore an essential part of the administration of justice. Jeremy Bentham contended ‘Evidence is the basis of justice: exclude evidence, you exclude justice.’\textsuperscript{147} The first part of his proposition is uncontroversial and is developed further in this chapter with emphasis on fabricated evidence, the withholding of evidence, destroying evidence, intimidation and suborning witnesses, obstructing investigations and the obtaining of evidence.

\textsuperscript{146} The meaning of ‘corruption’ in this thesis is as defined in the Shorter Oxford English Dictionary: ‘Perversion of a person’s integrity in the performance of (esp. official or public) duty or work by bribery etc’ and ‘change for the worse of an institution, custom, etc’.

\textsuperscript{147} Jeremy Bentham, Rationale of Judicial Evidence (Hunt and Clarke, Vol 5, 1827) 1.
through unlawful means that breach fundamental legal rights, all having the potential to pervert justice. The police and more recently ASIO agents are those who can most easily manipulate what evidence is provided by way of disclosure to an accused and tendered in court. They therefore have the greatest potential to corrupt the administration of justice.

The police are meant to be controlled by the limits of the criminal laws they are enforcing, guidelines, laws that establish the police forces, and ultimately the courts that apply the criminal laws once a case is brought before them. Ultimately they can be controlled by the criminal law if they are caught breaking the laws and if it is decided they should be prosecuted. An alleged offender is usually caught and charged by the police and then prosecuted by an agency either attached to the police (police prosecutors) or by an independent agency such as the Office of Director of Public Prosecutions. Alleged offenders are provided some protection from abuse by law enforcement agents by the limits of the criminal laws they are confronting, ethical requirements placed on enforcement agencies, lawyers and judges, and by those common and statute laws that govern criminal hearings. With the introduction of anti-terrorism laws that have amended the *Australian Security Intelligence Organisation Act 1979*, agents employed under the *Act* who previously were primarily involved in vetting for employment purposes and surveillance and reporting activities, have now moved into roles that involve criminal investigation and interrogation functions that were normally solely the preserve of the police. Their new powers apply to those activities that are covered by some of the anti-terrorism legislation and they should not apply to the application of criminal laws that operate in the traditional criminal justice system. They are an integral part of the parallel system and, as will be shown, their first known activities in law enforcement have involved breaches of fundamental legal right and criminal laws.

This thesis proposes that there is a dependent interrelationship between the laws created by parliaments and the courts, law enforcement agencies, legal practitioners and the courts when they apply the laws; and that when one part of the relationship becomes dysfunctional the whole can fail in the central task of the fair administration of the criminal justice system and the avoidance of miscarriages of justice. In the event of a
failure to properly apply one or more of the laws, procedures, guidelines, or ethical requirements, a miscarriage of justice can occur that leads to an innocent person’s liberty being removed. Where there has been a failure by enforcement agencies to operate within the confines of the law, systemic corruption can result that infects more broadly law enforcement and community confidence in the criminal justice system. At its worst, failure to follow lawful procedures by enforcement agencies has resulted in death, the ultimate breach of a fundamental right.

Most of the examples provided relate to those criminal cases that do not involve terrorism and where legal protections of rights are in place. The anti-terrorism legislation that has been introduced largely lacks the laws and procedures that protect legal rights; this fact is detailed in Chapters 5 and 6. The weakness or absence of due process protections allows not only for greater abuses by corrupt enforcement officials, but, where ASIO agents are involved, the absence of nearly all public oversight of their activities. The extent of the secrecy that surrounds the anti-terrorism laws is shown in Chapter 6. The fear campaigns that have been run to promote the anti-terrorism legislation have failed to refer to the concerns that should be felt about handing excessive and invasive powers to enforcement agencies that are controlled by a small elite group. A number of examples provided in this chapter show that the problem created by corrupt law enforcement agents is not just isolated to individuals within the police force or within ASIO, but it can extend to politicians who are in government if a nexus of corrupt interests exists.

In the haste to deal with a perceived but inflated terrorist threat since 2001, inadequate attention has been given to the scope for abuse by individuals in law enforcement agencies. Furthermore, no attention seems to have been given to the potential for a corrupt nexus of interests to develop between law enforcement agents and politicians. The scope for an increase in corrupt practices in the parallel legal system allows for a potential increase in crimes, because they can be covered by secrecy provisions and therefore may never be publicly known or prosecuted, rather than the reduction of criminal offending. A proposition that is considered along with the central thesis of this work is that the traditional criminal laws are sufficient to deal with threats posed by people whose
motivation for their criminal activity may be political, ideological and/or religious (‘terrorists’), and therefore an extension of an extant corruption problem is avoidable as terrorists can be dealt with along with other criminals within the existing justice system.

The protection of the community, which was emphasised by those who introduced anti-terrorism laws, is based not just upon security measures designed to protect things such as aircraft and certain buildings that have traditionally been of interest to terrorists, but also on pursuit of potential terrorist offenders. Security measures that protect things have little impact on fundamental legal rights. However, the pursuit of individuals or groups who are deemed by enforcement officials to be a possible threat should bring with it a very real concern about whether the enforcement officials are abusing individuals they are investigating. The same concern should exist about whether those in government are engaging in abuse. In this regard it is not simply a matter of ensuring that law enforcement is acting within statutory restraints, because the laws themselves contain elements that allow abuse to occur. Because of this there should be concern about how the laws can foster abuse and allow corrupt practices to thrive under the cloak of their secrecy provisions. The examples drawn from the recent past in this chapter show that it is more than reasonable to be alert and worried about the potential for abuse, to the extent that there is a need for law reform. The examples of police, paramilitary and military abuses in 19th Century Australia are numerous and some of them are considered in Chapter 4. The examples used in this chapter are confined to the 20th and 21st Centuries.

Fabrication of Evidence and Institutional Corruption

Those closest to the operations of the criminal justice system can often see more clearly what is happening when individuals are being abused, than members of the public or naïve politicians. Chester Porter QC, a leading Australian criminal barrister, focuses on the presumption of innocence as the fundamental basis of liberty in his book The Conviction of the Innocent. He describes the longstanding problem of police claiming that an accused confessed when they did not. Police would often type records of

interview, or make notebook entries, including in them questions and answers without assistance from the person supposedly being interviewed. This corrupt practice became known as a ‘police verbal’. Porter notes the role played by judicial officers in allowing the practice to flourish: ‘In the past, many, many persons were convicted of serious crimes - including murder - on little other evidence than police verbals. Such cases are, of course, an indictment of our magistrates and judges. There is no doubt that many judicial officers in those days were hopelessly biased in favour of the police force. I have sat in court watching a respectable Sydney businessman give evidence as to how he was brutally bashed by a police officer whom he had offended. I looked at the presiding judge. He was not even looking at the witness who was demonstrating the assault, and of course completely rejected his evidence’. The relationship between the judiciary and the police has been an on-going problem for those confronting fabricated evidence. In an historical account of a trial involving members of the Industrial Workers of the World in Sydney in 1916, Ian Turner contends that there was a complex relationship between the government, the judiciary and the police that involved ‘an unacknowledged agreement’ where ‘law enforcement is based on violence [that] almost necessarily involves malpractice’ and ‘[y]et none of this can be admitted by Government or Bench, because to do so would be to undermine an institution on which the power of judges and politicians depends’.

The problem with police verbals has to some significant extent been overcome by the use of audio visual recording of police interrogations. The problem still exists but its use is more nuanced and requires more effort on the part of the police than it once did. Porter notes that the corruption in the police force can run from the highest to the lowest ranks and that the planting of evidence remains a serious problem. He states:

Unfortunately, police misconduct by way of planting evidence is always on the cards. Thus it was in the case of Arthur Allan Thomas in New Zealand. The report of the Honourable R.L. Taylor (a former Justice of the Supreme Court of New South Wales) and two others found, after a lengthy inquiry in 1980, that Thomas was framed for the murders of David Harvey Crew and Janette Lenore Crew. In the words of the report: “He should never have been charged by the

149 Ibid 43.
Police. He was charged and convicted because Police manufactured evidence against him, and withheld evidence of value to the defence. The fact that he is imprisoned on the basis of evidence which is false to the knowledge of Police Officers, whose duty it is to uphold the law is an unspeakable outrage.” Among other matters, there was the planting of a cartridge case. Thomas served nine years when he was an innocent man.\footnote{151}

In the case of Thomas, the fabrication of evidence by the planting of a cartridge was an obvious criminal act, the non-disclosure of evidence was a corruption of the process of disclosure discussed in Chapter 2, and a breach of the dependent relationship between those who enforce and apply their criminal law.

The nexus of corrupt interests between politicians and police is probably more opaque for those directly involved in the administration of justice; unless they are part of it. Such corruption can probably be best seen by those who study the phenomenon, such as journalists. A very good example of the corrupt nexus can be found in journalist David Hickie’s work *The Prince and the Premier*.\footnote{152} He detailed the links in the 1960s and 1970s between the Liberal Premier of New South Wales, Sir Robert Askin, corrupt senior police and those who ran criminal operations and supplied politicians and police with substantial amounts of illegally acquired money. Hickie describes, amongst other things, the links that Askin had with corrupt police, SP bookmakers and illegal casino operators: ‘Askin’s links with corrupt police allowed those casinos and SP betting to flourish. The corrupt police included Commissioners Norm Allan and Fred Hanson. During the Askin reign the illegal casinos blossomed into the major political scandal of postwar New South Wales. Most importantly, they provided colossal cash flows to the underworld and enabled organised crime to consolidate its powers once and for all . . . Parliament, the police, public morality – compromised, it was natural for the violence and unsavoury activities of the 1970s and 1980s to evolve largely unhindered’.\footnote{153} Askin was a Liberal Premier who won four elections between 1965 and his retirement in 1975. It is probably reasonable to say that it was against the interests of the corrupt to legalise casinos because it would have interrupted the flow of money to them. Sir Robert Askin died on 9

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\footnote{151} Porter, above n 148, 50-51.  
\footnote{152} David Hickie, *The Prince and the Premier* (Angus & Robertson, 1985).  
\footnote{153} Ibid 11-12.  

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September 1981 and left an estate worth $1.958 million. The Department of Taxation determined that ‘a substantial part of Askin’s estate was generated through undisclosed income from sources other than shares or punting and taxed it accordingly’. His wife, Lady Askin, inherited most of his estate, which upon her death was valued at $3.725 million. The reach of organised crime and extent of involvement of professionals and politicians with it was commented on by Justice Athol Randolph Moffitt, President of the NSW Court of Appeal, and Head of the Royal Commission into Organised Crime in NSW Clubs 1973-1974, in the following way: ‘Organised crime has made enormous advances in the past 10 years and is now operating on a large scale across Australia . . . . no group, professional or political, could be free from the likelihood that some of its members were corrupt.’

Where there is a close nexus between corrupt politicians and the senior ranks of the police force, it is unlikely that the politicians are going to insist the law is enforced and it is against the interests of the corrupt police to investigate their political protectors or their criminal money providers. None of the parties involved in the illegal activities wanted the casinos legalised or the law enforced.

In the case of anti-terrorism laws an obvious concern is that the politicians promoting the laws may do so to gain political advantage with the public and to mask their inadequacies in other areas of governance. Those engaged as enforcers of the law have an obvious interest in ensuring that they remain part of a growth industry which is largely unaccountable. While criminal laws have always existed to stop crime and corruption, the enforcement of the laws can be fraught with difficulties even if the crime is being committed in public view, if politicians and police do not want the laws enforced. In the case of anti-terrorism laws, the secrecy provisions allow for abuse of rights to be lawfully hidden and permanently removed from the record such that even historical revelations, as

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155 Ibid.
157 See references to masking effect of the promotion of anti-terrorism laws in chapters 7 and 8.
in the case of David Hickie’s work *The Prince and the Premier*, are not possible. While there is always the possibility that corrupt police and politicians can form a community of interest with terrorists, especially if there are significant amounts of money involved and no overt violence in the community, the most obvious problem is corruption that involves abuses of individual rights and the laws that already condone significant abuses. Reliance on the integrity of any part of the justice system as offering a reliable safeguard against corrupt and illegal behaviour is naïve to the point of being reckless. The recent historical examples of police misconduct and political corruption show the need for vigilance and concern about the activities of police and politicians. The need for caution is enhanced where fundamental legal rights safeguards are removed or diminished. Whilst a distinction can be drawn between cases of abuse against an individual and abuse of power more generally, as shown in a number of the examples including the Fitzgerald Report and Wood Royal Commission referred to below, they form part of the same power centered criminality. It occurs because the individuals engaged in the activity have power and think they can use it in a way that ignores the law without unacceptable consequences to them.

**Blackburn Royal Commission**

A good example of police investigative failure that involved the breaching of the fundamental legal rights of an individual and corruption of procedure is the Blackburn case. On 24 July 1989, Harold James Blackburn, a man of good character and who had no criminal record, was arrested as he left his workplace at the Special Investigation Unit, Federal Attorney-General’s Department in Sydney. In the evening of that day he was paraded by police before television cameras and later charged with 25 crimes, 13 of which involved sexual assaults against women. Blackburn had joined the New South Wales police force in 1947 and was appointed as a Superintendent on 2 January 1985. He was promoted to Officer in Charge of the Scientific Investigation Section. He retired from the police force on 3 May 1988 and was working with the War Crimes Commission at the time of his arrest.
On 11 October 1989, in the Local Court, the Director of Public Prosecutions offered no evidence and the Magistrate discharged Mr Blackburn on all charges. On 14 October 1989, the Premier of New South Wales announced that there would a Royal Commission established to inquire into the arrest and charging of Mr Blackburn and the withdrawal of the charges. Justice JA Lee was appointed Royal Commissioner. He examined the investigation undertaken by the police and highlighted points where the evidence was inappropriately gathered. His findings about the reasons why the police charged Blackburn are relevant for the purpose of providing an example of corrupt behaviour. One of the terms of reference was, ‘Whether any person who was involved in the investigation, arrest, charging, prosecution, discontinuance of prosecution . . . acted out of any improper motive.’ Justice Lee found that there was evidence showing misconduct, deceit, fabrication and suppression of evidence that could be attributed to an improper motive on the part of some investigating police. He stated, *inter alia*, ‘One sees incompetence, gross at times, slip shod practices, deceitfulness, lying and, above all else, an attitude that accepts evidence blindly, not objectively but because on its face it might implicate the suspect….‘

Mr Blackburn was probably fortunate in that he held a high profile position and was a person of unblemished character which resulted in people with influence taking an interest in his case. The vast majority of people charged with criminal offences, even when they are withdrawn, do not receive the benefits of Royal Commission investigation. It is not unusual for charges to be withdrawn against an accused person because there is no evidence or insufficient evidence, even if the accused person has spent a considerable amount of time in gaol. It is also not uncommon for individuals to have been convicted of crimes they did not commit, because they were inappropriately targeted by the police. The traditional criminal justice system at least offers some hope for people who are wrongly convicted to get their conviction overturned on appeal. There is also a greater

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159 A recent example involving an arrest for an alleged offence is the case of teenager Harun Causevic who was held for 120 days before being released: Adam Cooper and Michael Bachelard, 'Terrible injustice': Lawyer calls for apology for teen terror accused Harun Causevic, *The Age*, 25 August 2015.
potential for people to have charges withdrawn where, upon disclosure of the prosecution case, it is found that they have no evidence or insufficient evidence. The charging and prosecution procedures involve not just police, lawyers and judges but also public scrutiny through open courts and reporting of cases. In the case of charges brought under the provisions of the anti-terrorism legislation, the openness of the process is largely absent and the involvement of lawyers restricted, as described in Chapter 5 and 6. Those who promote the anti-terrorism laws provide no reasonable explanation of how the system they have introduced will protect against abuses when it is significantly more secretive than the traditional system. The explanations provided by politicians are detailed in Chapter 7, but the promoters of the anti-terrorism laws make no reference to the potential for corruption by law enforcement agents. They focus on how the public will be protected from terrorists.

**Fitzgerald Report**

Probably the clearest example of a police force that engaged in corrupt practices along with a Premier who controlled it was exposed in the Fitzgerald Report.\(^{160}\) It is an example of a nexus of political and police corruption on a very broad scale. On 1 November 1986, Sir Johannes Bjelke-Petersen was re-elected as leader of the National Party Government in Queensland. Shortly after his election he began campaigning to enter Federal politics. The control of the government was left in the hands of the Deputy Premier William Gunn when the Premier attempted to enter the federal parliament. In December and January 1987, the *Courier Mail* newspaper published a number of articles about police inactivity concerning prostitution and gambling. The articles were written by the journalist Philip Dickie. On 11 May 1987 the Australian Broadcasting Corporation’s 4 Corners aired a documentary called the ‘Moonlight State’ compiled by journalist Christopher Masters. The work of Dickie and Masters was instrumental in exposing police corruption. The day after the broadcast of the ‘Moonlight State’, Acting Premier Gunn announced that there would be an inquiry. The inquiry was not given the status of a Royal Commission and the Chairman of the Inquiry was appointed by Order in Council. The Chairman of the Inquiry

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Tony Fitzgerald noted, ‘The general expectation was that the inquiry would be brief and ineffectual, and was primarily a device to ease the political pressure on the government’. The expectation was not to be fulfilled. The Commission of Inquiry’s terms of reference were greatly expanded. Fitzgerald commented that the Inquiry ‘began by pulling a few threads at the frayed edges of society. To general alarm, sections of the fabric began to unravel’.

The Inquiry produced extensive evidence of police corruption and links between corrupt police and politicians. The government of the day and its appointed Police Commissioners engaged in similar activities to those typical of the Askin years in New South Wales. The difference was that a Commission of Inquiry had been established in the absence of the Premier, and it exposed in a formal way extensive corruption. The Inquiry’s findings can be summarised from the words of its report under the heading of ‘Police Misconduct in the 1980’s’. Fitzgerald stated:

In the last decade, vice in Brisbane increased and became more organized, organized syndicates plainly became involved, some with members with serious criminal records, and activities were expanded in other areas of criminality, including illegal drugs, violence, extortion and arson. Various ethnic communities became involved through the misconduct of some of their members. Police corruption grew with the additional funds available for bribery.

Much the same pattern developed outside Brisbane, especially in tourist areas such as the Gold Coast, where vice, drugs and police corruption are all grave social problems, with the same organised criminal syndicates and their associates involved.

... .

Not all police officers stationed in the sections of the Police Force or locations where there has been widespread misconduct have participated, but most, if not all, have been aware of what was occurring and have acquiesced for one reason or another, some less culpably than others.

161 Ibid 3.
162 Ibid 4.
163 Ibid 63.
Fitzgerald exposed extensive corruption but by no means all of it. He found ‘it ought not to be thought that the Inquiry has exposed all or even most of the misconduct which has occurred. It most certainly has not. Other material held by the Commission makes it clear that only a small number of the guilty have been exposed’.164 The type of activities he noted that were available to police officers in the criminal justice system included: ‘manufacture or falsification of evidence; interference with evidence and other material, including loss and destruction of records; intimidation and suborning of witnesses; obtaining admissions by threats or inducements; and obstruction of investigations’.165

The police, according to Fitzgerald, engaged in corrupt activities that included stealing forfeited property, accepting money, property and sexual favours.166 Police became criminals and those who did not failed to arrest and charge those who were and thereby committed a criminal offence as well. Many police could reasonably be described as being members of criminal gangs who were posing as law enforcement officers. Fitzgerald noted: ‘There is no single “rotten apple” or small number of “rotten apples” in the Police Force, and its problems are not confined to specific sections, although there are major concentrations of misconduct in some areas of police activity’.167 The Fitzgerald Inquiry exposed a degree of corruption that is more often associated with third world countries where the rule of law has little influence. The role of the police in supporting politicians of their choice is an identifiable problem because it can be influential in allowing corruption to flourish. Notoriously corrupt Queensland Police Commissioner, Sir Terence Murray Lewis, described how he would never support Deputy Premier Bill Gunn to become Premier, stating ‘I got on well with my men, there’s no two ways about that, and he [Gunn] knew that the police vote in the country could be very useful because a lot of people were friendly with their local policeman [and] their Sergeants or whatever, and they’d all talk together . . . they thought Joh was a good bloke’.168 The police and political misconduct exposed by the Inquiry was not unique to Queensland and is not an historical artefact. Of current concern is the influence the police and security agents have had on the

164 Ibid 7
165 Ibid 206 [7.4].
166 Ibid 207.
167 Ibid 208.
drafting of anti-terrorism laws and how federal parliamentarians may have embraced the laws to avoid criticism from police during elections. Reference is made to the concerns of politicians in this regard in Chapter 7.

**Royal Commission into the New South Wales Police Service**

The ongoing problem with crime in the police forces was at least in part exposed by the subsequent Royal Commission into the New South Wales Police Service, 169 which was established on 13 May 1994 by Letters Patent issued to Justice James Wood. It authorised the investigation of a number of matters including ‘the existence, or otherwise, of systemic or entrenched corruption within the New South Wales Police Service’. 170 The Royal Commission continued until 10 June 1997. It found that there was systemic and entrenched corruption in the New South Wales Police Service. Justice Wood’s comments about the protection of the drug trade and drug trafficking by the police provide good examples of systemic and entrenched corruption. He stated:

> There is an overwhelming body of evidence suggesting the existence of close relationships between police and those involved in the supply of drugs. This encompassed a variety of activities ranging from police turning a blind eye to the criminality of the favoured in return for regular payments, to active assistance when they happen to be caught, to tip-offs of pending police activity, to affirmative police action aimed at driving out competitors. 171

The police activities around the drug trade did not only involve allowing and protecting criminals to engage in the trade, but also the elevation of police criminality into the direct marketing of illegal drugs. Justice Wood stated:

> Perhaps most disturbing of all was the extent to which police admitted to being directly involved in the supply of Cocaine, Heroin and Cannabis. In most cases this involved the recycling of drugs seized in various operations that had simply not had been booked up. The methods of supply included the provision of drugs

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170 Ibid 1.

171 Ibid [4.135], 119.
to informants in return for information and re-sale through informants and known drug dealers.\textsuperscript{172}

The police would protect a preferred group of fellow criminals and they would remove criminal competitors.

The Royal Commission engaged in proactive investigations rather than simply reviewing available evidence and questioning witnesses. This approach allowed for a more effective gathering of evidence than is usually the case in Royal Commissions. For example, the Royal Commission into Aboriginal Deaths in Custody largely restricted its investigations to reviewing available documentation and questioning witnesses who came forward or who were identifiable from police documents. The approach adopted by Justice Wood was to use investigators independent of the police and use surveillance methods to gather new evidence. The Aboriginal Deaths in Custody Royal Commissioners used evidence previously gathered by police to determine, amongst other things, if police were criminally involved in the deaths of Aboriginals in their custody. In the Edward James Murray death in custody case, Commissioner Muirhead, found that some of the police evidence could not be accepted\textsuperscript{173} and that their investigation into the death was inadequate,\textsuperscript{174} but he failed to reveal the full extent of the misconduct and he only allowed limited questioning of investigative police.\textsuperscript{175}

The Wood Royal Commission did not just consider police involvement in the illegal drug trade, it also dealt with a wide range of criminal activities such as theft and extortion, assaults and abuses of power, fraudulent practices, compromised prosecutions, protection of gaming and betting interests, protection of clubs and vice operations. Its investigations stopped in 1997 and there remained significant areas of New South Wales where its investigations had not completed or had not commenced.

\textsuperscript{172} Ibid [4.182], 132.
\textsuperscript{174} Ibid 138.
\textsuperscript{175} Ibid 133-135.
As a result of the Wood Royal Commission, senior police acknowledged the need to raise the ethical standards of police. It is now accepted by senior police that there is a requirement to have high ethical standards that include upholding the law and preserving an individual’s rights and freedom. Former New South Wales Police Commissioner Ryan stated to the police under his command: ‘Even though we live in a changing society with changing values, customs and even laws, there are certain elements which must resist change. Scrupulously avoid even the hint of compromised ethical standards. Act in an ethical and profession manner. Society judges us by our conduct, i.e. our actions and inaction. . . . Your actions are judged within a system of moral principles. There are many circumstances in which you may be tempted to perform an illegal or improper act. However, you must act ethically and professionally at all times in a way which places integrity above all. . . . There are no degrees of ethical standards and any action which breaches these standards is not tolerated’. The acknowledgement that the highest ethical standards are required is not, however, evidence that an organisation that historically has been populated by corrupt individuals who display recidivist criminal tendencies has in fact changed, or that where it might have that vigilance is not required to ensure that it does not relapse.

The Royal Commissions and the Fitzgerald Inquiry examined past and current misconduct by police. They were open inquires that allowed for exposure of wrongdoing. The aims of such inquiries are to identify wrongdoing and through exposure stop the behaviour. Additionally, such inquiries can lead to the laying of criminal charges and law reform. In the case of anti-terrorism activities under the ASIO Act 1979, there is little prospect of inquiries into wrongdoing, and when the Hope Royal Commission did investigate ASIO its inquiries were done in secret. There is little chance of a Royal Commission being established to investigate misconduct by those engaged in anti-terrorism law enforcement. If one was established precedent indicates that it would carry out its investigations in secret while trying to investigate secret activities, where those they were investigating were authorised to destroy evidence and had immunity from prosecution.

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Chamberlain Case

Probably the most infamous case, certainly the case that has received the most publicity, which revealed the fragility of the criminal justice system, is the Chamberlain case. On 17 August 1980 Azaria Chamberlain went missing from a camp site at Ayres Rock (Uluru) in the Northern Territory. The first Coronial Inquest into her death, from December to February 1980-81, resulted in Coroner Denis Barritt finding that a Dingo snatched and killed Azaria Chamberlain. The parents, Michael and Lindy Chamberlain, were not implicated in any way with the disappearance of their child. In November 1981, the Supreme Court of the Northern Territory quashed the findings of the Coroner and ordered a second Inquest. The second Inquest was presided over by Coroner Gerry Galvin, between December 1981 and February 1982. He overturned the finding of the first Inquest and committed Lindy and Michael Chamberlain for trial. The trial commenced on 13 February 1982 in Darwin with Justice Muirhead presiding. On 19 October 1982, Lindy Chamberlain was sentenced to life imprisonment for murder and Michael Chamberlain given a suspended sentence for accessory after the fact to murder.

Thirty years elapsed before a third Inquest was held which vindicated the Chamberlains. In between, there was a series of appeals and a Royal Commission. On 19 November 1982, Lindy Chamberlain was released from prison pending an appeal. On 30 April 1983 the Federal Court rejected her appeal and she was again given a term of life imprisonment. On 22 February 1984 a High Court Appeal, in a split decision (3:2), rejected an appeal by the Chamberlains. On 7 February 1986 Lindy Chamberlain was released from prison on compassionate grounds, and in April 1986 a Royal Commission was established. The Royal Commission on 2 June 1987 delivered findings that the trial verdicts were unsafe and unsound. On 15 September 1988, the Northern Territory Criminal Court of Appeal quashed the convictions of the Chamberlains. Compensation for wrongful imprisonment was paid. The third Inquest into the death of Azaria Chamberlain commenced on 24 February 2012 and the Chamberlains were vindicated.177

The Crown case was inherently flawed in terms of the sequencing of events. Royal Commissioner Morling pointed out the apparent absurdity of the Crown position, stating amongst other things:

It was the Crown case that Azaria was killed in the car. It seems absurd to suggest that Mrs Chamberlain carried Azaria’s bleeding body from the car back to the tent when she would have been under Aidan’s observation. The presence of Azaria’s blood in the tent, unless it be shown to have been transferred there from Mrs Chamberlain’s personal clothing, is inconsistent with the Crown case… It has not been shown by the Crown that the blood in the tent was transferred there by the clothing or person of Mrs Chamberlain. On the contrary, the evidence points to this being an unlikely occurrence.\(^{178}\)

In most criminal cases, a jury can distinguish between the reasonable theory of a case and the improbable. However, where the improbable becomes reasonable through corroborative evidence, the prosecution can sometimes prove its case beyond reasonable doubt. In the Chamberlain case, apart from a zealous approach adopted by the police and the prosecution, false and misleading evidence was introduced by expert witnesses. The evidence of Joy Kuhl, Forensic Scientist, was essential to ensuring the convictions of the Chamberlains. She identified blood where it did not exist. In particular, Kuhl identified blood under the dashboard area of the Chamberlain’s vehicle, which was in fact a sound deadening spray. Commissioner Morling noted a series of problems with Kuhl’s record keeping, including 12 occasions when results of tests had been changed or crossed out. He found in respect of her finding of blood under the dashboard that ‘The fact that she could come to such a conclusion about something, which was, very probably, sound-deadener, casts doubt upon the efficacy of her testing generally and upon the accuracy of her other results’.\(^{179}\)

The Chamberlain case had available to it the appellate process, full disclosure requirements and an open court and still a miscarriage of justice occurred that was not fully rectified for many years. Anti-terrorism laws and procedures do not have the same protections, full disclosure is not required, and in a number of instances not permitted, the

\(^{178}\) Ibid 317.
\(^{179}\) Ibid 315.
court is not open and therefore appellate procedures may be left incapable with dealing with a case such as the Chamberlain case. The brief outline of this case provided here does not do justice to the efforts made by those who had to counter the evidence given by Joy Kuhl and others. Even where disclosure was required, it was necessary to go behind what the prosecution had provided to engage in independent investigations to disprove Kuhl’s findings. For example, Professor Barry Boettcher, who gave evidence at the trial and was attacked by the prosecution as for being an academic rather than a practicing forensic pathologist, went to the Behringwerk company in Germany that produced the anti-serum used in the testing for blood and got confirmation that he had used the same anti-serum as Kuhl.  

180 This confirmed that her testing was flawed. Professor Boettcher also in May 1986 tested dust from a variety of places in Mt Isa, Queensland and found that they all gave positive readings for blood.  

181 This was further confirmation that the blood tests which were central to the prosecution case could not be relied upon. The secrecy provisions, especially those contained in the ASIO Act 1979, if used in a case like the Chamberlains could stop people such as Professor Boettcher from even being given the data that Kuhl had worked with, if a few people decided it was in the interests of national security that it not be revealed.

Harold Eastman Case

The Eastman case provides a very clear example of where failure to disclose evidence can lead to a failure to provide a fair trial. On 10 January 1989 at about 9.15am Assistant Commissioner in the Australian Federal Police, Colin Stanley Winchester, was shot and killed when alighting from his vehicle near his home in Lawley Street, Deakin, Canberra. He was shot in the head twice as he was about to get out of his car. The shots it was claimed were fired at point blank range from a Ruger 10/22 calibre rifle fitted with a silencer.  

182 David Harold Eastman was charged with the murder of Winchester. On 2 May 1995 Eastman was arraigned and pleaded not guilty. On 3 November 1995 a jury returned a verdict of guilty. Eastman was sentenced to imprisonment for life. There were a number of unsuccessful appeals and an inquiry in 2005 concerning his fitness to

181 Ibid 184.
182 Eastman v The Queen [1997] 548 FCA.
stand trial. On 29 April 2011 Eastman applied for another inquiry into his conviction. On 3 September 2012 the application was granted and an inquiry ordered.

Acting Justice Brian Martin conducted the Inquiry. He found a number of flaws in the way that the case was conducted, but one of the most significant was that there was a failure to disclose evidence about the reliability of the testing of gunshot residue undertaken by the prosecution expert, Mr Barnes. Martin J. findings were, inter alia:

A substantial miscarriage of justice occurred in the applicant’s trial.

The applicant did not receive a fair trial according to law. He was denied a fair chance of acquittal.

The issue of guilt was determined on the basis of deeply flawed forensic evidence in circumstances where the applicant was denied procedural fairness in respect of a fundamental feature of the trial process concerned with disclosure by the prosecution of all relevant material.

As a consequence of the substantial miscarriage of justice, the applicant has been in custody for almost 19 years.

The miscarriage of justice was such that in ordinary circumstances a court of criminal appeal hearing an appeal against conviction soon after the conviction would allow the appeal and order a retrial.

A retrial is not feasible and would not be fair.

The failure to properly disclose crucial evidence as found in the Eastman case occurred when all the traditional protections available to ensure a fair trial were available. In the case of trials conducted under anti-terrorism legislation the disclosure requirement is significantly restricted. The restrictions placed on disclosure are examined in Chapter 5 and they include: provisions under the National Security Information (Criminal and Civil Proceedings) Act 2004; and secrecy provisions that exclude names of agents, details of special intelligence operations and the detail that provides the basis for seeking control

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183 Inquiry under s 475 of the Crimes Act 1900 into the matter of the fitness to plead of David Harold Eastman, 6 October 2005.
and preventative detention orders. Where evidence is withheld it can lead to miscarriages of justice as shown in the Chamberlain case and others.

**David Hicks Case**

The Australian government’s readiness to accept fundamentally flawed criminal procedures that ignore or avoid fundamental legal rights protections is shown in the case of David Hicks. This case also shows the muted response by the Australian public to the abuse of one of its citizens by a foreign power. The reaction to his case by the public and the government is an example of why a fully functioning criminal justice system buttressed by established due process protections is essential if the rule of law in a democratic state is to have meaning.

David Hicks, an Australian citizen, was abused by the United States military and security agencies, with the full knowledge of the Australian government. He was detained without trial in Guantanamo Bay for over five years, three years of which was spent in isolation. He was captured by members of the Northern Alliance in a taxi in Baghlan, Afghanistan, in December 2001. On 11 January 2002 he was taken to Guantanamo Bay and detained without charge as an ‘unlawful combatant’. In July 2003 it was decided by the US President George W Bush that Hicks and five others were eligible for trial by Military Commission which was established by Presidential Order. In 10 June 2004 Hicks was charged with conspiracy to commit war crimes, attempted murder and aiding the enemy. However, before a trial could be held the US Supreme Court in June 2006 held that the Military commissions established by the President were unconstitutional.

Hicks continued to be held in detention without any clear prospect for release. In late 2006 the United States Congress enacted the *Military Commissions Act of 2006*. In March 2007 Hicks pleaded guilty to one charge of ‘providing material support for terrorism’. In

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185 Detailed descriptions of the public and mental abuse inflicted on David Hicks can be found in David Hicks, *Guantanamo: my journey*, (William Heinemann, 2010).
186 Leigh Sales, *Detainee 002: The Case of David Hicks* (Melbourne University Press, 2007) 27.
187 *Hamdan v Rumsfeld* 548 US 577.
April 2007 he was sentenced to seven years imprisonment, and he was returned to Australia on 20 May 2007 to Yatala Labour Prison in South Australia. As part of a plea bargain by Hicks the remaining nine months of his sentence was suspended on 29 December 2007, and he was then placed under a 12 month control order. In 2014 Hicks appealed against his 2007 conviction and on 18 February 2015 the United States Court of Military Commission Review set aside the guilty plea and sentence and his conviction was quashed. Hicks spent time in gaol as a result of a system that ignored the rule of law and fundamental legal rights.

The Law Council of Australia criticised the way Hicks was treated for the followings reasons: ‘the inability of Hicks to effectively challenge the legality of his detention; Hicks' treatment in detention; the flawed and inherently unjust rules of procedure and evidence of the military commissions; the lack of any legal foundation for the charges initially pursued against Hicks; the retrospective nature of the charge eventually pursued against Hicks; the acquiescence of the Australian Government in Hicks' detention without charge; the acquiescence of the Australian Government in Hicks' trial before a military commission; the terms of Hicks' plea agreement; and the unnecessary imposition of a control order on Hicks upon his release’. Timothy McCormack describes the politicisation of the processes involving Hicks as involving, amongst other things, the ‘blustering by Australian politicians’ and by US military prosecutors who claimed Hicks was ‘one of the most dangerous people in the world’, and one of whom addressed a jury with the words, “you are on the frontline of the global war on terror and sit here face to face with the enemy”. The claims, as McCormack points out, ‘proved to be utterly devoid of substance’.

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188 *David Hicks v United States of America* CMCR 13-004. The UN Human Right Committee recently found that Australia violated article 9(1) of the Covenant on Civil and Political Rights by imprisoning Hicks from 20 May 2007 until 29 December 2007 in accordance with the transfer agreement it had negotiated with the United Sates. Human Rights Committee, International Covenant on Civil and Political Rights, Communication No. 2005/2010, 16 February 2016, annex I, para 5.


The case of David Hicks exposed how the parallel legal system allowed for abuse within Australia by the imposition of a control order on a person who ultimately was found to have committed no crime. The case clearly shows the willingness of the executive government to allow one of its citizens to be exposed to abuses whilst in the custody of a close ally who refused to allow him access to their criminal justice system. The attitude of the government as reflected through the then Liberal Prime Minister, John Howard, was that justice was not a matter that needed to be considered in the case of Hicks. John Howard states:

The prime example of a barnacle was the time it had taken for the Americans to bring David Hicks to trial. Most Australians suspected that Hicks was at least guilty of the things to which he ultimately pleaded guilty. They had little sympathy for him, but he should have his day in court. The fact that a lot of the delay was due to major constitutional challenges against the military commissions which were intended to try detainees such as Hicks went through to the keeper with most Australians. The longer the wait dragged on, the harder it became to stop supporters of Hicks building him into some kind of martyr.¹⁹¹

The former Prime Minister John Howard made these comments although he, at least by qualification, had some understanding of the law. Before entering parliament he was a solicitor. His comments are concerning in a number of ways. First, they are put forward in a way that reflects his views when he was Prime Minister and therefore the leader of the executive arm of government that devised and promoted anti-terrorism laws. Second, the views display an emphasis on perceived public attitudes rather than on ensuring that an individual received a fair trial. Third, he seems to be endorsing the military commission system of trial, which was inherently flawed, did not contain the safeguards necessary for a fair trial, and has most recently been discredited.¹⁹²

The public view about how David Hicks was treated is hard to discern and there may not be a settled view by a majority of people about whether the Australian government acted reasonably in his case or not. However, Michael Bradley, a managing partner of a Sydney ¹⁹¹ John Howard, Lazarus Rising: A Personal and Political Autobiography (Harper Collins, 2013) 745,746.
¹⁹² See United States Supreme Court case Hamdan v Rumsfeld 548 US 577.
law firm, probably reflects the opinion of the majority of legal professionals when he commented on the disregard for basic human rights by politicians and suggested that the rule of law would have provided a better solution in the Hicks’ case. He stated:

. . . the likes of Abbott and Brandis . . . debase themselves and their offices with comments that trample on the most basic legal rights. The fact is that Hicks never committed a crime and should never have been charged, convicted and imprisoned. That ought to be acknowledged. Not necessarily apologised for, nor compensated - those are political choices the Government can make.

The lesson that should be taken from this case is that the rule of law, imperfect as it is, provides much better solutions to complex situations than governments will do when they decide to make up the rules as they go. Next time we decide to invade another country, we need to determine our legal justification for doing so and then deal with who and what we find accordingly. ¹⁹³

Another example of the methods employed by law enforcement agents when dealing with someone charged under anti-terrorism laws also indicates that, like their political supervisors, they are prepared to trample on basic rights. The case of Ul-Haque, described next, is one example of unlawful behaviour; however, later additions to the anti-terrorism laws probably make the unlawful techniques that enforcement agents employed now lawful and their criminal offending immune from prosecution. It is apparent that politicians with the necessary power did not want judges criticizing, or finding criminal, the behaviour of law enforcers in the parallel legal system. They have also taken the necessary legislative steps to limit criticism of their actions and those of law enforcers, by limiting or removing access to information about their activities, and by the introduction of non-disclosure and other secrecy provisions.

**The Case of Izhar Ul-Haque**

An example of how law enforcement authorities can abuse fundamental legal rights when investigating an alleged terrorist offence is shown in the case of Izhar Ul-Haque, a third year medical student, who was charged pursuant to s102.5(1) of the *Criminal Code* in the following terms:

That between 12 January 2003 and 2 February 2003, in Pakistan, he did receive training with respect to combat and the use of arms from a terrorist organisation, namely Lashkar-e-Taiba, he the said Izhar Ul-Haque at the time aforesaid knowing that the said organization was a terrorist organisation.\footnote{R v Ul-Haque [2007] NSWSC 1251.}

Ul-Haque pleaded not guilty and at his trial objection was taken to alleged admissions he was said to have made to Australian Federal Police officers during interviews which were conducted on 7 and 12 November 2003 and 9 January 2004.

It was alleged that Ul-Haque had trained in a camp operated by Lashkar-e-Taiba for twenty-one days. Upon his return from Pakistan to Sydney on 20 March 2003 his baggage was searched by Customs officers who found a number of documents that consisted of books, notebooks and printed material. The documents referred to a number of things including that he was going to Kashmir for ‘jihad’ and that he intended to join Lashkar-e-Taiba. The Customs officers seized the material and let him go.\footnote{Ibid 12.}

Over six months after his return to Australia on 6 November 2003 at 7.25pm about twenty ASIO officers assisted by about five police officers, all in plain clothes, executed a search warrant at his home where he lived with his parents and three brothers.\footnote{Ibid 14.} ASIO and the Australia Federal Police, as the evidence revealed, wanted to use him as an informant. Ul-Haque had been under surveillance earlier in the day at the University of New South Wales, and was observed catching a train from Sydney to Blacktown. ASIO officers B14, B15 and B16 waited for him in the car park of Blacktown railway station\footnote{Ibid 15.} (the names of the ASIO agents have been kept secret). Al-Haque and his seventeen year old brother were confronted by agents and taken in a car to Francis Park some distance away.\footnote{Ibid 15.} According to Ul-Haque he was confronted and intimidated and told he had to answer questions, he stated; ‘At that time really I didn't know where I was being taken. In my mind a lot of things were going on, you know, am I being taken to a secret location or
some secret ASIO interrogation rooms. I didn't know what was going to happen to me and then they took me to a park near the Blacktown Railway Station. I think it's Francis Park, and when we got to the park, officer [B15] told me to get out of the car.'199

The trial judge Adams J described the initial confrontation and actions in the following way: ‘The officers were dealing with a young man of twenty-one years. It is obvious that any citizen of ordinary fortitude would find a peremptory confrontation of the kind described by the ASIO officers frightening and intimidating. Furthermore, the fact that he was being taken to a park rather than any official place would have added an additional unsettling factor. I do not think it can be doubted that this was precisely the effect that was intended.’200 There were a number of questions asked about activities on the day between Ul-Haque and the ASIO officers. His Honour Justice Adams described the questioning as ‘intimidating’ and noted that Ul-Haque ‘was not told what was being investigated except in the most general terms. He was told, in effect, that he knew what he had done was wrong.’201 Adams J’s criticism of the actions of ASIO officers was scathing, stating it was ‘reminiscent of Kafka’.202

His Honour found that B15 and B16 had committed the offences of false imprisonment and kidnapping at common law and also an offence under s86 of the Crimes Act 1900 (Kidnapping). He stated that: ‘Their conduct was grossly improper and constituted an unjustified and unlawful interference with the personal liberty of the accused. So far as their conduct in his parents’ home is concerned, it also constituted an unlawful trespass against the occupants, since they gained admittance under colour of the warrant which did not authorise what they did: keeping the accused incommunicado in a bedroom, let alone subjecting him to compulsory questioning.’203 The period of time when the accused’s fundamental right to liberty was withdrawn was relatively short but nevertheless the

199  Ibid 17.
200  Ibid 19.
201  Ibid 31.
203  Ibid 62.
agents of the state who did it felt that they were able to do so without penalty, either that or they had no understanding the law placed limits on their behaviour.204

The Australian Federal Police conducted an interview with Ul-Haque on 7 November 2003. His Honour Justice Adams noted that Ul-Haque was given a ‘completely inadequate caution’ and the person who commenced the questioning was unaware of the improper conduct of ASIO.205 However, his Honour found that other Australian Federal Police officers failed to ‘remove the effect of what had been said’ to Ul-Haque by ASIO officers.206 That is, the AFP officers knew that he had been intimidated and had not been properly cautioned by ASIO officers, yet they did not try to overcome the effect of these due process failures on the accused.

The interview that occurred on 12 November 2003 was considered together with the interview of 7 November 2003. His Honour considered the admissibility of the interviews under a number of sections of the Evidence Act 1995. Section 84 of the Act governs the exclusion of admissions where they have been influenced by ‘violent, oppressive, inhuman or degrading conduct’. In this regard his Honour found, inter alia, ‘the conduct of ASIO, in particular by officers B15 and B16, was well within the meaning of the phrase. In substance, they assumed unlawful powers of direction, control and detention. It was a gross interference by the agents of the state with the accused’s legal rights as a citizen, rights which he still had whether he was suspected of criminal conduct or not and whether he is a Muslim or not. Furthermore, the conduct was deliberately engaged in for the purpose of overbearing the accused in the hope that he would co-operate.’207 Relevantly, for the purpose of considering whether separate agencies, within the enforcement part of the criminal justice system, would be a controlling influence on each other for the purpose of stopping abuses, his Honour found this not to be a realistic proposition. He stated:

204 Adams J formed the view that the behaviour of the ASIO agents showed at least incompetence: Ibid 70.
205 Ibid 69.
206 Ibid 70.
207 Ibid 95.
Quite rightly, the accused regarded ASIO and the AFP as arms of the state. He quite rightly assumed that they were acting together. The notion that he would be likely to reason that the AFP would not tell ASIO about the extent of his cooperation is fanciful. It would also have been utterly mistaken. Not only did the AFP disclose what he had said to ASIO, but both organizations were aware that this was consistent with what he had said to ASIO on 6 and 7 November. Ordinary reason – quite apart from the accused’s evidence – leads to the conclusion that there could be no confidence either that the cautions would be taken as realistically describing his actual position or that his agreements at the end were honestly answered.\(^{208}\)

The interviews were excluded pursuant to s138 of the *Evidence Act 1995* that governs the exclusion of improperly or illegally obtained evidence.\(^{209}\)

The police evidence was found in several instances to be untruthful. Adams J stated: ‘I do not accept that in respect of those parts of the evidence in which [AFP Officer Pegg] is contradicted by the accused, I should prefer his account. Having decided, as I reluctantly feel I must, that Mr Pegg did not tell the truth about the conversation following the first interview with the accused, a question mark as to his veracity necessarily attaches to other portions of his evidence which are not independently corroborated. I prefer the accused’s evidence over that of Mr Pegg where they are in contradiction.’\(^{210}\)

The third interview which occurred on 9 January 2004 was also found to be inadmissible on the basis that the Crown could not prove it was not influenced by the oppressive conduct of ASIO.\(^{211}\) The Director of Public Prosecutions abandoned the prosecution after the judge found the alleged admission could not be used during the trial.

The Australian Federal Police who gave evidence at trial were identified and their errors exposed to public gaze, as is appropriate in criminal cases. The ASIO agents who committed criminal offences were protected from public scrutiny. The then Attorney-

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\(^{208}\) Ibid 97.

\(^{209}\) Ibid 106.

\(^{210}\) Ibid 116.

\(^{211}\) Ibid 118.
General, Philip Ruddock, is reported to have said that ‘any disciplinary action against the ASIO officers was a matter for the intelligence watchdog, Ian Carnell’.212

The ramifications for the justice system are not limited to one criminal case being decided on an admissibility issue, as frequently occurs. The judge, who made the decision, it is reported, had a complaint lodged against him by Robert Cornall, Secretary of the Federal Attorney General’s Department and one of the original architects of the first wave of anti-terrorism legislation. The complaint, it is reported, was lodged with the Judicial Commission of New South Wales and was in part based on the fact that it was revealed that ASIO Agents had broken criminal laws.213 This perceived difficulty may have been eliminated, as discussed in Chapters 5 and 6, because secrecy provisions have been expanded in the ASIO Act 1975 to the extent that criminal activities by ASIO agents can be kept secret, and criminal penalties apply to those who reveal them. The changes also make much of his Honour Justice Adams’ correct statements on the law irrelevant.

Ian Carnell, the Inspector-General of Intelligence and Security, in a ‘Report of Inquiry into the Actions Taken by ASIO in 2003 in Respect of Mr Izhar Ul-Haque and Related Matters’ dated 12 November 2008, made a number of findings and recommendations. Carnell held the position of Inspector-General between 23 March 2004 and 9 April 2010. Prior to taking up the position he was Deputy Secretary, Attorney Generals Department, responsible for national security. His findings differ significantly from those of Justice Adams. Essentially, Carnell decided the agents B15 and B16 were people of good character and accepted the evidence of other ASIO officers that they were ‘habitually professional and respectful in approaching members of the community,214 and that there was no ‘substantial evidence’ to show they did anything wrong.215

212 Tom Attard, ‘ASIO interrogators were grossly incompetent: judge’, Sydney Morning Herald, 13 November 2007.
214 Ian Carnell, Report of Inquiry into the Actions Taken by ASIO in 2003 in Respect of Mr Izhar Ul-Haque and Related Matters, 12 November 2008, 35 [114].
215 Ibid 36 [118].
Carnell made very little reference to the credibility of Ul-Haque, simply stating that he did not give evidence before him and in that any event ‘I do not see it as my role to come to a view as to whether I prefer the substance of the evidence of one person over another’. Whilst he claimed not to prefer the evidence of one person over another, he clearly did, and he used good character to assist in determining the issue of whether the agents did anything wrong. At law, character evidence can be used to assist in determining if a witness should be believed or not. The approach he adopted when considering the case seemed to be administrative rather than judicial. He therefore was not required to apply a standard of proof or to consider who had the burden of proof.

**Dr Mohamed Haneef Case**

Dr Haneef, an Indian Doctor, was about to leave Britain to travel to Bangalore to visit his family before travelling to Australia to take up a position at a hospital in Queensland. Before leaving, on 25 July 2006, he gave his second cousin Sabeel Ahmed the SIM card from his mobile phone. It was due to expire in August 2006. On 30 June 2007, approximately one year later, the second cousin’s brother Kafeel Ahmed crashed a jeep into the entrance of Glasgow Airport, with Kafeel dying from injuries two days later. The day before that action Kafeel was a central figure in a thwarted attempt to car bomb 2 London nightclubs. The second cousin, Sabeel, was arrested on 30 June 2007 in connection with the Glasgow attack and failed London bombings.

Dr Mohamed Haneef was arrested on 2 July 2007 and held without charge for 12 days under the provisions of Australia’s anti-terrorism legislation. The relevant sections of the *Crimes Act 1914* allow for an extension of the period of detention where a person has been arrested for a terrorism related offence. However, in order for a police officer to arrest a person, even if subsequent amendments to anti-terrorism are applied, that officer needs to have a reasonable suspicion that person committed or was committing an offence. The involvement of one second cousin in the bombing and the provision of a SIM card that expired nearly a year before the bombing could not form the basis of a

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216 Ibid 35 [117].
218 Section 3WA, *Crimes Act 1914*. 
reasonable suspicion for an arrest. The police removed the fundamental right to liberty and continued the abuse despite the fact that they had no legal basis for doing so, and the magistrate or magistrates who kept approving the extension of his detention were either mislead about the need for continuing detention, or applied an administrative rather than a judicial approach to the detention.

On 14 July 2007 Dr Haneef was charged with one offence of recklessly providing support to a terrorist organisation on the grounds that his SIM card was connected to the failed terrorist attacks in Britain, contrary to section 102.7(2) of the Commonwealth Criminal Code. The police who arrested Dr Haneef alleged the SIM card he gave to his cousin Sabeel was found in the jeep that Sabeel’s brother Kafeel had crashed at Glasgow Airport. It was a false allegation, but none the less formed one of the unreasonable bases of his arrest. The UK police had known for six days before Dr Haneef was charged that the SIM card was not found at the scene, but no attempt was made to correct the erroneous story by the Australian Federal Police, the Commonwealth Director of Public Prosecutions or the Queensland Police Service. Furthermore, there was evidence in an email known as the ‘Jihad email’ sent by Kaleef to his brother Sabeel, that the latter had no knowledge of the plans; evidence which showed that Dr Haneef was not connected to the car bombing.

Dr Haneef had his 457 work visa cancelled by the Immigration Minister on the basis of failing the character test pursuant to section 501(3) of the Migration Act 1958. Under s 147 of that Act he was required to stay in immigration detention and later home detention and then to leave voluntarily for India on 28 July 2007. The day prior to his departure the Commonwealth Director of Public Prosecutions had withdrawn the charge.219

The case of Dr Mohamed Haneef is a clear example of where the criminal justice system failed to protect his rights and where anti-terrorism laws were used to justify his incarceration. The government intervention in his case is a clear example of it becoming involved in the administration of justice in a way that allowed the criminal justice system

to become dysfunctional. The former Prime Minister, John Howard, seems to have had little concern about Haneef and how he was being treated. He was, however, very concerned about how the Government would be viewed. He wrote:

Other awkward news was the decision of the AFP to abandon altogether any action against Mohamed Haneef, the Indian doctor employed in a Queensland hospital and detained on suspicion of a link with a terrorist attack in Glasgow, Scotland. Even though Haneef had been released, Kevin Andrews cancelled his visa and the man returned to India. The detention and charging of Haneef had occurred independently of the Government. The AFP had acted on the advice of the Director of Public Prosecutions (DPP) who later admitted that the advice given had been faulty. Even though Andrews had adequate reason on character grounds to cancel the visa, the Government was heavily attacked for trying to exploit fear of terrorism for political gain. The AFP’s decision to abandon the case against Haneef bolstered, however unfairly, that attack on the Government.220

The suggestion by Howard that the ‘advice given had been faulty’ implies that information based on a lie was a minor issue. It cannot reasonably be regarded as a minor problem because such lies allow the criminal justice system to be perverted. Lies fracture the interdependent relationship between the various elements of the system and can lead to miscarriages of justice.

The action of government Minister, Kevin Andrews, in cancelling the visa of Dr Haneef was clearly a political decision taken on the basis that he was a terrorist threat, or at least had close connections with people who were terrorists and therefore had an unsuitable character for residence in Australia. The fact that a distant relative was a criminal would not normally be used to assess character without the terrorist element. The government had no reason to be concerned about Dr Haneef because the evidence clearly showed that he had no involvement at all with the attack at Glasgow Airport, but it was willing to use fear to enhance its political standing. Kathleen Gleeson makes a number of significant points about the case. First, that evidence ‘was clearly secondary to innuendo and speculation’ and that ‘humanising information was avoided’. Second, that Kevin Andrews

220 Howard, Lazarus Rising, n 191, 752, 753. Brian Galligan and Emma Larking note that ‘the Haneef case was politicized to a degree almost unthinkable in a country supposedly committed to the rule of law’. ‘The separation of judicial and executive powers in Australia: detention decisions and the Haneef case’, refereed paper delivered at Australian Political Studies Association Conference, Brisbane, July 2008, p 18.
focused his media appearances on talkback radio where he had a better chance ‘of the message resonating with listeners’. Third, that although most Australians thought the case was ‘poorly handled’, they ‘thought extraordinary detention measures were warranted’.221

As Kent Roach notes, the actions taken against Dr Haneef were worse than a failure of due process or, as suggested by Howard, a reasonable character assessment and a failure by the DPP. Roach calls the Haneef case a demonstration of ‘how aggressive counter-terrorism measures can stretch the limits of the law’, in his case ‘through a strategic use of “dead time” provisions that exempted unused hours from provisions that allowed detention for questioning’, thus allowing 12 days of detention.222 Dr Haneef was abused by government officials and law enforcement agents who were not penalised for their behaviour. He received a financial settlement and an apology from the government.

**Further Cases**

Additional cases of abuse by ASIO can be found in an article by Professor Michael Head.223 A further significant case that involved police lying and fabricating evidence that led to a miscarriage of justice is *Mickelberg v The Queen*.224 In *Morgan v R*225 the prosecution used spurious expert evidence to gain a conviction. The case *Wood v R*226 involved the use of inadmissible evidence. There are numerous other Australian cases where miscarriages of justice have occurred, even though procedures are in place to reduce the possibility. Rachel Dioso-Villa identified 57 people who had been convicted and were later exonerated and received compensation in Australia between 1956 and 2011. The time served in custody ranged from 30 months to 15 years.227 The cases

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227 Rachel Dioso-Villa, ‘Without Legal Obligation: Compensating the Wrongfully Convicted in Australia’, (2012) 75.3 *Albany Law Review* 1329, 1340. Other cases, many of which may be unrecorded, involve police criminality that was not investigated. For one example, see Rick Feneley, ‘Erased from the records: investigation into bashing of gay man by police in Surry Hills in
identified by Dioso-Villa do not include all those who have been wrongfully convicted during the period examined. There are also many cases in other common law countries including England and the United States. The point being that even in those criminal justice systems which robustly attempt to ensure fair trials, the very real possibility of a miscarriage of justice occurring remains, and where safeguards are removed the number of people wrongfully convicted will more probably than not increase.

Additionally, if it is thought that police criminality can be relegated to history, more recent examples show this to be wrong. For example, there is the high profile case of Mark Standen who was Assistant Director of Investigations with the New South Wales Crime Commission. He was arrested on 2 June 2008 and eventually found guilty of conspiring to import and supply 300 kilograms of pseudoephedrine and using his position to pervert the course of justice. He appealed his conviction but was unsuccessful, and his sentence of 22 years with a non-parole period of 19 years was maintained.228 Standen was reported as having ‘supervised some of Australia’s biggest international drug busts and investigated corrupt police’.229 Standen fits the profile of criminal offending by police revealed in the Fitzgerald Inquiry and the Wood Royal Commission.

Conclusion
In a legal system that places emphasis on restricting rights and maintaining secrecy, the opportunity for miscarriages of justice multiplies. The inquiries and cases reviewed show that reliance should not be placed on any part of the criminal justice system acting in isolation, to act with integrity. In the case of law enforcement officers, the need for vigilance to ensure they do not abuse their powers is overwhelmingly made out. Of crucial significance is also the fact that a system that allows for secrecy and provides law enforcement agents with wide ranging powers allows for criminal activity to flourish, as

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shown by the findings of the Fitzgerald Inquiry and the Wood Royal Commission. Both those inquiries reveal systemic corruption by law enforcement officers, the extent of which raises serious concerns about the potential for institutionalised abuse in the parallel legal system that has been created as a result of anti-terrorism legislation. The cases of Ul Haque and Haneef demonstrate that there is little to stop abuses by law enforcement officers occurring and recurring, particularly in a political environment of manipulated fear of terrorism. The Ul Haque case also shows that reviews by bureaucrats within the parallel system legal system established by anti-terrorism laws, such as the report by the Inspector-General of Intelligence and Security, cannot be expected to reveal restrictions of fundamental legal rights, let alone prevent or minimise such restrictions. Chapter 4 examines a number of examples of breaches of fundamental legal rights in Australia and the growth of the Australian Security Intelligence Organisation up to 2001.
This chapter reviews a number of actual and attempted restrictions of rights in Australia from the foundation of a colony in New South Wales through to 2001. The examination focuses on the role of the governing political elite rather than the activities of individuals. It also considers some examples where Australia has been successful in maintaining fundamental rights, most notably the elimination of the death penalty. The activity of governments since 2001 under the cloak of the need to fight terrorism is only the most recent example of the use of fear to introduce restrictions on rights. In colonial times the emphasis was on controlling convicts, eliminating bushrangers, and expropriating Aboriginal land by force. These activities paid little, if any, attention to due legal processes or fundamental legal rights. The period after federation is examined where greater attention was paid to ensuring that there was legislative approval for the derogation of rights, which primarily occurred during wartime. The decade following World War II is considered with emphasis on the promotion of the ‘communist threat’ as the cloak used to attempt to derogate rights. The attempts made to outlaw the Communist Party of Australia, and the formation of the Australian Security Intelligence Organisation, are examined.

The Death Penalty and Extrajudicial Executions in Australia

The right to a fair criminal trial was not a priority in colonial days. A notable but by no means lonely example was the summary execution of insurgent Philip Cunningham following the Castle Hill rebellion on 4 March 1804. Those involved in the rebellion have been described by one historian as not being inspired by a ‘social or religious programme, either for convicts, ex-convicts or settlers, but were united by a desire to hurt or take revenge on the Anglo-Saxon for all his outrageous cruelty and abominations against the Irish’. Whatever the motivation for the rebellion, Cunningham, who had been wounded during the one sided battle, was hanged at 9 pm on the staircase of a public

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store. The decision to hang Cunningham was apparently taken at the scene by the military commander, Major Johnston, in consultation with his officers.\(^{232}\)

The extra judicial killing of Aborigines was also widespread and when such killings were brought before the courts the result could be the waiving of any penalty for the felons.\(^{233}\) The extent of the extrajudicial killing of Aboriginals is contentious and records were usually not kept. However, taking into account the activities of the notorious Native Police, the death toll in Queensland has been estimated at between 48,000 and 50,000 during the 19th and early 20th centuries.\(^{234}\) The brutality of the early colonial period is well known and even when the deaths were authorised by judicial process the numbers killed give weight to the proposition that little consideration was given to the right to life for convicts or Aborigines. In Van Diemen’s Land the fate of the Aboriginal population was probably more dire than elsewhere. James Boyce notes that officials ‘did not even make a cursory attempt to find out how many [Aboriginals] died outside the operations of the official roving parties’ in 1830 and previous years.\(^{235}\) He concludes that, despite the lack of record keeping, their numbers had reduced dramatically:

What is clear is that remorseless British pursuit of Aborigines throughout Van Diemen’s Land caused the Aboriginal population to decline very rapidly. Only in the remote west coast, where even Van Diemonian bushmen feared to wander, were communities intact. Ever-smaller groups of Aboriginal warriors continued to conduct raids on the stock huts and estates, but the end was clearly in sight.\(^{236}\)

Boyce describes the forced removal of Aborigines from western Tasmania in 1832 and 1833 as having no economic or security justification, making ‘the removal unique among the tragedies experienced by Indigenous peoples during the nineteenth century’.\(^{237}\)

The death toll of Aboriginals through killing by white colonists and by Native Police under the control of white officers was added to by influenza, the common cold, pleurisy,
dysentery, tuberculosis, measles, smallpox, typhus and whooping cough and other
diseases to which they had no immunity. Blainey notes the many causes of death and
whilst not disputing the killing that occurred, claims that, ‘emphatically, violence inflicted
by Europeans was not the main cause of death’. His conclusion, even if accepted, does
not detract from the fact that the ultimate right to life was removed on a large scale by
extra judicial killing, and the right to liberty was often removed.

Henry Reynolds describes the warfare between the colonists and Aborigines in his work
*Forgotten War.* He makes the point that for more than a hundred years settlers living
near the frontier knew the ‘harsh truth of war’. Reynolds is critical of Russell Ward
who in his influential book *The Australian Legend* made no reference to relations between
pastoral workers and Aborigines in first half of 19th Century New South Wales. The
conflict Reynolds suggests was clearly forgotten by Australians, but well known to their
grandparents. Relevantly, written histories of the early 20th Century may not have
referred sufficiently or at all to the killing of Aborigines by white settlers, but some oral
histories existed. My grandmother Catherine Jane Fitzgibbons (nee Basset) before her
death on 10 February 1975 described to me that on a journey with her family and others
from Victoria to settle in central New South Wales in the late 19th Century an Aboriginal
man was shot dead. His body was buried in tracks of the bullock wagons and his grave
obliterated by their wheels. The Aboriginal male was simply walking near the wagons and
had caused no offence. Nearby was an Aboriginal woman with a child, she said they were
not killed. She said as a young girl she was shocked by what she saw and had not spoken
about it for many years. She did not tell me who fired the shot or what was said during the
incident.

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239 Ibid 325.
241 Ibid 255.
242 Ibid 18.
243 Ibid 19.
Roger Milliss in his work *Waterloo Creek* provides a very detailed account of some of the massacres of Aboriginal people in New South Wales by the military and settlers.\(^{244}\) The detail he provides is substantial evidence of widespread systematic murder of Aboriginal people in colonial times, and in the case of the twenty-three day military campaign around Bathurst in April 1816, he depicts it as ‘little short of a pogrom’.\(^{245}\) The forgetfulness of Australians referred to by Reynolds could have been assisted by what Millis says is the ‘customary silence’ of the annals about massacres.\(^{246}\)

The conclusion of Reynolds that people have forgotten the devastation visited on Aborigines and their resistance is relevant in the context of this thesis, in that people in 21st Century also seem to have forgotten the abuses that were committed by the law enforcement agents during the 20th Century. If they have not forgotten, as my grandmother had not, they largely remain silent.\(^{247}\)

The removal of the fundamental right to liberty from Aboriginals is described by Manning Clark when he refers to the situation in the Kimberley district of Western Australia in the late 19th early 20th Centuries. According to Clark, it was a period when ‘white men were at times transformed into monsters in human flesh’.\(^{248}\)

Aborigines who absconded from their place of work as indentured servants were pursued, captured, tied to the saddle by a chain fastened round their necks and forced to keep pace with the horses dragging them till they arrived at the nearest police station. There their backs were belted with a knotted rope, till they were turned away, their furrowed backs clotted with blood. In the white man’s rags the Aborigines ceased to be objects of concern or pity: they became vermin which must be exterminated.\(^{249}\)

\(^{245}\) Ibid 47.
\(^{246}\) Ibid 47.
\(^{247}\) There are a number of problems caused when people who witnessed or suffered criminal abuse remain silent. First, the perpetrators will most likely go unpunished and become recidivist criminals. Second, where the state is involved the naïve and inexperienced may simply believe that they can rely on the integrity of politicians and government agencies, because they are unaware of past failings.
\(^{249}\) Ibid 106.
The violence committed against the Aboriginal people can be ascertained, in part, from their population decline from the time of first colonization. Although the original estimated numbers may well be understated, the decline is noted by Clark as ‘251 000 in 1788 to approximately 67 000 in 1888’\textsuperscript{250} and ‘60 479 in 1921’.\textsuperscript{251}

The extra judicial killing and other types of violence committed against Aboriginals throughout Australia along with the alienation of their land is the clearest and most disgraceful example of systematic removal of fundamental rights in Australia’s history. The actions taken against Aboriginal people would now count as genocide under international law. Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide states:

\begin{quote}
In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.\textsuperscript{252}
\end{quote}

The forced transfer of Aboriginal children was investigated by the Australian Human Rights and Equal Opportunity Commission under terms of reference that required the tracing of past laws, practices and policies, the adequacy of current laws, practices and policies, the justification for compensation, and whether the law needed to be reformed.\textsuperscript{253}

The Inquiry was presided over by former High Court judge, Sir Ronald Wilson, and Aboriginal Social Justice Commissioner Mick Dodson, who were assisted by fifteen state and regional commissioners. Under Part 4 of the Inquiry Report that deals with reparation

\textsuperscript{250} Ibid 1.
\textsuperscript{251} Ibid 317.
\textsuperscript{252} Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.
\textsuperscript{253} Michael Lavarch, Attorney-General of Australia, Terms of Reference, 2 August 1995.
the Commissioners found that the right to liberty of Indigenous children had been removed. They stated:

The common law offered two safeguards of liberty. The first was the requirement that everything except a very short detention (for example following arrest) must be scrutinised by a court. A deprivation of personal liberty was only lawful after the proponent of removal had established its desirability and lawfulness in open and independent court of law. The second safeguard was the writ of ‘habeas corpus’ (literally ‘deliver the body’). This writ developed in tandem with protection of individual liberty and enabled a person to demand freedom – usually for another person – by bringing the Government into court to justify that person’s detention or imprisonment. The court would order the person’s release if the detention was found to be unlawful, as would often be the case where the detention had not been sanctioned by the court in the first place. The court process offers the safeguard of publicity as well as the chance to challenge the grounds of removal.

The safeguard of pre-detention court scrutiny was denied to Indigenous children in many States and the Northern Territory when legislation permitted them to be removed and confined by the order of a public servant alone . . . . During these periods non-Indigenous children removed from their families had to be processed through the courts. Where an appeal right was given to Indigenous parents, as in New South Wales, the right was ineffectual. The courts were not realistically accessible to Indigenous people in this period. They were unlikely to know of that right and most would not have been able to find any assistance to proceed to court.254

Relevantly, in terms of genocide and the policy of removal of children, the Commissioners referred to the assimilation policies and Australia’s international obligations, and concluded that the policy involved both racial discrimination and genocide. They stated:

By 1940 assimilation had become official policy in all Australian mainland States and the Territories. In fact the practice of child removal with the aim of children’s ‘absorption’ pre-dated the term ‘assimilation’. The assimilation policy persisted until the early 1970s and continues to influence public attitudes and some official practices today.

Yet within a few years of the end of the Second World War, Australia, together with many other nations, had pledged itself to standards of conduct which required

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all governments to discontinue immediately a key element of the assimilation policy, namely the wholesale removal of Indigenous children from Indigenous care and their transfer to non-Indigenous institutions and families.

The United Nations Charter of 1945, the Universal Declaration of Human Rights of 1948 and the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 all imposed obligations on Australia relating to the elimination of racial discrimination. Genocide was declared to be a crime against humanity by a United Nations Resolution of 1946, followed by the adoption of a Convention in 1948. The Australian practice of Indigenous child removal involved both systematic racial discrimination and genocide as defined by international law. Yet it continued to be practised as official policy long after being clearly prohibited by treaties to which Australia had voluntarily subscribed.

The removal of children and in many instances their institutionalisation without reference to parents was, as submitted by the Australian Section of the International Commission of Jurists, a break in the relationship between the people and their representatives, and placed the government in the impossible situation of being both ‘parent/guardian and servant of the people’. Further, such removal involved an abuse of trust that is ‘the hallmark of totalitarianism and is the antithesis of representative government’. The same proposition can apply to situations where governments remove fundamental legal rights from individuals and engage in secret surveillance of people who are not even suspected of a crime.

Whilst attempts at ethnic cleansing of Aboriginals were taking place in various parts of Australia, during the colonial period for others life could also be harsh. However, even brutal conditions suffered by convicts did not involve the systematic destruction of race and culture. In a period of five years between 1830 and 1834 there were 169 hangings in

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255 Ibid, 266.
256 ‘Amended Submissions of the International Commission of Jurists (Australian Section) on the Questions Reserved [In the Cases of Kruger & Ors v The Commonwealth of Australia No. M12 of 1995 and Bray & Ors v The Commonwealth of Australia No. D5 of 1995], cited in ‘After the Removal’, A submission by the Aboriginal Legal Service of Western Australia to the National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families, Prepared by Tony Buti, 1996, 418 [24].
257 Ibid [25].
New South Wales: the total population in 1834 was only 66,000.\textsuperscript{258} Death, floggings and severe gaol penalties were characteristic of the era.

**Apprehension ‘Alive or Dead’**

In 1830 an ‘Act to suppress Robbery and Housebreaking and the Harbouring of Robbers and Housebreakers’\textsuperscript{259} was introduced in New South Wales. The *Ordinance* provided for a person suspected to be a transported felon at large to be taken before a Justice of the Peace and ‘shall be obliged to prove to the reasonable satisfaction of such Justice that he is not a felon . . . ’.\textsuperscript{260} This had the effect of reversing the onus of proof, eliminating the inconvenience of the presumption of innocence and effectively the right to silence. The *Ordinance* also provided for harsh and swift punishment, death two days after conviction, for those convicted of robbery and break and enter offences. It stated:

\begin{quote}
And whereas it is expedient that robbers and housebreakers should be tried and punished as speedily as may be consistent with the ends of justice. Be it therefore further enacted That all persons who shall be fully committed for the crime of robbery or of entering and plundering any dwelling-house with arms and violence shall be brought to trial as soon as possible and being lawfully convicted of any such crime and sentenced to suffer death shall be executed according to law on the day next but two after sentence passed unless the same shall happen to be Sunday and in that case on the Monday following and such sentence shall be passed immediately after the conviction of such offender unless the Court or Judge shall see reasonable cause to postpone the same.\textsuperscript{261}
\end{quote}

Reliance on the discretion of a trial judge to determine if death should be delayed effectively removed the right to appeal a conviction, one of the substantive rights that are designed to allow higher courts to determine if an accused has received a fair trial.

The *Ordinance* had a provision to continue in operation for two years.\textsuperscript{262} The law was renewed on a regular basis until 1853.\textsuperscript{263} In 1865 ‘An Act to facilitate the taking or

\begin{itemize}
\item \textsuperscript{259} 11 Geo 1V 10, known as the Bushrangers Act 1830.
\item \textsuperscript{260} Ibid 2.
\item \textsuperscript{261} Ibid 6.
\item \textsuperscript{262} Ibid 10.
\end{itemize}
apprehending of Persons charged with certain Felonies and the punishment of those by whom they are harboured’, known as the *Felons Apprehension Act 1865* (NSW), was introduced into law of the colony. It allowed for a person to be declared an outlaw and apprehended ‘alive or dead’. The extra judicial death penalty was not a feature of the common law. The diversion from acceptable legal norms by allowing ‘alive or dead’ apprehension is perhaps acknowledged by the fact that the *Felons Apprehension Act 1865* had a sunset provision of one year. The desire for such legislation was to re-emerge with the *Felons Apprehension Act 1879* and the *Felons Apprehension Act 1899*. The use of a sunset clause is designed to ensure that the legislation lapses after a specified period. It is an implicit acknowledgement that the law is not a good one and that it should not be maintained. The removal of the need for a trial by the killing of a suspect removed the need to even consider the application of fundamental legal rights.

The enthusiasm of judges to impose the will of the parliament, even if it involved the death penalty, is seen in a number of decisions. For example, in the *Hatfield Bushrangers case* his Honour, Sir William Manning, told the prisoners:

> It is profoundly sad to see before us four men, such as you are, under conviction for a capital offence, three of you so young. The gaol calendar reports you to be of the ages of 21, 21, and 18, and the fourth stated to be a cripple. But you have unhappily chosen a bad career, and your crimes have brought you to this terrible position. Of the fidelity of the evidence given against you, and the soundness of the verdict pronounced by the jury, I have no sort of doubt; and now the dreadful duty devolves on me of declaring the extreme penalty of the law, that law imperatively imposes the sentence of death. No discretion is left to the Judge. Nor should I, in this case, if a discretionary power had been given to me, think it right to exercise it so as in any way or degree to defeat or hamper that of the Executive to decide on high public grounds, as to the execution of the sentence.

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263 See also Offenders Illegally at Large Act 1848 (NSW). In 1854 Western Australia introduced the Suppression of Violent Crimes Ordinance.
264 28 Vic 2 11.
265 Ibid 2.
266 Ibid 8.
The reports of cases in nineteenth century Australia do not contain full transcriptions of the words said by judges, and the reports are most often found in the newspapers published at the time. However, the harshness of approach seemed to be reflected in a number of cases, and any clemency rested in the hands of the Governor. In 1827 in the piracy case of *R v Walton*, for example, the Stephen J declared to those he was sentencing that there ‘is a great degree of humanity presiding in the administration of justice in this Colony’ but ‘When at New Zealand, you endeavoured to escape, to get away. Why was it, because force was employed, and you were obliged to give up your piratical design, and surrender to the terms of your captors. In every point of view, your case is of a very aggravated character, for you have abused that clemency, which a merciful and forbearing hand extended to you. The sentence therefore of this Court is, “that you, and each of you, be severally hanged by the neck, until your bodies be dead.”’[^268] It is reported that there were 22 prisoners sentenced to death in 1827 but only four were hanged.[^269] The tone of the sentencing judges in the 19th Century, in the writer’s experience, does not vary greatly from that of many 21st Century judicial officers. The primary difference being that the death penalty has been abolished and sentencing principles further developed.

Lennan and Williams provide an overview of the history of the death penalty in Australia.[^270] They note that it is estimated that about 80 people a year were executed in Australia during the 19th Century and that the death penalty was available for murder, manslaughter, burglary, sheep stealing, forgery, sexual assaults and being illegally at large.[^271] In the 20th Century 114 prisoners were executed in Australia.[^272] They provide a description of the debates that occurred in each State and Territory as the death penalty was abolished in Queensland in 1922,[^273] Northern Territory in 1973,[^274] Victoria in 1975,[^275] and South Australia in 1975.[^276] The Australian Capital Territory, never having

[^271]: Ibid 663.
[^272]: Ibid 669.
[^274]: Ibid 671 – 673.
[^275]: Ibid 673 – 675.
executed anyone, formally abolished the death penalty in 1983,\textsuperscript{277} Western Australia abolished it in 1984, and New South Wales in 1985.\textsuperscript{278} The Commonwealth Parliament abolished the death penalty when it enacted the \textit{Commonwealth Death Penalty Abolition Act 1973} and it locked in the positions of states and territories when it introduced the \textit{Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010}. This \textit{Act} perforce of section 109 of the \textit{Constitution}, binds states and territories. There has never been an execution carried out under Commonwealth law.

The abolition of the death penalty is by way of legislative enactment and therefore can be reversed if the federal parliament decides to repeal the \textit{Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010} and thus allow states to impose the death penalty if they wish. Lennan and Williams provide examples of where three recent Prime Ministers of Australia have expressed ambivalent positions about the death penalty. As Opposition Leader, Tony Abbott, Prime Minister Kevin Rudd and Prime Minister John Howard have all expressed reservations, and in some instances have supported the death penalty. It seems it depends on the circumstances existing at the time and whether the people that they want to execute are sufficiently unpopular. As Lennan and Williams write:

Abbott [then Opposition Leader stated] that although it was not his policy to reintroduce the death penalty, if the matter ever came before the federal Parliament it should be put to a conscience vote. Abbott is by no means alone in voicing contradictory positions; Kevin Rudd, who had previously described the death penalty as ‘abhorrent’ and ‘unacceptable in all its forms’, said as Prime Minister on Perth radio station 6PR that the Bali bombers (who were then on death row in Indonesia and have since been executed) would ‘deserve the justice that will be delivered to them’. John Howard also voiced incongruous views as Prime Minister: in 2001, for example, he said that he had ‘a pragmatic opposition to the death penalty that is based on the belief that from time to time the law makes mistakes and you can’t bring somebody back after you’ve executed them’. But on the \textit{Sunrise} television program in February 2003, Howard said that the Bali bombers:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{276} Ibid 676 – 677.
\item \textsuperscript{277} Ibid 678.
\item \textsuperscript{278} Ibid 678 – 681.
\end{itemize}
\end{footnotesize}
should be dealt with in accordance with Indonesian law … and if [the death penalty] is what the law of Indonesia provides, well, that is how things should proceed. There won’t be any protest from Australia.

Similarly, in March that year, Howard told US television that he would welcome the death penalty for Osama Bin Laden, adding, ‘I think everybody would’. And, speaking on Melbourne radio station 3AW on 7 August 2003, Howard told a caller, ‘If people want to raise it again it would be open for example to the Victorian Opposition, if you have a different view on this matter to promote it as an electoral issue’. 279

Lennan and Williams also note that the Australian public is ambivalent about the death penalty, ‘Polling of public sentiment also shows vacillation, but it is plain that a substantial minority (if not a bare majority) of Australians still support the penalty’s use in certain circumstances.’ 280 The anti-terrorism laws since 2001 have shown a readiness to remove fundamental legal rights where it is perceived that a threat exists. If the threat was deemed sufficient and the Labor and Liberal parliamentarians combine as they have done since 2001 over anti-terrorism laws, then the death penalty could be quickly re-introduced. The only way of providing protection against this possibility would be to incorporate its abolition in the Constitution or in a constitutionally guaranteed Bill of Rights.

World War I and World War II and the Origins of Internal Security Agencies

During World War I and World War II executive prerogative overshadowed consideration of any application of fundamental legal rights. The War Precautions Act 1914 allowed the Governor-General to make regulations for securing the public safety and defence of the Commonwealth. 281 It also allowed, inter alia, for the ‘Courts-Martial and punishment of persons . . . communicating with the enemy’ or who ‘spread reports likely to cause disaffection or alarm’. 282 The power of courts-martial was not restricted to members of the military, it allowed for any person who breached the regulations to be treated as if they were a member of the military. 283 The Defence Act 1903 incorporated, so far as they

279  Ibid 660, 661.
280  Ibid 661.
281  War Precautions Act No.14 of 1914, s. 4.
282  Ibid s. 4(2)(a)(c).
283  Ibid s. 4(2).
were not inconsistent, the powers of courts-martial in the ‘King’s Regular Forces’.

The Unlawful Associations Act 1916 was also introduced ‘for the duration of the present war and a period of six months thereafter, but no longer’. It made unlawful the Industrial Workers of the World and ‘any association which, by its constitution or propaganda, advocates or encourages, or incites or instigates to, the taking or endangering of human life, or the destruction or injury of property’. It also introduced a penalty of six months imprisonment for advocating or inciting a crime, the same period of imprisonment for members of an unlawful association advocating or inciting to acts impeding warlike preparations, and six months imprisonment for printing or publishing matter inciting a crime. If a person committed an offence under the Act and was ‘not . . . a natural-born British subject born in Australia’, then after serving the term of imprisonment deportation was an option.

The National Security Act 1939 gave broad powers to the Governor-General to ‘make regulations for securing the public safety and defence of the Commonwealth’ during the Second World War with Germany. The Act had an emphasis on control of aliens and shifted the onus of proof onto the individual to prove he or she was not an alien. The Act was later amended by the National Security Act 1939-1940. The regulations section allowed the making of very broad regulations.

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284 Defence Act 1903, s. 88.
285 Unlawful Associations Act 1916, s. 1.
286 Ibid s. 3.
287 Ibid s. 4.
288 Ibid s. 5.
289 Ibid s. 7.
290 Ibid s. 6.
291 National Security Act 1939, s. 5.
292 Ibid s. 15.
293 National Security Act 1939, s 5.-(1.) Subject to this section, the Governor-General may make regulations for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth, and in particular-
(a) for providing for the apprehension, prosecution, trial or punishment, either in Australia or in any Territory of the Commonwealth, of persons committing offences against this Act;
(b) for authorizing-
(i) the taking of possession or control, on behalf of the Commonwealth, of any property or undertaking; or
(ii) the acquisition, on behalf of the Commonwealth, of any property other than land in Australia;
(c) for prescribing any action to be taken by or with respect to alien enemies, or persons having enemy associations or connexions, with reference to the possession or ownership of their property, the conduct or non-conduct of their trade or business, and their civil rights or obligations; . . .
(Subversive Associations) Regulations were used to declare the Communist Party of Australia along with a few other organisations and individuals unlawful. In the Commonwealth of Australia Gazette, No 110 the Governor-General, Alexander Gore Arkwright, Baron Gowrie declared the Communist Party of Australia ‘prejudicial to the defence of the Commonwealth or the efficient prosecution of the war’. This declaration was revoked by the Governor-General in Council on 18 December 1942. The fact that the Soviet Union had entered the war may have been a significant factor in revoking the unlawful status, however, within the Commonwealth Investigations Branch its Director placed emphasis on undertakings given by the Communist Party leadership to support the war effort. He wrote to the Inspector-in Charge of the Commonwealth Investigation Branch in Perth, forwarding a ‘copy of undertaking signed by J.B. Miles, L.L. Sharkey and eleven other persons that, in consideration of the setting aside of the Order dated 15th June, 1940, declaring the Communist Party of Australia to be unlawful, they will observe the requirements of the National Security Act and the Regulations and Orders’ and that if ‘maximum support for the war effort was not observed, the ban would be re-imposed’.294

Attempts to Outlaw the Communist Party Post World War II

The introduction of restrictive legislation during war time may be able to be justified on the basis that the nation is under threat to the extent that it needs to act quickly in self defence, and that extraordinary actions may be needed to meet immediate dangers. Part of this reasoning, which amongst other things provides a basis for the exercise of executive prerogative, is the proposition that normal law enforcement methods are insufficient and actions taken in self defence may have to break domestic laws and breach fundamental legal rights. Similar arguments are promoted in peace time when governments want to ban groups and limit or remove fundamental legal rights.

Probably the first major intervention by the executive arm of government that attacked not only the activities of the Communist Party of Australia but also trade unions and their activities was when Labor Prime Minister, Ben Chifley, engaged in breaking a coal miners’ strike in the Hunter Valley of New South Wales in 1949. Chifley used the army to

294  H.E. Jones, Director, Commonwealth Investigation Branch, Letter, 1 January 1943.
break the strike, and had parliament pass the National Emergency (Coal Strike) Act 1949. The National Emergency (Coal Strike) Act 1949 section 4 made it unlawful on penalty of one thousand pounds for ‘a participating organization . . . [to] make, or promise to make, any payment for the purpose of assisting or encouraging, directly or indirectly, the continuance of the strike’; section 5 made it, on penalty of six months imprisonment or fines, illegal to ‘receive a payment or benefit from any person for the purpose of assisting or encouraging, directly or indirectly, the continuance of the strike’. The strike was broken within seven weeks, but the use of the military probably did not enhance Chifley’s standing in the electorate because he lost the next federal election. The legal basis for the use of the military to break a strike is moot. Whether arguable or not, the Australian government used troops to defeat strikes a number of times in the 20th Century.

Intervention by the military in the Waterfront dispute at Bowen in 1953, the Qantas Strike in 1971, and the use of the RAAF during the 1989 Airline Pilots' Dispute are examples. The use of the army in Hunter Valley coal fields’ disputes also has precedents. On Sunday 21 September 1879, the New South Wales Permanent Artillery were used for a 95 day occupation of parts of the Newcastle coalfields, and in 1888, during a three months strike in the coalfields, 200 soldiers were used to assist strike breakers.

Chifley was assisted by the Commonwealth Investigation Service (CIS), to gather information about the strike. David Horner in his official history of the Australian Security and Intelligence Organisation makes brief reference to the role played by the CIS. He states: ‘In July the CIS, with police assistance, raided the ACP headquarters, Marx House, at 695 George Street, Sydney and other communist establishments, seizing documents’. Horner does not make reference to the contents of the documents seized or their worth. This is a striking oversight for an official history that includes a lot of details

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296 Ibid.
298 Ibid 47.
about meetings and reasons why ASIO was established, yet one of its main activities receives only a short mention. It is assumed that, because Horner had access to the ‘ASIO data base’, any documents that were seized that showed a threat to the State at the time would have been referred to, and reference made to the value of such raids to State security, or at least used to provide another reason why the Australian Security Intelligence Organisation needed to be established. The use of the CIS was a portend of what was to come when the Australian Security Intelligence Organisation was established.

The leader of the opposition in federal parliament Robert Menzies in his 1949 election speech railed against socialism and specifically promised to outlaw the Communist Party. It was not a false promise, and his use of fear to gain support engaged with past approaches and was to be emulated by future politicians whenever they wanted to ban groups and restrict rights. Menzies described Communism in Australia as ‘an alien and destructive pest’ that acted in the interests of a foreign power, and that it engaged in ‘a series of damaging industrial disturbances with no true industrial foundation’.

The Communist Party Dissolution Act 1950 was passed on 19 October 1950 and received the Governor-General’s assent the next day. It contained nine recitals six of which referred to the Australian Communist Party. The fourth recital claimed, ‘the Australian Communist Party, in accordance with the basic theory of communism, as expounded by Marx and Lenin, engages in activities or operations designed to assist or accelerate the coming of a revolutionary situation, in which the Australian Communist Party, acting as a revolutionary minority, would be able to seize power and establish a dictatorship of the proletariat’. The fifth recital contended that ‘the Australian Communist Party also engages in activities or operations designed to bring about the overthrow or dislocation of the established system of government of Australia and the attainment of economic, industrial or political ends by force, violence, intimidation or fraudulent practices’. The sixth said that ‘the Australian Communist Party is an integral part of the world communist revolutionary movement, which, in the King's dominions and elsewhere, engages in

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300 Ibid xvii.
espionage and sabotage and in activities or operations of a treasonable or subversive nature’. The seventh said that ‘certain industries are vital to the security and defence of Australia (including the coal-mining industry, the iron and steel industry, the engineering industry, the building industry, the transport industry and the power industry)’. The eight linked with the seventh recital claiming, ‘the Australian Communist Party, and activities or operations of, or encouraged by, members or officers of that party and other persons who are communists, are designed to cause, by means of strikes or stoppages of work, and have, by those means, caused, dislocation, disruption or retardation of production or work in those vital industries’. The final recital indicated that the Australian Communist Party and ‘bodies of persons’ affiliated with it ‘should be dissolved’, and property ‘forfeited to the Commonwealth’. Additionally, it said ‘that members and officers of that party or of any of those bodies and other persons who are communists should be disqualified from employment by the Commonwealth and from holding office in an industrial organization’.

Section 4 of the Act declared the Communist Party of Australia an unlawful association and dissolved it. Section 5 allowed for affiliated organisations to be declared unlawful. Section 6 allowed for affiliated organisations to be dissolved. Section 7 provided for 5 years imprisonment for office bearers or members who promoted an unlawful association, to the extent that wearing anything that indicated membership was a crime. Section 8 allowed for the seizing of property. Section 9 allowed the Governor-General to declare a person a communist. Section 10 provided that a person who had been declared could not be employed by the Commonwealth, hold office as a member of a body corporate or hold office in an industrial organisation. It also allowed the Governor-General to declare an industrial organisation. Sections 11 and 12 dealt with suspension from employment and the vacation of office in industrial organisations. Appeals were allowed but the onus of proof shifted to the applicant and this effectively diminished the right to silence by shifting the burden of proof. Section 9(5) stated:

> At the hearing of the application, the applicant shall begin; if he gives evidence in person, the burden shall be upon the Commonwealth to prove that he is a person to

302 The recent anti motorcycle gang laws have adopted a similar restriction: see s 173EA Liquor Act 1992 (QLD).
whom this section applies, but if he does not give evidence in person, the burden shall be upon him to prove that he is not a person to whom this section applies.

The declaration of a person or organisation was to be done without hearing from the person or representatives of the organisation. If an appeal was lodged there was no presumption of innocence and the onus of proof was on the applicant. The Act had striking similarities to anti-terrorism legislation introduced by governments over sixty years later. Communists were to be followed decades later by terrorists; and their existence used to provoke fear and gain public support for draconian legislation. The communists and their sympathisers of the 1950s, if Menzies is to be believed, meet the definition of terrorists under anti-terrorism legislation introduced since 2001. The obvious consequence for many hundreds if not thousands of people, if the Communist Party and its membership level still existed, would be prosecution, conviction and imprisonment.

The media response to the attempt to outlaw the Communist Party of Australia and affiliated organisations is shown by the editorial of The Sydney Morning Herald on Friday 28 April 1950. Under the heading ‘New Bill a Death-Blow to Communist Power’ the endorsement for the abolition of the Party was given:

The attack made on the Communist organisation and its auxiliaries is bold, frontal, and unequivocal. The methods adopted will excite worldwide interest, all the more so because their selection had to have regard for the constitutional limitations upon the power of the Commonwealth Parliament. The moral and political justification for the measure is stated in its “recitals”- a series of devastating and unanswerable propositions, indicating the Communist conspiracy. And this indictment was driven home by Mr. Menzies in a speech memorable for its logical and analytical eloquence.

The ‘analytical eloquence’ of Menzies and the ‘moral and political justification’ in the recitals were not sufficient for the High Court of Australia, and it declared the Act invalid on the basis that it was beyond the power of the Parliament to use defence powers to

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303 See Chapter 5 where definition of a ‘terrorist act’ is detailed and includes pursuant to the Criminal Code 1995, section 101.1 ‘(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause’.
suppress organisations and remove civil liberties in a time of peace. The High Court, with only the Chief Justice Latham dissenting, provided a variety of reasons for coming to its ultimate conclusion. Dixon J. stressed at considerable length that the federal government had the power in war time to engage in a way that best allowed the prosecution of the war, but that there was no war being prosecuted that required the defence of the nation and thus the application of defence powers as provided in the constitution. He stated, *inter alia:*

A war of any magnitude now imposes upon the Government the necessity of organizing the resources of the nation in men and materials, of controlling the economy of the country, of employing the full strength of the nation and co-ordinating its use, of raising, equipping and maintaining forces on a scale formerly unknown and of exercising the ultimate authority in all that the conduct of hostilities implies. These necessities make it imperative that the defence power should provide a source whence the Government may draw authority over an immense field and a most ample discretion. But they are necessities that cannot exist in the same form in a period of ostensible peace. Whatever dangers are experienced in such a period and however well-founded apprehensions of danger may prove, it is difficult to see how they could give rise to the same kind of necessities. The Federal nature of the Constitution is not lost during a perilous war. If it is obscured, the Federal form of government must come into full view when the war ends and is wound up. The factors which give such a wide scope to the defence power in a desperate conflict are for the most part wanting.\(^{304}\)

The High Court decision did not halt the government from continuing its attempt to ban the Communist Party. The issue was put to a constitutional referendum on 22 September 1951. The aim was to add a new section 51A to the Constitution. The question posed was: ‘Do you approve of the proposed law for the alteration of the Constitution entitled “Constitution Alteration (Powers to deal with Communists and Communism) 1951”?’

The Constitutional amendment was not carried by the voters. It was rejected on both requirements contained in section 128 of the Australian Constitution.\(^{305}\) Only 49.44% of

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\(^{304}\) *Australian Communist Party v Commonwealth* (*"Communist Party case"*) [1951] HCA 5, 50, 51; (1951) 83 CLR 1, 202-203.

\(^{305}\) *Commonwealth of Australia Constitution Act*, s128 requires, *inter alia:*
When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.
the National Vote approved the proposed change and it was carried in only three States: Queensland, Western Australia and Tasmania.

The legislation would have allowed decisions about individuals and organisations to have been made in secret, reverse the onus of proof, and remove the presumption of innocence. It was rejected by the Australian people, but by a margin of only 52,000 votes. The electorate’s inherent conservatism rather than the campaigning skills of the Deputy Leader of the Opposition, Evatt, may well have been the reason why the affront to fundamental legal rights was rejected. There have been 44 referendum questions put to the Australian people and only 8 have been carried.\(^{306}\)

The Commonwealth Investigation Service had been used by Chifley to assist with breaking the coal miners’ strike in 1949. Menzies also used a security agency to assist him to try and defeat a domestic non-government organisation he disliked, and to gain political advantage. In Menzies’ case he used ASIO in a political way that had been specifically excluded when it was established. The Directive from Chifley that established ASIO in 1949 contained a specific reference to the requirement that it ‘be kept absolutely free from any political bias or influence, and that nothing should be done that might lend colour to any suggestion that it is concerned with the interest of any particular sections of the community’.\(^{307}\) This requirement was shortly to be interpreted as not relevant to the Menzies’ Government’s attempt to ban the Communist Party in 1951. In fact ASIO played a significant role in supporting the government’s campaign to outlaw the Communist Party. David Horner notes that ‘ASIO was closely involved in drafting the preamble to the bill.’\(^{308}\) As part of its support of the campaign, ASIO provided Prime Minister Menzies with a list of 53 Australian trade unionists that it was said were...

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communists. The information was contained in ASIO Bulletin No.2 dated 1 March 1950. Menzies read out the list of names supplied by ASIO which contained a number of inaccuracies. The use of ASIO for political purposes remains an issue, especially in light of its history of surveillance of citizens and non-government organisations and its greatly increased powers in the 21st Century.

When trying to evaluate the reasons for the development and derogation of legal rights, there is necessarily a bias in the contemporary interpreter created by cultural conditioning. At the centre of historical consciousness should be the awareness that everything is relative or related to the context in which it arose or in which it exists. The application of hermeneutics is not easily done. However, there is an objective reality that transcends the centuries: those who have power maintain and accrue to themselves control over others – if permitted. The impact on the individual, while varying in degree, is usually the same, death or the removal of liberty. The legislative restrictions imposed on the liberty of the individual over the past 200 years in Australia, so far as they derogate fundamental legal rights, have no evidential basis justifying removal or limitation of the rights. For example, the fact that the Communist Party Dissolution Act 1950 could not be used has had no adverse consequences for the Australia. The community did not need protection from Australian communists as claimed by Menzies, and there had been no overt actions that could be used to substantiate the Act.

Proof of need for the removal of rights in order to ensure the safety of individuals or the society as a whole has not been a necessary condition for the removal of rights, or for the establishment of agencies that have as part of their function the invasion of privacy and the derogation of rights. In Australia the main agency that has been used by politicians to erode freedoms is the Australian Security Intelligence Organisation. Its establishment and use in the 20th Century is considered in the next section.

309 Horner, n 299 above, 140
Establishment and Function of the Australian Security Intelligence Organisation

Prior to the establishment of the Australian Security Intelligence Organisation in 1949 the first example of a security intelligence service was the Prime Minister’s Special Intelligence Bureau created in 1916. In 1915, the British government arranged for the establishment of a Commonwealth branch of the Imperial Counter Espionage Bureau in Australia. This branch, known as the Australian Special Intelligence Bureau (SIB) was established in January 1916. The SIB maintained a close relationship with state police forces, and later with the Commonwealth Police Force. The Commonwealth Police Force was created in 1917 under the War Precautions Regulations to conduct investigations independent of state police forces. In 1919, the Commonwealth Police and the Special Intelligence Bureau merged to form the Investigation Branch within the Attorney General's Department. The Bureau was formally established by Executive Council Minute on 14 February 1917. State Chiefs of Police were ex-officio members of the Special Investigation Bureau. The paramount concern during the war and those years leading up to it was espionage and sabotage. David Horner starts his work on the history of ASIO by describing the activities of the German Commercial Attache, Walter de Haas, who was attached to the German Consul-General’s office in Sydney. Haas’ trips in 1911 to Thursday Island and Darwin apparently attracted attention and surveillance by local police.311 During the war the Army’s Directorate of Intelligence had a number of tasks, including the surveillance of enemy aliens.312 Horner describes the reaction to the fear of espionage and sabotage:

Foreign nationals, mainly Germans, were rounded up and placed in internment camps. Walter de Haas and several businessmen who were German spies were among the interned aliens. Meanwhile, concerned members of the public were on the alert for incidents such as possible spies signalling by lights to enemy ships offshore.313

Similar concerns about espionage and sabotage existed during World War II. The Special Investigation Bureau was responsible for internal security up to the end of World War II.

312  Ibid 13.
After the war, in 1946, the Investigation Branch was re-organised and renamed the Commonwealth Investigation Service (CIS). The focus changed after the World War II to Australian citizens who did not have faith in the capitalist system.

The establishment of the Australian Security Intelligence Organisation, according to Horner, was as a direct result of America and Britain outing Australia from ‘Allied Sigint’, based on the belief that there were Australians in government departments spying for the Soviet Union. On 16 March 1949, Labor Prime Minister, Ben Chifley, issued a ‘Directive for the Establishment and Maintainance (sic) of a Security Service’. The Directive came in the form of a memorandum to ‘The Director General of Security’ classified as ‘secret’ and not declassified until 1976. The memorandum was the method used to initiate the establishment and maintenance of a Security Service and to appoint a Director General of that service. The Security Service formed part of the Attorney General’s Department and the Attorney General was responsible to Parliament for it. The secret nature of the Directive and the Security Service meant that it effectively had no parliamentary oversight and its operations were unknown to parliamentarians and the public.

The Director General was given direct access ‘at all times’ to the Prime Minister. The extent of ministerial involvement was limited in the following terms, ‘It is your [Director General] responsibility to keep each Minister informed of all matters affecting security coming to your knowledge and which fall within the scope of his Department’. In case there was any doubt about the limited extent of ministerial involvement, Prime Minister Chifley stressed to the Director General,

You and your staff will maintain the well established convention whereby Ministers do not concern themselves with the detailed information which may be obtained by the Security Service in particular cases, but are furnished with such information only as may be necessary for the determination of the issue.

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314 Ibid 53.
316 Ibid 2, paragraph 1. This Directive has become known as The 1949 Charter of ASIO.
317 Ibid 2.2.
318 Ibid 2.3
319 Ibid 2.4.
320 Ibid 3.8.
The function of the Security Service was described in the following terms.

The Security Service is part of the Defence Forces of the Commonwealth and save as herein expressed has no concern with the enforcement of the criminal law. Its task is the defence of the Commonwealth from external and internal dangers arising from attempts at espionage and sabotage, or from within or without the country, which may be judged to be subversive of the security of the Commonwealth.\textsuperscript{321}

There is no definition in the Directive for ‘subversive’, but for the purpose of the Directive and the subsequent Charter and legislation the description provided by Royal Commissioner Hope is probably apt, in the sense of acceptable to those promoting the need for a secret security organisation: ‘Subversion, which is activity whose purpose is ultimately, to overthrow constitutional government, and in the meantime to weaken or to undermine it’.\textsuperscript{322}

Hope later in his report qualifies the definition of subversion, stating:

Subversion is difficult to define but is nonetheless a very real, and may be a very dangerous, form of activity. In para 35 I described rather than defined it as an activity whose purpose is, directly or ultimately, the overthrowing of the constitutional government, and in the meantime the weakening or undermining it. “Overthrowing the government” does not, of course, refer to the ousting by constitutional methods of the political party in power for the time being but the overthrow by unconstitutional methods of the established constitutional government or system of government.\textsuperscript{323}

The concern about how such an organisation might be used to undermine civil liberties and potentially advance the interests of the government of the day seems to be reflected in the emphasis placed on the defence of the Commonwealth and the limitation of the activities for this purpose. Chifley’s Directive stressed the requirement that the

\begin{footnotesize}
\begin{enumerate}
\item Ibid 2.5.
\item Justice Hope, Royal Commission on Intelligence and Security, Fourth Report, Volume 1, 1976, 17.35.
\item Ibid 34.55.
\end{enumerate}
\end{footnotesize}
organisation be kept free of political bias or influence. It contained the following instructions to the Director General:

You will take especial care to ensure that the work of the Security Service is strictly limited to what is necessary for the purpose of this task and that you are fully aware of the extent of its activities. It is essential that the Security Service should be kept absolutely free from any political bias or influence, and nothing should be done that might lend colour to any suggestion that it is concerned with the interests of any particular section of the community, or with any matters other than the defence of the Commonwealth. You will impress on your staff that they have no connection whatever with any matters of a party political character and that they must be scrupulous to avoid any action which could be so construed.324

Nothing in the Directive, apart from the instruction about political bias, provided guidelines about how the Security Service should go about its work or what limits there were as long as the activities fell under the umbrella of ‘espionage’, ‘sabotage’ and ‘subversion’. The requirement for the activities to be in defence of the Commonwealth gave it Constitutional validity pursuant to section 51(vi): ‘The naval and military defence of the Commonwealth and of several States, and the control of the forces to execute and maintain the laws of the Commonwealth’.

The extent to which Chifley was serious about the Security Service avoiding political bias is unclear from his instruction. As the Security Service grew and became the Australian Security Intelligence Organisation its activities clearly focused on political dissenters, the Australian Communist Party and other parties that did not hold the same fundamental beliefs as the Labor Party, Liberal Party and Country Party.

On 19 December 1949 Robert Menzies again became Prime Minister of Australia: this time as leader of the Liberal Party. On 6 July 1950 he followed in Ben Chifley’s footsteps and issued ‘A directive from the Prime Minister to the Director-General of Security’ under the heading ‘Charter of the Australian Security Intelligence Organisation’.325 The directive was issued to Colonel C.C.F. Spry, Director-General of Security. This directive

325  Ibid, Appendix 4-A, 5.
was also classified as ‘secret’ and not declassified until 1976. The directive informed the Director-General of Security of his duty ‘to direct and maintain the Security Service established under the name of the Australian Security Intelligence Organization’. A second directive provided additional detail about how the ‘Organization’ was to function. For example, Menzies added a paragraph about co-operation with other agencies.

For the purposes of the Organization you will establish the maximum co-operation with other agencies, whether of Commonwealth or of the States, operating in the field of security (and, where appropriate, in the field of law-enforcement) in Australia, and will maintain effective contact with appropriate security agencies in other countries.

Apart from some minor changes, the Menzies Charter mirrored Chifley’s Charter and did not provide many guidelines about how the Organization should conduct itself. The creation of ASIO without parliamentary oversight and enforceable guidelines remains a feature to the present day in that any parliamentary involvement is strictly limited to the extent that it is virtually meaningless, despite legislative changes that have expanded its powers. The Charters had no legislative basis and have been tactfully described as, ‘more a statement of principles of activity than a document of incorporation or authority’, creating ‘together with relevant minutes of the Federal Executive Council, the only authority for ASIO’s existence and operations until 13 December 1956, when ASIO was established by statute.’

The Charters were followed by legislation, assented to on 15 November 1956, which placed the Chifley and Menzies Charters in statutory form and provided some operational clarity. The \textit{Australian Security Intelligence Organisation Act 1956} section 4(1) and (2) of the Act stated:

\begin{itemize}
\item \textit{Ibid} 5.1.
\item \textit{Ibid} 7.12.
\item Section 28 of the \textit{Intelligence Services Act 2001} creates the Parliamentary Joint Committee on Intelligence and Security, and s 29 provides for its functions which are heavily curtailed by s 29(3).
\item Royal Commission on Intelligence and Security, Fourth Report [re Australian Security Intelligence Organisation] Volume 1, 1976, 2.5.
\end{itemize}
The Australian Security Intelligence Organization, being the Organization established in pursuance of a directive given by the Prime Minister on the sixteenth day of March, One thousand nine hundred and forty-nine, is, subject to this Act, continued in existence.

The Organization shall be under the control of the Director-General.

The functions of the Organisation were contained in section 5. The functions section provided the Director-General with broad powers in the same way as allowed by the Charters; and it specifically excluded ASIO from having enforcement powers: something that was to change in the 21st century. Section 5(a) directed the Organisation ‘to obtain, correlate and evaluate intelligence relevant to security and, at the discretion of the Director-General, to communicate any such intelligence to such persons, and in such manner, as the Director-General considers to be in the interests of security’. Section 5(b) gave the Director-General the discretionary power to advise Ministers ‘in respect of matters relevant to security, in so far as those matters relate to Departments of State administered by them.’

The justification for the establishment of ASIO was said to have been because the Commonwealth Investigation Service that was fulfilling security needs was ‘found wanting’ and the ‘UK Security Service had very strongly urged Mr Chifley to set up a new service’.

John Burton, the Secretary of the Department of External Affairs from 1947 to 1950, noted that with the advent of the Cold War the subservience of Australia to its powerful allies was entrenched, and a more open foreign policy thwarted, with intelligence agencies playing an active part in this outcome. He stated:

The recognition of communist China was high on the agenda, but finally frustrated by the beginning of Cold War reactions against these policies prior to the 1949 elections.

330 Ibid 1.3.
Post-war reconstruction dreaming then came to an end. In the following years, Australian Labor’s policy was quickly subverted by American and British so-called ‘Intelligence’, and subsequently by the Australian Security Intelligence Organisation and the Australian Defence Department, whose members could conceive of Australian security only in pre-war power balance terms, and pre-war reliance on, subservience to the United Kingdom and the United States of America.\textsuperscript{331}

The emphasis on secrecy as an integral part of security activities and the lack of accountability has, no doubt, facilitated the growth of organisations such as ASIO. Burton comments on the reason for such secrecy in a diplomatic context and dismisses it as rarely warranted. He says: ‘Foreign offices around the world retain secrecy primarily to give status, to hide error and a lack of information and policy’.\textsuperscript{332} The use of secrecy in a domestic context to cloak the activities of ASIO may also give it a status it does not deserve. However, Burton’s advocacy, according to Horner, was one of the four reasons why Chifley decided to create ASIO.

Chifley had agreed to establish a new security organisation for several reasons. First, he had been briefed on the Venona program. Second, Hollis was able to show that Milner and Bernie had most likely passed classified information to the Soviet Embassy. Third, Burton had persuaded Chifley about the importance of security in the context of Australia’s role in the British Commonwealth and Empire. Fourth, it was becoming apparent that the continual denial of access to US information would be damaging to Australian defence.\textsuperscript{333}

The desire to be part of the western security system was apparently too enticing. However, the emphasis was still on security within the public service and on foreign powers, rather than on Australian citizens. The change to a focus on Australian citizens increased as Australia became more involved in British and American activities. The Long Range Weapons Establishment at Woomera and the British Nuclear Tests in Australia were good examples of how ASIO could be used by politicians who wished to

\textsuperscript{332} Ibid 31.
keep secret the extent of their dangerous activities. Horner briefly notes the importance of vetting people for these projects:

One of the most important tasks was the vetting of all people, including employees of private firms, who were employed at the Woomera Rocket Range, and later Maralinga; the checking of employees at Radium Hill; and later again, in collaboration with the Department of Supply, the complete coverage of people with access to, and knowledge of, atomic explosions in the north-west of Australia.334

In the case of the British Nuclear Tests in Australia, the Menzies Liberal Government, and the Opposition Labor Party, were eager to have nuclear testing in Australia. Alan Parkinson provides a history of the nuclear testing program at the Monte Bello Islands in Western Australia, and Emu and Maralinga in South Australia.335 There were 12 major atomic explosions between 3 October 1952 and 9 October 1957 and a series of trials involving plutonium through to 1963. Parkinson notes that there were 24,400g of plutonium used and only 900g were repatriated to Britain.336 The testing program exposed Aboriginals to fallout from the major tests and to plutonium from the later trials, and they were also forced off their land; Australian servicemen were exposed to fallout as they watched the tests and later cleaned planes and other machinery; and segments of the Australian population were polluted with fallout as it drifted from the South Australian test sites over parts of eastern Australia. The suppression of information about what occurred was assisted by ASIO and continued until the Royal Commission into British Nuclear Tests in Australia was initiated in 1984.

The justification for the existence of ASIO was provided in 1976 by Royal Commissioner Hope, who produced reports that provided general propositions about how necessary such an organisation was, and based his conclusions on assumptions rather than evidence that could be evaluated by others. He concluded:

334 Ibid 235.
335 Alan Parkinson, Maralinga: Australia’s Nuclear Waste Cover-up (ABC Books, 2007); see also Reports of the Royal Commission into Nuclear Tests in Australia.
336 Ibid 7.
I find, therefore, that Australia needs a security intelligence organisation like ASIO. The proper fields for investigation by ASIO should, however, be more clearly defined than in the present ASIO Act. They should include:

- Espionage.
- “Active measures”.
- Subversion.
- Sabotage.
- Terrorism (politically motivated violence).
- Domestic activity related to violence and subversion abroad.\(^\text{337}\)

The requirement for secrecy by Australia’s main allies if intelligence sharing was to take place was a factor from the beginning and remains so to the today, even if the main enemy is no longer the Soviet Union. What is striking is that there has never been evidence produced to show the effectiveness of the organisation in countering the perceived threats listed by Royal Commissioner Hope: no matter how much time passes evidence is not provided and the acceptance of the need for such an organisation remains primarily based on faith rather than proof. For example, the concern with subversion is highlighted in the Charters and by Royal Commissioner Hope, and there existed in the *Crimes Act 1914* from 1920 until 2005\(^\text{338}\) the offence of sedition which is the subversion of political authority.\(^\text{339}\) Prosecutions for sedition in the 20th Century in Australia have involved only a few cases. In *Burns v Ransley*\(^\text{340}\) the High Court dismissed the conviction; in *R v Sharkey*\(^\text{341}\) the High Court upheld the conviction; and in *Sweeney v Chandler*\(^\text{342}\) the charge was dismissed in the Court of Petty Sessions. The cases involved public utterances that did not require a security organisation to identify. Subversive activities could also potentially result in a prosecution for treason which carried the death penalty when introduced in the *Crimes Act 1914*.\(^\text{343}\) There have been no prosecutions for treason. There


\(^{338}\) *Crimes Act 1914*, s 24A.


\(^{340}\) (1949) 79 CLR 101.

\(^{341}\) (1949) 79 CLR 121

\(^{342}\) Unreported, Sydney Court of Petty, 8 September 1953.

\(^{343}\) *Crimes Act 1914*, s 24.-(1.) Any person who within the Commonwealth or any Territory

- (a) instigates any foreigner to make an armed invasion of the Commonwealth or any part of the King's Dominions, or
- (b) assists by any means whatever any public enemy,

shall be guilty of an indictable offence and shall be liable to the punishment of death.
is the notable Petrov case that involved a Royal Commission in 1954, but no criminal prosecutions resulted. There have also been no prosecutions for sabotage.

The 1956 Act was followed by the *Australian Security Intelligence Organization Act 1979*. This Act significantly expanded the procedural and operational sections, whilst maintaining the functions as previously enacted. Section 17 of the Act governed functions, stating:

17. (1) The functions of the Organization are-
(a) to obtain, correlate and evaluate intelligence relevant to security;
(b) for purposes relevant to security and not otherwise, to communicate any such intelligence to such persons, and in such manner, as are appropriate to those purposes; and
(c) to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities.
(2) It is not a function of the Organization to carry out or enforce measures for security within an authority of the Commonwealth.

The Act introduced sections relating to search warrants,\(^{344}\) listening devices,\(^{345}\) inspection of postal articles\(^{346}\) and procedural sections relevant to those sections. It also introduced a section relating to security assessments. Section 37 of the Act linked the functions subsection 17(1)(c) to security assessment. It allowed the Organisation to provide security assessments to Commonwealth agencies ‘relevant to their functions and responsibilities’.

Section 38 allowed an individual who received an adverse or qualified assessment to be provided with details of it. However, section 37 allowed reasons for an adverse assessment to be withheld. Section 38 allowed the Director-General to exercise his discretion and decide to withhold the provision of notice of an adverse assessment to an individual.

\(^{344}\) Any sentence of death passed on an offender in pursuance of this section shall be carried into execution in accordance with the law of the State or Territory in which the offender is convicted.

\(^{345}\) Australian Security Intelligence Organisation Act 1979, 25.

\(^{346}\) Ibid 26.

\(^{346}\) Ibid 27.
Section 54 of the *Act* provided for a Tribunal to review an adverse or qualified assessment. The obvious point about such a review process is that the powers of the Director-General were so broad that the Tribunal could only have a role if he wanted it to have a role and his decision in this regard was not reviewable.

The *Act* also introduced the requirement that the Director-General provide an annual report to the Minister and the Leader of the Opposition in the House of Representatives about the Organisation’s activities. Section 94 required the Minister to be supplied with a report ‘on the activities of the Organization during that year’, and for the Leader of the Opposition to treat the report as secret.

The content of such reports was to remain unknown because such content was secret, even if there was no basis for secrecy, and presumably the Director-General only included such matters as he considered necessary. Section 8 made clear the overriding power of the Director-General and the limits of the power of the Minister. It placed control of the Organisation with the Director-General and made clear that the Minister was not ‘empowered to override the opinion of the Director-General’ on questions of ‘collection of intelligence’, or communication of intelligence concerning a particular individual’, or ‘concerning the nature of advice that should be given’.347

The requirement for candor on the part of the Director-General was absent as was Ministerial or parliamentary control. Section 21 required the Director-General to consult regularly with the Leader of the Opposition in the House of Representatives ‘for the purpose of keeping him informed on matters relating to security’. The section provided no guidance about what ‘matters relating to security’ the Director-General was to inform the Leader of the Opposition about, thus giving a wide discretion to include or not any matters the Director-General deemed appropriate. The discretion given to the Director-General under the 1979 *Act* remains the same.

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347 Section 8 of the current Act has a similar provision but it specifies that the Director-General is subject to the directions of the Minister, and the Minister can in writing override the opinion of the Director-General.
Examples of the way the Director-Generals of ASIO have used their discretion and extensive powers to engage its security apparatus in surveillance and vetting activities can be found in records eligible for release under the Archives Act 1983. The records relate to the surveillance of individuals, groups and organisations. Since 2010 the access period commences after 20 years. However, there are restrictions, including the fact that the names of those who did the spying, sometimes on their friends and relatives, are not revealed. What the records do show, that was unaccountably not dealt with by Royal Commissioner Hope, is that the spying that took place was a waste of time, money, and, more importantly, involved the invasion of privacy and in numerous instances adversely affected careers. ASIO surveillance on Australian citizens during the Cold War was extensive. There is no reason to be sanguine that in the 21st Century it is less pervasive. Indeed, because of the substantial increase in funding it is likely that the surveillance of citizens is on the increase.

A number of stories of ASIO spying are contained in a book edited by Meredith Burgmann titled Dirty Secrets: Our ASIO Files. In the book individuals who accessed their files provide details and point out flaws in the information collected. One person’s story is referred to because she is a well-known Walkley Award winning journalist, and her summary of the ASIO approach can be applied to many other people who suffered under their gaze. Anne Summers AO states:

I have spent a great deal of time reading various other ASIO files on the NAA website and have been quite taken aback by some of what I found. To say that all the stereotypes about ASIO in the 1970s were true is an understatement. ASIO was everywhere, observing, reporting, commenting – often in the most personal way. Even at an anarchist ‘conference’ in Minto, just outside Sydney, in 1971, attended by fewer than forty people. The ASIO agent not only took notes on what was said but made extensive and extremely personal comments about participants, about Paddy McGuinness’s drinking, for instance, and his sister’s ‘illegitimate’ child, about the extent of dope-smoking, even about the way Rosemary Pringle walked. . . . ASIO’s interest in individuals, including me, was exceeded only by its inability to get – or to get right – personal details.  

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348 Meredith Burgmann, Dirty Secrets: Our ASIO Files (NewSouth, 2014).
349 Ibid 82, 83. See the chapter by Elizabeth Evatt on her father Clive Evatt’s 115 page ASIO file. He was a senior NSW Labor politician and prominent advocate for human rights. She notes: ‘Many of the issues reported faithfully in the file are quite remote from the mandate of ASIO’. Ibid 322.
The approach adopted by ASIO agents bears a close resemblance to that of gossip columnists whose aim is to titillate the public with items about celebrities. Michael Tubbs, a respected barrister, in his book *ASIO: The Enemy Within*, examines his own files and comments more generally on the activities of ASIO. Tubbs makes a number of cogent arguments about worthless ASIO activities, and in respect of the dossier kept on him he makes the point about the unnecessary financial cost to the community:

> It is quite clear to me that ASIO has cost the Australian taxpayer, on my dossier alone, much more that I was able to earn myself in those 11 years. I estimate in today’s values the cost would all up have been in the order of $200,000 - $300,000 per year. What did Australian taxpayers get for all their money wasted on me by ASIO? Not a single bloody thing – not a ‘brass razoo’ of public value whatsoever. So what good was it all? How is that for public waste? Yet conservatives yell loud and long about ‘dole cheats’ and the high cost of social security benefits, not enough money for this and not enough for that. What about the waste of taxpayers’ funds by ASIO for no social benefit whatsoever. Thousands of pages and not a single charge laid – what crap!

The usefulness of ASIO activities so far as they related to spying and vetting of many thousands of Australian citizens is certainly more than questionable; especially in light of the absence of unlawful activities relevant to national security by those being watched. Whilst vetting and spying on citizens remains a priority, significant changes have occurred to ASIO functions, the most significant happening in the 21st Century. ASIO’s role has changed from surveillance state activities and a security assessment role to one that engages in a criminal investigative process, albeit in secrecy and without legal rights being an impediment. The legislation has been amended to introduce significant penal provisions where cooperation is not forthcoming. These additional activities provide further potential for abuse of rights and danger to public safety. The changes are examined in Chapter 6.

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351 Ibid 87.
In July 1992 Labor Prime Minister, Paul Keating announced that the role of ASIO and other agencies had been reviewed as a result of the end of the Cold War. ASIO had sixty people cut from its staff and a budget reduction of $3.81 million. The announcement of the review was in a long, waffling press release that said little and was clearly designed to avoid the suggestion that the government was not concerned about security. The small reductions were to be short lived, with an increased role for ASIO before and during the Sydney Olympics in 2000, and a dramatically expanded role in the 21st Century as part of the preventive ‘war on terror’. While ASIO funding in 1998-99 had returned to the level of 1992-93 of just under $50 million, after 1999 it increased dramatically.353

The Keating statement is interesting because it shows that, despite the budget reduction, it was necessary to claim adherence to the security state apparatus and foreign alliances. Keating stated, *inter alia*:

> In the light of the fundamental changes in the world since the end of the Cold War, the Government commissioned earlier this year a review of the overall impact of changes in international circumstances on the roles and priorities of the Australian intelligence agencies and of the Department of Foreign Affairs and Trade as a provider of reporting.

> The review examined how Australia's interests have been affected by the rapid and significant changes in international circumstances, whether Australia still needs the intelligence structure it has and, if so, whether the roles and priorities of our intelligence agencies need to be adjusted. It also looked at how changes in international circumstances would affect management and coordination arrangements between the Australian intelligence and security agencies, and Australia's partnership and liaison arrangements.

> The Government considers that global and regional relationships, freed from the rigidity of the Cold War ideological and strategic divide, will become more complex and diverse. A more fluid international environment will require a sharper appreciation of Australian interests and priorities, of the resources available to pursue our goals, and of the need to allocate those resources effectively.

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The Government has decided not to alter the basic structure of Australia's intelligence community which was set in place after Mr Justice Hope's comprehensive reviews, for reasons of enduring concern relating to efficiency and effectiveness. Essential to that structure is the separation of the assessment, policy and foreign intelligence collection functions—a philosophy which the Government continues to embrace.

The review stresses the need for a self-reliant intelligence capability in those areas and issues of highest priority for Australia, but recognises the benefits which continue to flow to us from the long-standing partnership agreements with the United States, United Kingdom, New Zealand and Canada. It also recognises the importance of developing and strengthening regional intelligence liaison arrangements.354

The review was announced after it occurred, and its terms of reference, the data and assumptions upon which it relied remain hidden. The Hope Royal Commission at least provided some reasoning for the conclusions it reached.

The restriction of fundamental legal rights through the growth of ASIO was confined, so far as can be discerned from publicly available records, to derogable rights. For example, the right to freedom of opinion and expression was undermined with sedition laws that in a number of instances were used to prosecute communists. These laws existed prior to the establishment of ASIO, but its existence was, at least in part, justified on the basis that such laws were necessary. The main assault on derogable rights during the 20th Century can be gleaned from the use of ASIO for surveillance and reporting on the political activities of individuals. Such reporting activities, as is shown by some of those who have accessed their ASIO records, can have an impact on the right to equality and non-discrimination. The main impact, however, derives from the creation of a state where citizens become accustomed to insidious surveillance activities and adopt an attitude that seems to deny the potential for adverse impacts on them: it happens to bad people. Such an attitude was clearly expressed by a federal politician as discussed in Chapter 7. The growth of ASIO powers in the 21st Century had its genesis in the 20th Century and, instead of the development of a freer society with the enhancement of legal rights, the reverse has

occurred. So far as terrorist activities were concerned the available evidence suggests that ASIO had little interest, at least between 1963 and 1975. John Blaxland notes that, regarding this period, ‘ASIO did not see terrorism as falling within its charter as defined by the ASIO Act 1956’.  

**Conclusion**

The colonial period was marked by violence, particularly towards Aboriginals. The violence, including the removal of children without reference to their parents, has been, and can properly be, described as genocide. It continued into the 20\textsuperscript{th} Century. Other breaches of fundamental rights during the colonial period were on-going in terms of the death penalty, and had sunset provisions where bushrangers were involved. During this period, at least for Aborigines, little comfort could be taken from the fact that courts existed. The forgotten war detailed by Reynolds was destructive of a race and was the clearest example of where rights, in practice, did not exist.

The war against Aborigines became quiescent during the first part of the 20\textsuperscript{th} Century, and the focus changed after World War II to the Cold War when attempts were made to outlaw the Communist Party. The 20\textsuperscript{th} Century was marked by the creation and growth of the Australian Security Intelligence Organisation which was used as a tool of government against domestic communists. The attempted abrogation of fundamental rights was thwarted by the High Court and the narrow defeat of the 1951 referendum, but with the growth of ASIO the Australian Government gained a powerful tool that it can wield in secret. The expansion of the role and powers of ASIO during the 21\textsuperscript{st} Century is examined in Chapter 6. Such expansion has been achieved in the 21\textsuperscript{st} Century without a review of its role and any consideration of whether the powers it has been given are even needed.

The High Court during the mid-20\textsuperscript{th} Century played a notable role in not being swayed by the extreme and repeated rhetoric of fear during the Cold War that communists were a threat to the nation and needed to be outlawed. The decision of the High Court, in

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rejecting the government’s attempt to ban the Communist Party, was the last time the Court has acted to reject significant legislation abrogating fundamental legal rights. The impact of the High Court decision and the referendum was to maintain fundamental legal rights during the Cold War when it was claimed that Australia was under imminent threat from external and internal communist forces. The threat of a communist invasion and subversion from within was pitched with great force by the Liberal and Country Party politicians of the day. When compared with the danger posed by terrorist attacks now, the Cold War construction of the communist threat must be regarded as a much greater threat. Yet fundamental legal rights could be maintained during the Cold War even though it was claimed that they should be abrogated for those said to be communists. In the 21st Century not only are rights to be taken from suspected terrorists but also from those who are not even suspects. The threat of terrorist attacks, even if severe, can reasonably be regarded as less significant than the defeat of Australia by hostile forces, yet the derogation of rights is now said to be more essential than was publicly urged by even hard line anti-communists in the 1950s and 1960s. The next chapter analyses the most significant specific details of legislative changes from 2001 that have removed or limited fundamental legal rights in Australia.
Chapter 5
Growth of Restrictions on Fundamental Legal Rights since 2001

This chapter outlines the anti-terrorist legislation introduced in Australia since 2001 that restricts fundamental legal rights. The main examples of legislation used to show the restriction of rights are drawn from the Commonwealth Criminal Code 1995, the Crimes Act 1914, and the National Security Information (Criminal and Civil Proceedings) Act 2004. The examples show a paradigm shift from government acceptance of the protection of fundamental legal rights as an integral part of the laws of Australia, to a rapid and exponential growth in criminal laws that specifically exclude those rights.

The growth in anti-terrorism legislation in Australia has been continuous since 2001. In 2015 Lynch, McGarrity and Williams identified 64 separate pieces of legislation. With the passage of the Metadata laws in 2015 the number of laws is at least 65 and growing. In order to understand the way the laws breach fundamental legal rights, it is necessary to appreciate in detail two critical implications of these laws taken as a whole. First, how they have broken the interdependent relationship between the various arms of the criminal justice system. Second, the degree of shift from pre-2001 restrictions on fundamental legal rights and the non-existent nature of any monitoring of the implications of the shift. To demonstrate these implications an extensive and detailed analysis of the legislation is required. This analysis will show that what has occurred is the creation of a parallel criminal justice system that deviates dramatically from the traditional criminal justice system.

Anti-terrorism Laws and the Criminal Code

Definition of Terrorism

A significant number of the anti-terrorist laws are contained in the Criminal Code Act 1995, at Schedule 1, Part 5.3. The definition of a terrorism offence is found in the Criminal Code 1995 and it was introduced through the Security Legislation Amendment.

Division 100, Part 5.3 of the *Criminal Code Act 1995* governs terrorism offences. Section 100.1 defines a ‘terrorist act’ as: ‘(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and (c) the action is done or the threat is made with the intention of: (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or (ii) intimidating the public or a section of the public.’ Subsection (2) further qualifies the definition requiring a terrorist act to have one or more of the following components: ‘(a) causes serious harm that is physical harm to a person; or (b) causes serious damage to property; or (c) causes a person’s death; or (d) endangers a person’s life, other than the life of the person taking the action; or (e) creates a serious risk to the health or safety of the public or a section of the public; or (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to: (i) an information system; or (ii) a telecommunications system; or (iii) a financial system; or (iv) a system used for the delivery of essential government services; or (v) a system used for, or by, an essential public utility; or (vi) a system used for, or by, a transport system’. In case there is any doubt because the qualified definition provides for a physical action on the part of an offender for a terrorist offence to have been committed, section 80.2C deals with advocating terrorism and subsection (4) states: ‘A reference in this section to advocating the doing of a terrorist act or the commission of a terrorism offence includes a reference to: (a) advocating the doing of a terrorist act or the commission of a terrorism offence, even if a terrorist act or terrorism offence does not occur; and (b) advocating the doing of a specific terrorist act or the commission of a specific terrorism offence; and (c) advocating the doing of more than one terrorist act or the commission of more than one terrorism offence’. Additionally, Division 101, examined below, allows for planning a terrorist act, training for such an act and possession or collection of things to facilitate a terrorist act to also be criminal, although no act causing injury or death is necessary. The *Crimes Act 1914* and the *Australian* ...
Security Intelligence Organisation Act 1979 provide definitions that refer to the Criminal Code and provide no better definition of what a terrorist offence involves than outlined.

One of the most significant requirements to meet the definition of a ‘terrorist act’ is that the motivation for the crime be ‘done or the threat is made with the intention of advancing a political, religious or ideological cause’. This requirement provides an element to the offence that is rarely found in other criminal laws. 358 For example, if subsection ‘(c) causes a person’s death’ is involved and traditional criminal laws applied then absent justifiable homicide, the criminal charges of murder or manslaughter could be laid and motive is not an element of these offences. It may be that motive is essential if there is to be a separate group of substantive crimes applicable to terrorists, otherwise the terrorists just join a queue with other alleged offenders who are charged with serious indictable crimes. This proposition leaves open the possibility that many of the laws were just politically inspired vote harvesting.

Where there is an individual offender not connected with any group espousing a political, religious or ideological cause, the Criminal Code does not preclude the person being charged with a terrorism offence. The use of the anti-terrorism laws contained in the Criminal Code where other criminal laws that contain due process legal protections for an accused are available raises the real prospect of the laws being used for political gain, or for the convenience of enforcement agencies who do not want to be restricted in the investigative stage by a suspect claiming a right to silence or requiring a lawyer. The difficulty could also arise, for example, where a person intends to steal for personal financial gain but through words falsely links their actions to a political, religious or ideological cause; or commits the crime because he or she is mentally ill and claims one of the motives required for a terrorist act. The possibilities are numerous.

The difficulties with applying the section are highlighted in section 100.1(3) which excludes action from the terrorist frame, if they involve: ‘advocacy, protest, dissent or

358 Hyam v DPP [1975] 2 All ER 41 highlights distinction between intention and motivation. The section mixes the distinction.
industrial action’; and they are not intended: ‘(i) to cause serious harm that is physical harm to a person; or (ii) to cause a person’s death; or (iii) to endanger the life of a person, other than the person taking the action; or (iv) to create a serious risk to the health or safety of the public or a section of the public’. By including this exception some of those in parliament must have been aware that the very broad definition given to terrorism offences could well include industrial action. Indeed, it still does if there is intention to cause one of the harms listed. A problem greater than the attribution of specific motives to the crimes concerns the procedures that have been introduced to deal with the motive based criminality: procedures that can be easily abused, that remove fundamental legal rights, and that are covered in a cloak of secrecy. The scope is present in the Criminal Code and the other legislation to allow political opponents to be scandalised and oppressed; and the powers are so broad that an anti-democratic elite could engage in active suppression of public dissent. This could not have as easily been achieved before the introduction of the anti-terrorism amendments to a number of Acts in the 21st Century.

**Preparing or Planning a Terrorist Act**

Division 101 contains a number of sections specifying particular offences and penalties. Section 101.1(1) allows for life imprisonment for a terrorist act; section 101.2 provides 25 years imprisonment for providing or receiving training connected with a terrorist act; section 101.4 has 15 years imprisonment for possessing things connected with terrorist acts; section 101.5 allows for 15 years imprisonment for collecting or making documents likely to facilitate terrorist acts; and section 101.6 has a penalty of life imprisonment for acts done in preparation for, or planning of terrorist acts. Section 101.6 is extremely broad, creating an offence if a ‘person does any act in preparation for, or planning, a terrorist act’, and it does not matter if ‘a terrorist act does not occur’, or if there was a ‘specific terrorist act’ contemplated, or if the was going to be ‘more than one terrorist act’.

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359 Introduced through the *Security Legislation Amendment (Terrorism) Act 2002* and the *Anti-Terrorism Act 2005*. 

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Intention to commit a terrorist offence is required for the offence to be committed. The intention can be inferred from words said or actions. For example, a discussion with another person may be sufficient. However, the act done can be as simple as downloading plans for bomb making from the internet, if there is some evidence that there was planning to carry out a terrorist act. The planning could, for example, be inferred from the discussion with another person which can also be used to show intention. The possibilities are open ended and can be inferred from a series of actions or words which by themselves are innocuous. It does not matter if the plans were unlikely to be successful or in fact did not eventuate. The planning can, for example, be an adolescent fantasy that goes nowhere, but the person can still be sentenced to life in prison if they engage in the planning process and the requisite intention is proved. In the case of *Regina v Lodhi*[^360^], where the prosecution used section 101.6, to bring its case that planning occurred to bomb part of the electricity supply system, Whealy J stressed in his sentencing remarks, the potential for serious consequences from planning, and found an analogy in an event that had nothing to do with terrorism but that he thought had ‘consequences on the national psyche’ in the ‘tragedy’ of the Port Arthur massacre, ‘to realise how a major terrorist bombing would or could impact on the security, the stability and well-being of the citizens of this country’.[^361^] He placed emphasis on the potential rather than an actual adverse outcome of the planning, stating:

> It may well be that there was a general lack of viability and sophistication about his actions. It may well be that there was a degree of impracticability as to whether he would be able to carry out his criminal intentions. On the other hand, even the most amateurish and ill-conceived plot to cause mayhem by the use of explosions would be capable of causing considerable damage and even death amongst our community.[^362^]

Prior to the verdict of guilty and the imposition of sentence, an appeal was lodged on the grounds that: retrospective amendments did not apply to a trial that had commenced; the amendments violated the Commonwealth Constitution; the Crown failed to specify the

[^360^]: [2006] NSWSC 691.
[^361^]: Ibid 53.
[^362^]: Ibid 54.
terrorist acts for which preparation was being made; the counts in the indictment were
duplicitious; and the indictment did not contain the essential elements of the offence. \(^{363}\)
The New South Wales Court of Criminal Appeal with Spigelman CJ, McClellan CJ at CL
and Sully J agreeing held that: retrospective amendments did not apply to a case that had
commenced and therefore it was not necessary to consider Constitutional issues; \(^{364}\) the
parliament had decided to create an offence where it was not necessary to specify
precisely what an accused intended to do; \(^{365}\) the parliament intended to create an offence
with one or more characteristics; \(^{366}\) and the essential elements of the offence had to be
specified. \(^{367}\) The case was sent back to the trial judge.

As part of the consideration of the grounds of the appeal Spigelman CJ pointed out the
unique nature of the legislation and that the courts need to respect the policy decisions of
parliament. He stated:

Preparatory acts are not often made into criminal offences. The particular nature of
terrorism has resulted in a special, and in many ways unique, legislative regime. It
was, in my opinion, the clear intention of Parliament to create offences where an
offender has not decided precisely what he or she intends to do. A policy judgment
has been made that the prevention of terrorism requires criminal responsibility to
arise at an earlier stage than is usually the case for other kinds of criminal conduct,
e.g. well before an agreement has been reached for a conspiracy charge. The
courts must respect that legislative policy. \(^{368}\)

The court concluded that the parliament had decided to allow for duplicitous offences, and
to remove the requirement that the prosecution specify what a person charged under the
section intended to do. The preparation or planning offence allowed for in section 101.6
has extraordinary reach. Arguably, it goes beyond attempt to commit a crime. It also goes
beyond the inchoate offences of conspiracy and incitement which require a minimum of
two people. A person, for example, who purchases a balaclava to be used to enter a bank


\(^{364}\) Ibid [1].

\(^{365}\) Ibid [2].

\(^{366}\) Ibid [3].

\(^{367}\) Ibid [4].

\(^{368}\) Ibid [66].
and disable its computer system, because the bank is part of the capitalist system which he or she ideologically opposes, could be found guilty of preparing for a terrorist act. This would be the case even if the person could not possibly gain access to the computers because they were computer illiterate, and did not know where the computer system was located. The law allows for the stupid and vulnerable to be caught but probably would be ineffective against an Al Qaeda member. In the event that section 101.6 was amended to remove the requirement for motive to be an element there could be a vast increase in the number of offenders. This, no doubt, would require substantially increased funding to the criminal justice system, assuming that the police bothered trying to enforce the law. This section is a very clear example of a parallel legal system.

**Proscribing Terrorist Organisations**

Division 102, section 102.1 contains the definition of a terrorist organisation. It has a general definition in subsection (a) ‘an organisation that is directly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act’. Subsection (b) allows for such organisations to be listed in regulations. The section gives the Minister the power to list organisations if satisfied on reasonable grounds that the organisation ‘(a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or (b) advocates the doing of a terrorist act’: subsection (2). Subsequent sections make members of such an organisation criminals who can suffer substantial periods of time in gaol. The definition would allow the use of literature produced by an organisation to be used as evidence that it was a terrorist organisation: there is no requirement that the organisation has actually been involved in terrorist activities. The initial listing seems to be at the discretion of the Attorney-General, but pursuant to section 102.1A it can be reviewed by the Parliamentary Joint Committee on Intelligence and Security and it is possible for a House of Parliament to disallow the regulation within 15 sitting days’ time after the regulation has been laid before the House: subsection (3). The likelihood of parliamentarians disallowing a regulation listing a terrorist organisation is not known; but if any guidance can be taken from the eagerness with which both Labor and Liberal-

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369 In 2015 there were 20 listed terrorist organisations: see Appendix B.
National governments have embraced anti-terrorist legislation, no reliance could be placed on gaining support for a disallowance.

The process for proscribing an organisation does not allow any member of the organisation to the opportunity to be heard prior to the organisation being listed. This is a denial of natural justice which usually forms part of due process rights in all courts and tribunals to assist in ensuring fairness.\textsuperscript{370}

An additional problem exists in that any member of a listed organisation who wanted to advocate for the removal of the organisation from the list would be exposing himself or herself to prosecution for being a member. Furthermore, section 102.8 may make it very difficult for anyone else to advocate for the removal of an organisation from the list, if it was open to argue that the person had an association with the organisation: 3 years goal being the penalty for association. The section is designed to stifle the freedom of association, and dissent about government decrees. Regulation making power of this kind would no doubt have been appreciated by Prime Minister Robert Menzies, who may well have been successful in banning the Communist Party of Australia if terrorist powers of the kind found in the \textit{Criminal Code} had existed in the 1950s.

The laws proscribing organisations have not been supported by any evidence as to their effectiveness. As noted by Roger Douglas:

\begin{quote}
There is pitifully little evidence bearing on the impact of proscription laws on group and individual behaviour. We have little idea of who refrains from what and to what extent this is a result of proscription laws. We do not know whether and to what extent laws which proscribe particular groups incite those who vaguely sympathise with such groups to provide more support than they otherwise would. Nor do we know how far plotting on behalf of terrorist groups is a substitute for, rather than a precursor to, action.\textsuperscript{371}
\end{quote}


Section 102.1 also includes a definition for ‘advocates’ that provides at section 102.1(1A)(c) the following: ‘the organisation directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act’. If the section had existed when the African National Congress was fighting for liberation from the apartheid regime then praise of Nelson Mandela could have led to imprisonment. Currently, praising the Kurdish Workers Party (PKK) could be regarded as a terrorist offence despite the fact that it is fighting the Islamic State. Apart from the potential impact on individual liberty, the section impacts on the constitutional right to communicate about political matters.

Division 102, Subdivision B creates a series of offences relevant to an organisation caught by section 102.1(a) or by regulation pursuant to subsection (b). Section 102.2(1) provides 25 years imprisonment for intentionally directing the activities of a terrorist organisation, and subsection (b) 15 years imprisonment for recklessly directing the activities of a terrorist organisation. Section 102.3 creates a 10 year imprisonment penalty for being a member of a terrorist organisation, subsection (2) provides a defence if the person can prove that he or she took reasonable steps to cease being a member. The defence is one of the many that reverses the onus of proof in such legislation: the emphasis is on freeing the State from the need to prove its case beyond reasonable doubt where a defence is raised. Section 102.4(1) has a 25 years imprisonment penalty for intentionally recruiting a person to be a member of a terrorist organisation, and subsection (2) allows for 15 years for recklessly recruiting. Section 102.5 allows 25 years imprisonment for providing training to a terrorist organisation, receiving training from such an organisation and intentionally participating in training. Section 102.6 has penalties of 25 years imprisonment for intentionally receiving or collecting funds, and 15 years for recklessly so doing. Section 102.7 makes it an offence to intentionally or recklessly support a terrorist organisation, with penalties of 25 years and 15 years respectively. Section 102.8 provides a 3 year penalty for associating with a terrorist organisation. It is a strict liability offence to intentionally associate knowing the organisation is a terrorist organisation or that it is listed in the regulations. Subsection (4) allows some exceptions including if the
association is for the purpose of providing legal advice on a limited range of matters. As
is usual with such sections, the burden of proof rests with the defendant to show an
approved association. The effectiveness of such legislation in dealing with political,
religious, or ideologically-based criminal activity remains to be seen. However, as a
matter of common sense, it is unlikely to deter hard core terrorists, as banning and
punitive laws failed to defeat revolutionary efforts over the centuries. The most it can
reasonably be expected to achieve is to deter people who might only flirt with such
organisations, or inspire stupid and disaffected youth to engage with such organisations.
A consequence that would be detrimental is where an organisation is banned that is
simply trying to achieve freedom from a tyrannical regime.

The Law Council of Australia has recommended the repeal of section 102.1(1) and the
introduction of a fairer, transparent system that includes the requirement that the
Attorney-General apply to the Federal Court for an organisation to be listed and that the
application be held in open court. Additionally, it recommended that there be stated
criteria for proscription, detailed procedures for revocation and wide publicity if an
organisation is proscribed.372

Division 103, section 103.1 provides for life imprisonment for providing or collecting
funds and the person is reckless as to whether the funds will be used to assist or engage in
a terrorist act. It does not matter if the act actually occurs, or if it involves a specific
terrorist act or more than one for the offence to have been committed. Section 103.2
provides for life imprisonment where a person intentionally, directly or indirectly makes
funds available or collects funds available to assist or engage in a terrorist act. As is the
case with section 103.1, it does not matter if the terrorist act occurred or whether there
were one or more acts.

Control Orders

to Australia’s anti-terrorism measures’, Anti-Terrorism Reform Project, October 2013, 74.
Control orders were introduced with the *Anti-Terrorism Act (No. 2) 2005* and are clearly contentious in that they place fetters on the liberties that are normally enjoyed by people in Australia who are not charged with a criminal offence.\(^{373}\) They also substantially change normal prosecution criminal disclosure requirements, shift the onus of proof, alter court procedures that are normally required for an accused to have a fair trial, restrict communication and contain significant penal provisions for non-observance of restrictions. An order can be placed on an individual even if they will never face a criminal charge. It can also be placed before or after a person has served a sentence of imprisonment, or even if the person is found not guilty following that verdict or at the same time. Only a selection of the sections is detailed and analysed: they have been chosen on the basis that they best illustrate what a control order is and how it restricts fundamental legal rights. Control orders are a good illustration of how the parallel criminal justice system significantly varies from the traditional system.

The *Anti-Terrorism Act (No.2) 2005* introduced control orders, which became part of the *Commonwealth Criminal Code Act 1995* (Division 104). The object of the Division is described in section 104.1: ‘... to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act’. The order is therefore for the purpose of dealing with an unspecified future threat. The proper desire to protect the public from a terrorist act cannot in itself be criticised. The problem is that in trying to protect, provisions have been placed in the *Criminal Code* that allow significant breaches of fundamental legal rights: in the case of control orders this is done without any evidence that a law of the same type has prevented any terrorist attack in any part of the world. The law is thus a predictive tool whose utility is unknown.

Section 104.2 allows an Australian Federal Police (AFP) member to seek an interim control order with or in certain circumstances without the consent of the Attorney-General. The AFP member is required to have ‘reasonable grounds’ that the order would

\(^{373}\) The *Anti-Terrorism Act (No. 2) 2005* also introduced updated sedition laws. Consideration of the sedition laws does not form part of this work, although they can be viewed as part of the ongoing package of anti-terrorism laws.
substantially assist in preventing a terrorist act or that the person has provided training or received training from a listed terrorist organisation. The involvement of the Attorney-General is interesting because it moves away from a trend of distancing such people from decision making about the application of criminal laws by using Directors of Public Prosecution. The reason for such distancing is to remove the appearance of political bias from the decision making process. Section 104.2 is mainly procedural, listing the steps the AFP member should undertake to seek the order. Section 104.3 requires the AFP member to make any changes to the request for an interim control order required by the Attorney-General, and to provide a certificate by the Attorney-General along with sworn or affirmed information.

Section 104.4 allows the court to make an interim control on the civil standard of proof, being, ‘on the balance of probabilities’ and requires that making the order would substantially assist in preventing a terrorist act, or that the person has provided training to, or received training from a listed terrorist organisation. A control order can be regarded as similar to a sentence of home detention for a criminal offence, except that it requires a lesser standard of proof than that involved in the usual criminal sentencing process of beyond reasonable doubt, and it is imposing a sentence on a person who has not been convicted of a criminal offence. Additionally, it is imposed without the requirement that there be an imminent threat of a terrorist attack.

374 The leading case on balance of probabilities is *Briginshaw v Briginshaw* (1938) 60 CLR 336 Dixon J stated at 361-362: ‘The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty . . . . Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.’ The *Briginshaw* test is a lower standard of proof than that applicable in criminal cases, where the prosecution must prove its case beyond reasonable doubt.

375 A control order can also be distinguished from State laws that can place restrictions on sex offenders in that there need be no conviction for a criminal offence as required for sex offenders.
Section 104.5 specifies what the issuing court must include in a control order, and as part of this process it is to specify the period during which the control order is to be in force: it allows for the order to be made for 12 months from the time the interim control order is made. Section 104.5(2) makes it very clear that the 12 months expiration ‘does not prevent the making of successive control orders in relation to the same person’. In effect, subject to the sunset provision in section 104.32 actually remaining in 2018, an individual could permanently remain the subject of a control order. Section 104.5(3) lists the controls that can be placed upon people. The obligations, prohibitions and restrictions are: ‘(a) a prohibition or restriction on the person being at specified areas or places; (b) a prohibition or restriction on the person leaving Australia; (c) a requirement that the person remain at specified premises between specified times each day, or on specified days, but for no more than 12 hours within any 24 hours; (d) a requirement that the person wear a tracking device; (e) a prohibition or restriction on the person communicating or associating with specified individuals; (f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet); (g) a prohibition or restriction on the person possessing or using specified articles or substances; (h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation); (i) a requirement that the person report to specified persons at specified times and places; (j) a requirement that the person allow himself or herself to be photographed; (k) a requirement that the person allow impressions of his or her fingerprints to be taken; (l) a requirement that the person participate in specified counselling or education.’ Many of the restrictions can be placed on people who receive bail following arrest for a criminal offence. The fact that a person who is subject to a control order need not even be accused of any offence, strikes at the long held fundamental legal right that an accused is presumed innocent until a tribunal of fact determines that the prosecution has proven its case beyond reasonable doubt: *Woolmington v DPP.*\(^{376}\) Section 104.6 provides for ‘Requesting an urgent interim control order by electronic means.’ In all cases interim control orders are issued *ex parte*: s104.4.

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This is a departure from usual practice where a person at least has a right to appear when their liberty is being determined.

Pursuant to section 104.12(1) within 48 hours, amongst other things, the person subjected to the control order needs to present their case if they are going to oppose the order being confirmed. This time restriction may put the person a considerable disadvantage, but of greater significance is the difficulty they may face in even knowing the basis for the claim that they are a future terrorist threat. Section 104.14(3) allows for information to be withheld if it is deemed to prejudice national security ‘within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004’; or attracts public interest immunity; or puts at ‘risk the safety of the community, law enforcement officers or intelligence officers’. Section 104.13 allows a lawyer to request a copy of the control order, but this request does not provide a basis for access to what would normally be provided in criminal cases, that is, the full factual basis upon which the prosecution is basing its case. Where full factual details are not provided it may not be possible to meet an allegation or rebut an inference drawn from facts; indeed at its most fundamental it is not possible to prove an asserted fact to be false if you don’t know what fact is being propounded. The approach taken by the parliament to control orders has allowed for real abuse based on ‘evidence’ that may be no more than speculative nonsense. The approach also is clearly diametrically different to accepted criminal law practice. For example, in *Grey v The Queen*[^2001] the High Court of Australia held that there is an ongoing obligation on the prosecution to make full disclosure. Bar Association rules and prosecution guidelines of States and Territories also require such disclosure. Section 104.14 governs the confirming an interim control order, but it does not remedy the problem related to disclosure. Some of the cases outlined in Chapter 3 provide clear examples of where the failure to disclose has led to miscarriages of justice. Additionally, there is no real legal role for those who apply this law, any involvement being simply administrative.

Section 104.18 provides a person with the right to seek revocation or variation of a control order. This might prove very difficult to achieve if full details are not provided about why

the order was made in the first place.

In the event that a person decides to contravene the control order, section 104.27 allows for 5 years imprisonment. This is strikingly different to the situation, which not infrequently presents, where a person breaches a bail condition and can lose the conditional liberty provided by bail until a trial is held. The person who breaches the control order, although innocent of any association with terrorism, may still go to goal for opposing the control order. Political dissent by non-compliance, even by an innocent person, is not allowed. Strikingly, and what further distinguishes a control order from the limits that can be imposed on a person in the traditional criminal justice system, is that a control order can be imposed on a person who will never be charged or tried. Control Orders can also be imposed on a person before trial and after trial if they have been acquitted, or when they have completed a sentence of imprisonment.

Section 104.28 provides that a control order cannot be made for a person under 16 years of age and introduces special rules for young people between the ages of 16 and 18. This will probably change if recent federal government proposals are enacted and 14 year olds are included.

The original section 104.32 provided a sunset provision ending control orders in 10 years, which meant that control orders would cease to exist in December 2015. However, the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 introduced a new section 104.32 which extended the sunset provision to 7 September 2018, specifying that such orders cease after that date.

Sunset provisions are included in legislation for the obvious reason that the parliament is concerned that the law is not a good one. Control orders have been given an extended lease of life and, with the increasingly harsh anti-terrorism laws being introduced, it would not be surprising if they were made a permanent feature of the Criminal Code. This proposition is given further weight because the Australian Security Intelligence Organisation Act 1979 contains provisions that are significantly more punitive and
restrictive of rights, and the sunset section that originally existed in it has been extended to 2026.

The Independent National Security Legislation Monitor (INSLM) recommended the repeal of the control ordered regime established by Division 104 of the *Criminal Code*.\(^\text{378}\) The recommendation has not been accepted by government. The Council of Australian Governments Review of Counter-Terrorism Legislation made a number of recommendations including one that proposed the retention of the control order regime. At the time it made its recommendation about control orders the report of the INSLM had not been completed, although the Chair of the Council of Australia Governments did have discussions with the INSLM about their respective roles.\(^\text{379}\) The Council review recommended that the ‘control order regime should be retained with additional safeguards and protections included’.\(^\text{380}\)

**The Response of the High Court to Control Orders**

The courts in Australia have shown a reluctance to do more than make limited use of statutory interpretation to limit the derogation of legal rights. There are notable exceptions where the High Court has clearly moved against the will of the government, such as the *Communist Party case*, or has introduced substantial change to the common law such as the *Mabo case*.

The leading Australian case on control orders is *Thomas v Mowbray*.\(^\text{381}\) Thomas was the subject of an interim control order imposed by a Federal Magistrate on 27 August 2006. Schedule 2 of the Order gives the reasons for its imposition, that included: he trained with Al Qaeda in 2001; there was ‘good reason to believe’ he was an ‘available resource’ for Al Qaeda ‘or a related terrorist cell’; he ‘may be susceptible’ to exploitation; he ‘is attractive to aspirant extremists who will seek out his skills’; and ‘the controls . . . will


\(^{380}\) Ibid 55.

\(^{381}\) *Thomas v Mowbray* [2007] HCA 33.
protect the public.382 The order required Thomas to: remain at his residence between midnight and 5 am each day; report to police three times a week; submit to having his fingerprints taken; not acquire or manufacture explosives; not communicate with named individuals (50 people); not to use certain communications technologies.383 The order was made ex parte.384

The special case taken to the High Court of Australia asked if Division 104 of the Commonwealth Criminal Code was contrary to Chapter III of the Constitution in that it conferred on a federal court non-judicial powers, or Division 104 was invalid because it conferred legislative power that the Commonwealth did not possess, or it was invalid because the powers were not properly referred by the States. The majority of the Court found that federal courts could exercise the powers given under Division 104, that it was not contrary to the defence or external powers of the Commonwealth, and they did not consider whether the States had properly referred their powers.

The case is of interest for the questions answered, but also because most of the judges engaged in consideration of current community expectations about how the threat of terrorism should be met, and they engaged in a process of justification based on a very few statutory and common law examples. The need to defend the community by the use of preventative laws mirrored the approach taken by a majority of federal parliamentarians.

Gleeson CJ, reflecting the opinion of the majority, said in respect of defence powers:

The power to make laws with respect to the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth, is not limited to defence against aggression from a foreign nation; it is not limited to external threats; it is not confined to waging war in a conventional sense of combat between forces of

382 Ibid [1].
383 Ibid [2].
384 Ibid see para 544 for full details of the obligations and restrictions place on Thomas.
nations; and it is not limited to protection of bodies politic as distinct from the public, or sections of the public.\textsuperscript{385}

When considering the preventative nature of the law and how courts could apply such laws Gleeson CJ used the example of \textit{Fardon v Attorney-General (Qld)}, \textsuperscript{386} which involved State legislation that allowed the Supreme Court of Queensland to keep people in custody who had completed their sentences, to lend support to the proposition that preventative laws are allowable. Gleeson CJ also said the examples of ‘executive detention pursuant to statutory authority include quarantine, and detention under health legislation’.\textsuperscript{387} He specifically excluded consideration of procedural fairness from his considerations, stating:

\begin{quote}
We are not concerned in this case with particular issues as to procedural fairness that could arise where, for example, particular information is not made available to the subject of a control order or his or her lawyers. Issues of that kind, if they arise, will be decided in the light of the facts and circumstances of individual cases. We are here concerned with a general challenge to the validity of Div 104. That challenge should fail.\textsuperscript{388}
\end{quote}

\textsuperscript{385} Ibid [7].
\textsuperscript{386} Ibid [15] Gleeson CJ: The power to restrict or interfere with a person’s liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what the person has done, which involves interfering with legal rights, and creating new legal obligations, rather than resolving a dispute about existing rights and obligations, is in truth a power that has been, and is, exercised by courts in a variety of circumstances. It is not intrinsically a power that may be exercised only legislatively, or only administratively. If it were otherwise, the federal Parliament would lack the capacity to confide an exercise of such power to the judicial branch of government. In \textit{Fardon v Attorney-General (Qld)[5]} the Court was concerned with State legislation which conferred on the Supreme Court of Queensland a power to detain in custody certain prisoners who had served their sentences. The power of detention was "to ensure adequate protection of the community[6]" and a court was required to decide whether there was "an unacceptable risk that the prisoner will commit a serious sexual offence"[7]. McHugh J said[8]:

"[W]hen determining an application under the Act, the Supreme Court is exercising judicial power. ... It is true that in form the Act does not require the Court to determine 'an actual or potential controversy as to existing rights or obligations'. But that does not mean that the Court is not exercising judicial power. The exercise of judicial power often involves the making of orders upon determining that a particular fact or status exists. It does so, for example, in the cases of matrimonial causes, bankruptcy, probate and the winding up of companies. The powers exercised and orders made by the Court under this Act are of the same jurisprudential character as in those cases. The Court must first determine whether there is 'an unacceptable risk that the prisoner will commit a serious sexual offence'. That is a standard sufficiently precise to engage the exercise of State judicial power. Indeed, it would seem sufficiently precise to constitute a 'matter' that could be conferred on or invested in a court exercising federal jurisdiction."

\textsuperscript{387} Ibid [18].
\textsuperscript{388} Ibid [31].
Perhaps the questions could have covered the obvious examples contained within Division 104 of the *Criminal Code* that do not allow for such fairness. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*, three years before, Gleeson CJ referred to the law of procedural fairness as involving a process designed to avoid practical injustice. In this regard legal representation is clearly an issue, as is the provision of all relevant facts, something that can be absent for a person confronting a control order. However, in *Thomas v Mowbray* he was confining himself to the challenge to the validity of Division 104 as a constitutional issue. It appears that Gleeson CJ was leaving open the possibility of a challenge to a control order based on procedural fairness.

Kirby J, in the minority, stated:

> In my view Div 104, as enacted, lacks an established source in federal constitutional power. It also breaches the requirements of Ch III of the Constitution governing the judicial power of the Commonwealth. Division 104 is therefore invalid.

He was concerned, when dealing with the referring powers of States, to stress the care that needs to be taken before the presumption in favour of common law rights can be overcome.

> Australian legislation is not ordinarily taken to invade fundamental common law rights or to contravene the international law of human rights, absent a clear indication that this is the relevant legislative purpose. . . Div 104 of the Code directly encroaches upon rights and freedoms belonging to all people both by the common law of Australia and under international law.

Kirby J noted and regretted the court’s break with tradition in finding the legislation constitutionally valid. He stated:

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390 Ibid [37].
391 [2007] HCA 33.
392 Ibid [157].
393 Ibid [208].
Whereas, until now, Australians, including in this Court, have generally accepted the foresight, prudence and wisdom of this Court, and of Dixon J in particular, in the *Communist Party Case* (and in other constitutional decisions of the same era), they will look back with regret and embarrassment at this decision when similar qualities of constitutional wisdom were demanded but were not forthcoming.

In the face of contemporary dangers from terrorism, it is essential that this Court should insist on the steady observance of settled constitutional principles. It should demand adherence to the established rules governing the validity of federal laws and the deployment of federal courts in applying such laws. It should reject legal and constitutional exceptionalism. Unless this Court does so, it abdicates the vital role assigned to it by the Constitution and expected of it by the people. That truly would deliver to terrorists successes that their own acts could never secure in Australia.394

Hayne J, in the minority, found that federal courts did not have the power to make or confirm an interim control order. He found that Division 104 provided no legal standards that a court could apply.395 Callinan J was a supporter of the legislation, Heydon J’s decision was brief and agreed with Gleeson, Gummow and Crennan JJ.

The ultimate role of the courts in determining the full extent to which the terrorist laws derogate fundamental legal principles remains moot. Recent history, however, suggests that the High Court of Australia is more likely to support parliamentary legislative power than fundamental legal rights when confronted by a determined government, if the most relevant recent case *Thomas v Mowbray* is any guide.

**Preventative Detention Orders**

The *Anti-Terrorism Act (No2) 2005* introduced Preventative Detention Orders found in Division 105 of the *Criminal Code*. Section 105.1 provides the ‘object’ of such orders. It states: ‘The object of this Division is to allow a person to be taken into custody and detained for a short period of time in order to: (a) prevent an imminent terrorist act occurring; or (b) preserve evidence of, or relating to, a recent terrorist act’. Section 105.5 stops a preventative detention order from being made if the person is under 16 years of

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394 Ibid [387]-[388].
395 Ibid [499].
age. Section 105.5A allows for interpreters for those with inadequate knowledge of English or who have a disability.

Section 105.2 allows the Minister to appoint a person who is an ‘issuing authority’ for continued preventative detention orders. The issuing authority is required to be a judge or former judge, a Federal Magistrate or a member of the Administrative Appeals Tribunal. If the person is a serving judge, magistrate or member he or she is required to act in a personal capacity. The requirement for the issuing authority to act in a personal capacity recognises that courts cannot be issued with non-judicial powers or functions. What is clear, when the sections are read as a whole, is that the role performed by an issuing authority is merely administrative, and scope for the exercise of any discretion to reject an application is extremely limited.

Section 105.4(4) allows an AFP member to apply for a preventative detention order if the member pursuant to subsection (a) ‘suspects, on reasonable grounds, that the subject: (i) will engage in a terrorist act; or (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or (iii) has done an act in preparation for, or planning, a terrorist act’: subsection (b) allows the issuing authority to make the order on the same grounds. The terrorist act must be imminent, and expected to occur within 14 days: subsection (5). If the terrorist act has occurred within 28 days and the person needs to be detained in order to preserve evidence, an order can be issued: subsection (6). The grounds for reasonable suspicion are phrased very broadly, so it is unlikely that an application would be rejected.

Section 105.42 restricts questioning of the person in custody to those matters involving welfare and safety. The restriction on questioning applies to police, ASIO employees and affiliates, except if it is ‘not practicable because of the seriousness and urgency of the circumstances in which the questioning occurs’: s 105.42(5)(b). If the desire is simply to

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396 R v Kirby; Ex parte Boilermakers’ Society of Australia ("Boilermakers' case") [1956] HCA 10; (1956) 94 CLR 254.
question and urgent circumstances cannot be found, the police can obtain a questioning and detention warrant.397

Section 105.7 allows for an initial preventative detention order, and under section 101.1(1) a senior AFP officer is an issuing authority for the purpose of an initial preventative detention order. The use of a senior AFP member as an issuing authority simply means that the police can detain a person for a set period, without charge and without reference to any type of judicial authority. Subsection (2A) allows the AFP member to avoid disclosing, in a summary to the issuing authority, any grounds for wanting the order that are likely to prejudice national security as provided for in the National Security Information (Criminal and Civil Proceedings) Act 2004. This provision exists whenever an order is being sought. In the first instance this may provide limited information to another police officer and if the order is continued to someone in a quasi-judicial role. Section 105.8(5) allows for an initial detention order to not exceed 24 hours. Section 105.9(2) allows for the initial preventative detention order to cease having effect at the end of 48 hours, if the person has been taken into custody in that time. Section 105.10 allows for the extension of an initial preventative order for 24 hours. Section 105.11 allows for an application for a continued preventative detention order, and subsection (5) allows for another 24 hours. Section 105.14 allows for an extension of a continued preventive detention order, however, subsection (6) states: ‘The period as extended, or further extended, must end no later than 48 hours after the person is first taken into custody under the initial preventative detention order’. The total period in custody, therefore seems to be 48 hours. State legislation, however, allows for detention up to 14 days.398 Section 105.33 requires humane treatment of a detainee.

397 See Chapter 6.
398 Section 25 of the Queensland Terrorism (Preventative Detention) Act 2005 allows for a person to be detained for 14 days; section 12 of the South Australian Terrorism (Preventative Detention) Act 2005 allows for 14 days; section 9 of the Tasmanian Terrorism (Preventative Detention) Act 2005 allows for 14 days; section 13E of the Victorian Terrorism (Community Protection) Act 2003 allows for 14 days; section 26K of the New South Wales Terrorism (Police Powers) Act 2002 allows for 14 days; section 15 of the Western Australian Terrorism (Preventative Detention) Act 2006 allows for 14 days; section 26 of the Australian Capital Territory Terrorism (Extraordinary Temporary Power) Act 2006 allows for 14 days; and section 21K of the Northern Territory Terrorism (Emergency Powers) Act allows for 14 days. The Acts all had 10 year sunset provisions that have been extended; thus the Victorian legislation has been extended to 2021, ‘Victorian
Section 105.14A and subsequent sections allow for a prohibited contact order. Section 105.34 restricts contact with other people while the person is in preventative detention. Section 105.35 requires the agreement of the police officer detaining the person for contact to be made with anyone else, including family members, and if permission is given subsection (1)(f) limits the contact to ‘solely for the purposes of letting the person contacted know that the person being detained is safe but is not able to be contacted for the time being’. Section 105.36 allows the person to contact the Ombudsman, and section 105.37 allows contact with a lawyer for limited purposes. Section 105.38 allows contact only if it can be effectively monitored. The limited contact requirement is bizarre, and in the case of terrorist belonging to a group their sudden absence would probably alert the others to the involvement of police.

Preventative detention orders cannot be appealed at the relevant time when a person is in custody. Section 105.51(2) excludes the possibility and thus breaches a fundamental legal right to appeal. There seems to be some attempt to cover this breach by allowing an appeal to the Administrative Appeals Tribunal, pursuant to s105.51(7), to seek a decision set aside the order thus making it void. Compensation for the detention can be paid pursuant to s105.51(8). The possibility of a decision being made in favour of a person subjected to an order must be significantly limited because of the restricted access to the evidence used to invoke the order. Apart from the fact that a person can be taken into custody and held for up to 14 days without the right of appeal, there is no requirement that the person be charged with an offence or even that there be sufficient evidence to allow the person to be charged.

Preventative Detention Order Secrecy Provisions

Section 105.41 of the *Code* governs disclosure offences. Section 105.41(1) makes it an offence for a person detained under a preventative detention order to disclose to another person the fact that a preventative detention order has been made, or the fact of detention, or the period of detention while subject to the order. Section 105.41(2) makes it an offence for the lawyer of the person subject to a preventative detention order to disclose to another person the fact that a preventative detention order has been made, or the fact that the detainee is being detained, or the period for which the detainee is being detained, or any information that the detainee gives the lawyer in the course of the contact. These restrictions apply for the period the order is in force, and do not apply to proceedings in the federal court, a complaint to the Commonwealth Ombudsman or to the federal police. Section 105.41(3) has similar restrictions on a parent/guardian where the person subject to an order is under 18 years of age or incapable of managing their own affairs (further qualifications and restrictions can be found in subsections (4) and (4A)). Section 105.41(5) creates an offence for an interpreter to disclose information. Section 105.41(6) makes it an offence for a person who has received information from passing it on. Section 105.41(7) makes it an offence for a police officer or an interpreter who monitors communication between a detained person and a lawyer to disclose the information to another person. Section 105.41 offences carry a penalty of 5 years imprisonment. There are no similar restrictive provisions in the traditional criminal laws of Australia.

Section 105.53 provides for a sunset provision similar to control orders. It was also extended from concluding in 2015 to conclude on 7 September 2018.

In 2012, before this extension, the Independent National Security Legislation Monitor recommended the repeal of the preventative detention regime established by Division 105 of the *Criminal Code*. The main reason given for this recommendation was that the powers of arrest, charging, detention and trial allowed for in the tradition criminal justice

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system would be more effective in preventing a terrorist act while maintaining due process and the right to a fair trial.400

The Council of Australian Governments Review of Counter-Terrorism Legislation, by a majority, also recommended the repeal of the Division.401 The response of the government to this recommendation can best be seen by the fact that it extended the sunset provision from 2015 to 7 September 2018. It also introduced the Independent National Security Legislation Monitor Repeal Bill 2014 designed to abolish the position of Monitor, presumably because the government did not like some of the recommendations it was receiving. In a submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry concerning the Bill, the Law Council of Australia noted with disappointment the lack of response by the government to the Monitor’s recommendations.402 The Law Council also supported the retention of the Monitor.403 Media reports indicate that the Labor Party and Greens opposed the repeal Bill in the Senate.404 On 17 July 2014, the bill was discharged from the House of Representatives Notice Paper. The Senate Standing Committee on Legal and Constitutional Affairs has resolved that it will not pursue its inquiry.405

Foreign Fighters
The Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 repealed the Crimes (Foreign Incursions and Recruitment) Act 1978, and introduced a range of amendments to the Crimes Act 1914, the Criminal Code 1995, the Australian Security Intelligence Organisation Act 1979 and seventeen other statutes. All the amendments were designed to increase restrictions on individuals who may be engaged in some form

400 Ibid 67.
403 Ibid
of terrorist activity. The legislation was introduced on 24 September 2014 and finally passed both Houses of Parliament on 30 October 2014. The speed with which this legislation was passed and the superficial consideration given to it by Labor, Liberal and National parliamentarians is considered in Chapter 7.

The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* shows a further growth in punitive legislation that restricts the right to fair trial. The *Act* amended *Criminal Code* (some of the amendments have been referred to earlier) and introduced Part 5.5 ‘Foreign incursions and recruitments’. Apart from dramatically increasing sentences for offences that previously existed under the repealed Act, it introduced absolute liability offences which make it significantly easier for the prosecution to prove that a criminal offence has been committed. For example, section 119.2 makes it an absolute liability offence to enter or remain in an area declared by the Minister in a foreign country if the person ‘(i) is an Australian citizen; or (ii) is a resident of Australia; or (iii) is a holder under the *Migration Act 1958* of a visa; or (iv) has voluntarily put himself or herself under the protection of Australia’. The penalty is 10 years imprisonment. Apart from the dictatorial power given to a single politician to declare the entry of a particular area of a foreign land a prohibited area, the creation of absolute liability offences means that there is no requirement that the person intended to enter the area before a conviction can be recorded and there is no defence of mistake. Dictatorial type powers, coupled with making non-intentional acts criminal, move Australia closer to countries where the rule of law is based on tyranny and individuals are powerless against the controllers of the state.

**Terrorism and the *Crimes Act 1914***

The *Crimes Act 1914* also contains significant anti-terrorism laws that remove or reduce pre-existing legal rights. Part 1AA, Division 3A of the *Act* contains powers to stop, question and search persons in relation to terrorist acts. Division 4B gives power to obtain information and documents in terrorism investigations. Part 1AE provides for video link evidence in proceedings for terrorism offences. Part 1A, section 15AA provides that bail be given only in exceptional circumstances for terrorist offences.
The requirement for exceptional circumstances before bail is granted is a significant change to the common law where there is a presumption in favour of bail. The exceptional circumstances requirement imposes on the judiciary the requirement that they presume the accused to be a significant risk and effectively eliminates consideration of the presumption of innocence. These additions to the existing laws are less invasive of rights than those contained in other statutes.

**Metadata Laws**

Metadata laws passed on 26 March 2015 are contained in the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014*. It amended the *Telecommunications (Interception and Access) Act 1979* to require a service provider to keep data. Sections 187A and 187C of the amended Act requires data to be kept by a service provider for a minimum period of two years. Section 187AA of the Act specifies the information required to be stored, including the source of the communication, its destination, the date, time and duration of the communication. Section 187A(4)(a) excludes: ‘information that is the contents or substance of a communication’. An amendment designed to gain bipartisan support in order to pass the bill included a concession to journalists that provides very limited protection if the communication was with a source. Section 180H of the Act requires a warrant to access the communication of journalist.

There was a chorus of opposition to the new laws, mainly from journalists. For example, Paul Murphy, the Chief Executive Officer of the Media, Entertainment, and Arts Alliance, stated ‘Accessing metadata to hunt down journalists' sources, regardless of the procedures used, threatens press freedom and democracy’.  

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Apart from increasing the reach of the surveillance state, the laws are arguably in breach of the *International Covenant of Civil and Political Rights*, Part III, Article 17(1) states: ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation’. The Universal Declaration of Human Rights contains the same wording with the exception of ‘unlawful’.

The justification for the laws is largely limited to the generalities as expressed by Attorney-General, George Brandis in terms of the need to fight against terrorism and paedophilia. The use of paedophiles to promote the laws is presumably to suggest that anyone who does not support the laws does not want to catch such hated criminals.

In 2014, the European Court of Justice issued a directive that the retention of mass data was invalid. The European Parliament had issued Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks. The High Court of Ireland and the Constitutional Court of Austria had asked the Court of Justice to examine the validity of the directive. The Court emphasised the fundamental right to a private life.

The effectiveness of meta-data laws, as with other specifically focused anti-terrorism laws, is very doubtful. France had metadata laws in place at the time of the Charlie Hebdo shootings in Paris in January 2015, but they did not prevent that tragedy, and examples of the effectiveness of the laws are not provided by their promoters.

**National Security Secrecy**

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407 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A(XXI) of 16 December, 1966 with entry into force on 23 March 1976.
The National Security Information (Criminal and Civil Proceedings) Act 2004[^10] is legislation that falls within the anti-terrorist category; however, it has much broader application and can be applied wherever a national security issue is raised in a federal criminal trial. It is an extraordinary piece of legislation that claims to be designed to protect national security but strikes at the very fundamentals of an accused’s right to a fair trial. It allows the prosecution to proceed without providing full disclosure, requires the defence to disclose information they otherwise would not, allows the court to exclude the accused and their counsel from a hearing where it relates to a national security issue, allows admissibility issues about national security to be heard in a closed court, provides a definition of ‘national security’ that is so broad that it allows state agencies to hide their own illegal abuses of the law from scrutiny, and introduces severe penalties for non-compliance with the Act. As with other significant anti-terrorist legislation, it emphasises procedure over substance, gives significant powers to the Attorney-General, and provides extremely broad definitions.

The object of the Act is stated in section 3 is to ‘prevent the disclosure of information in federal criminal proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice’. A court is required to have regard to the object when performing its functions.

The proviso ‘except to the extent that preventing the disclosure would interfere with the administration of justice’ is neat, but when other sections of the Act are applied it becomes virtually meaningless.

Section 6 of the Act stipulates that it applies to all federal criminal proceedings where a prosecutor gives notice. Section 13(2) clarifies any doubt about the extent of criminal proceedings and therefore the coverage of the Act by including: ‘a bail proceeding; a committal proceeding; the discovery, exchange, production, inspection or disclosure of intended evidence, documents and reports of persons intended to be called by a party to

[^10]: See Appendix A for sequence leading to final form of enactment.
give evidence; a sentencing proceeding; an appeal proceeding; a proceeding with respect
to any matter in which a person seeks a writ of mandamus or prohibition or an injunction
against an officer or officers of the Commonwealth (within the meaning of subsection
39B(1B) of the Judiciary Act 1903) in relation to: (i) a decision to prosecute a person for
one or more offences against a law of the Commonwealth; or (ii) a related criminal justice
process decision (within the meaning of subsection 39B(3) of that Act); and (g) any other
pre-trial, interlocutory or post-trial proceeding prescribed by regulations’. 

The Act applies to proceedings where disclosure is likely to prejudice ‘national security’
and includes an attempt made to define ‘national security’. This attempt is made in
Division 2, sections 8, 9, 10, and 11. Julian Burnside QC makes the point that the
definition is so wide that national security could be affected if evidence was brought
showing:

1. that a CIA operative extracted a confession by use of torture;
2. operational details of the CIA, Interpol, the FBI, the Australian Federal Police,
the Egyptian Police, the American authorities at Guantanamo Bay, etc; or
3. the use of torture or other inhumane interrogation techniques by any law
enforcement agency.411

The scope for abuse is substantial, and evident from reports into abuses of prisoners in
Abu Ghraib. Interrogation techniques used in Guantanamo, Afghanistan and Iraq involved
stress positions, isolation for up to 30 days, exploiting fear of dogs, removal of clothing,
sleep and light deprivation.412 Those torture techniques were seemingly approved and
would probably be excluded from disclosure in an applicable case in Australia if the
National Security Information (Criminal and Civil Proceedings) Act 2004
was invoked. The use of torture by the United States in Guantanamo, Afghanistan and Iraq is not an
aberration that can be dismissed as happening in unique circumstances confined to a short
period of time.413 There is substantial evidence that the United States has a disgraceful

412 Steven Strasser (ed), The Abu Ghraib Investigations: The Official Reports of the Independent
Karen Greenberg and Joshua Dratel (eds), The Torture Papers: The Road to Abu Graib
(Cambridge University Press, 2005).
history of funding murderous regimes that engaged in torture, and of using the CIA to fund others to torture on their behalf.\textsuperscript{414}

Section 21 provides for pre-trial conferences where the prosecutor has issues about disclosure. Section 22 allows arrangements to be made about disclosure between the prosecutor and the defence. Section 23 governs the storage, handling and disposal of information disclosed in court. Section 24 requires the prosecution and defence to advise the Attorney-General if they believe they will disclose information that relates to or affects national security. Considering the very broad definition of national security contained in the \textit{Act}, the application of the section could keep the lawyers and the Attorney-General very busy. This section imposes on the defence a disclosure requirement that is not usual in a criminal trial, where defence disclosures prior to the presentation of the defence case are very limited; and subject to being waived by the trial judge in the interests of justice. The section also has the potential for restricting cross examination, and otherwise crippling a trial through continual adjournments whilst the decision of the Attorney-General is sought. Section 25 relates to witnesses not disclosing evidence that relates to or may affect national security. It has similar procedural and fairness problems as section 24.

Section 26 allows the Attorney-General to give a non-disclosure certificate identifying for the potential discloser what they can not disclose. If a non-disclosure certificate is given pursuant to section 27 and 28, the court must hold a hearing to determine what order to make pursuant to section 31. As part of process the court must have a closed hearing pursuant to section 29.

The defendant and his lawyer can be excluded from the hearing if they do not have appropriate security clearances. It would probably be very unlikely that a criminal

defendant would be given a security clearance. Moreover, the basis for not granting a
security clearance is not open to meaningful review.

Under section 30 the Attorney-General can intervene on behalf of the Commonwealth.
Pursuant to section 31 the court can decide whether to admit the contested information or
witness evidence or not, however, when making this decision subsections (7) and (8) are
relevant. Subsection (8) requires the court to give greatest weight to the Attorney-
General’s certificate which is designed to exclude information or witness evidence; and
without having fully tested the basis for the granting of the certificate. This factor alone is
sufficient to say that the proviso in section 3 that states, ‘except to the extent that
preventing the disclosure would interfere with the administration of justice’ is neat but
virtually meaningless.

Ian Barker QC describes the impact of the Act as effectively taking from the court and
giving to the executive the power to determine whether a claim for public interest
immunity has been made out. Former High Court Justice Michael McHugh added his
voice to those who found the legislation repugnant, stating: ‘It weights the exercise of the
discretion in favour of the Attorney-General and in a practical sense directs the outcome
of the closed hearing. How can a court make an order in favour of a fair trial when in
exercising its discretion, it must give the issue of fair trial less weight than the Attorney-
General’s certificate?’ Spencer Zifcak notes that non-disclosure allowed by section 31
of the Act gives paramountcy to broadly defined national security over the interests of
justice, and concludes that if the balancing exercise previously found necessary by the
High Court is not followed then ‘from the human rights perspective, that would be a most
damaging outcome’. The fact that non-disclosure could result in a fair trial being given

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415 Ian Barker QC, ‘A geriatric barrister’s yearning for the good old days’ (2009) NSW Bar
Association News 14, 12.
117, 125. McHugh stresses that the legislation is an attempt to reverse the decisions in Sankey v
Whitlam (1978) 142 CLR 1 and Alister v R (1984) 154 CLR 404 that require courts, not the
executive, to determine if public interest immunity is made out: Ibid 125.
417 Spencer Zifcak, ‘Counter-terrorism Laws and Human Rights’, Paula Gerber and Melissa Castan
(eds), Contemporary Perspectives on Human Rights Law in Australia (Lawbook 2013) 443. Zifcak
relies on s 31 of the Act breaching Article 14(1) of the International Covenant on Civil and
less weight than it should, means that if it resulted in a conviction it probably was not a fair trial. The Act makes the unfair result legally acceptable, thus placing such cases squarely in a parallel legal system where the various participants who apply the law have a fractured relationship.

Conclusion
The introduction of the control orders and preventative detention orders into the Criminal Code 1995 has removed the necessity for the right to liberty to be preferred over detention. There is also no need to apply the requirements of a fair trial, such as disclosure and appropriate legal representation, when making orders or imposing preventative detention. There is also no requirement that a person actually be charged with a criminal offence for an order or preventative detention to be imposed. In the event that a person is eventually charged and goes to trial, the National Security Information (Criminal and Civil Proceedings) Act 2004 can result in the trial being unfair. The definition of terrorism in the Code allows for people to be charged with a terrorism offence who should be dealt with through the traditional criminal justice system where fundamental legal rights play a significant part. The Code also allows for Ministerial outlawing of organisations and imposes severe appeal restrictions. It introduces, as a strict liability offence, associating with a listed organisation and reverses the onus of proof for an accused. Additionally, the Code introduces the offence of planning a terrorist act that is so encompassing that it could result in a conviction on ambiguous evidence, and is so broad it verges on making it a crime to have juvenile thoughts about engaging in destructive acts. Apart from the planning and association offences, the substantive terrorism offences contained in the Code are in fact comprehensively covered by pre-existing criminal laws. The next chapter examines the dramatic growth in powers given to the Australian Security Intelligence Organisation that are substantially more draconian than those contained in the Criminal Code.

Political Rights to support his proposition that it is damaging to human rights, specifically that part which states: ‘All persons shall be equal before the courts and tribunals’, ibid 439.
Chapter 6

ASIO Powers in the 21st Century: Further Restricting Fundamental Rights

This chapter examines the legislation introduced since 11 September 2001 to enhance the powers of the Australian Security Intelligence Organisation and its affiliated agents. It highlights some of the ways the legislative changes adversely impact on fundamental legal rights and civil liberties more generally. The powers examined are those that allow the detention and questioning of suspects and non-suspects, the penalties that can be imposed for the failure to supply information, limitations placed on contact with lawyers, special intelligence operations that allow ASIO agents to engage in criminal activities, and secrecy provisions that keep ASIO activities hidden from public scrutiny.

A number of amendments to the Australian Security Intelligence Act 1979 have been made in the 21st Century. The move for change commenced with the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002. The proposed legislation was designed to give ASIO new powers to detain and question: it was introduced into the Australian Parliament on 21 March 2002. The legislation was delayed by the Senate. It was reintroduced in the House of Representatives, with some amendment, as the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No.2] in March 2003. It was assented to on 23 July 2003 as the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 that inserted Division 3, Part III into the Australian Security Intelligence Organisation Act 1979. The ASIO legislation Amendment Bill 2003 made further changes to Division 3 of the Act that increased the amount of time during which a person could be questioned if they use an interpreter or the person being interviewed has a physical disability. A detailed history of each amendment is not included in this work.418 It is significant that when Division 3 was first introduced it had a sunset section 34Y that provided that the questioning and detention powers established by Division 3 of Part III of the Act would cease to be in force from 23 July 2006, just three 3 years after it

418 The endnotes attached to the Act provide a detailed amendment history.
commenced. This was amended in 2006 to repeal section 34Y and introduce section 34ZZ which extended the life of Division 3 by 10 years. It stated: ‘This Division ceases to have effect on 22 July 2016’. The recently introduced *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* has amended section 34ZZ to increase the life of the section, stating: ‘Omit “2016”, substitute “2026”’, which is clearly inconsistent with the reason for having sunset clauses, that is the knowledge that the law should not remain and that it only exists to meet an emergency that cannot be dealt with by existing laws. In the case of ASIO there has been no independent review of the expansion of its powers, nor any evidence provided that shows the need to extend the life of the legislation. Reference is made in Chapter 7 to parliamentary consideration of the legislation.

The changes have resulted in a major shift in the functions of ASIO, from a focus on surveillance and vetting for employment purposes to an emphasis on evidence gathering using interrogation and detention to elicit information about criminal activities that have been placed under the banner of terrorism. ASIO has also been given legal authority to conduct Special Intelligence Operations (SIO) with extensive immunity from prosecution for criminal activities.

*Australian Security Intelligence Organisation Act 1979* special powers for investigation

Division 3 of the *Australian Security Intelligence Organisation Act 1979*, as amended in 2003, gives special powers for the investigation of terrorism offences. These powers can reasonably be described as draconian. They allow for detention for a continuous period of 168 hours (7) days without charge,\(^{419}\) for restrictions of communication, substantial limits on what lawyers can do to assist and severe penalties for non-compliance. The warrants can be in force for 28 days.\(^{420}\) The Division allows people to be detained and questioned who are not even suspected of a crime, nor suspected of being a person who might commit a crime, nor suspected of being a terrorist or potential terrorist. These provisions

\(^{419}\) Section 34S *Australian Security Intelligence Organisation Act 1979*.
\(^{420}\) s34E(5), s34H(8) Ibid.
are unique in the legal history of Australia and ignore the right to silence and the presumption of innocence.

The reason for the broad scope of the legislation probably has a number of parts: first, detention restrains people who might become involved in a terrorist act; second, it stops a detained person from warning others that they could be under investigation; third, it could allow for information to be gathered through interrogation to assist the capture of terrorists; and four, a confession to a terrorist act could be obtained. This may not be a comprehensive list. Apart from the very real potential for innocent people to have their right to liberty removed for no good cause, the investigative approach lacks any evidence to support its efficacy when compared with other investigatory methods that do not derogate fundamental legal rights. The scope for law enforcement agents to abuse people by detaining them under this legislation is extensive. The most obvious way the powers can be used to abuse people is by the targeting of individuals from certain racial or religious backgrounds. This type of targeting is obviously discriminatory. Targeting is a feature of law enforcement and has been for many years. Aboriginals are often targeted by police, as are people who appear to be poor and yet have possessions of some value. However, where such people are targeted the police are restrained by the law to stopping and searching. As offensive as this type of law enforcement is, in the traditional criminal justice system there are no powers to detain a non-suspect for lengthy periods of time.

**Questioning Warrants**

The Division allows the Director-General to seek the consent of the Minister to issue a questioning warrant pursuant to section 34D of the *Act*. This warrant is meant to be distinct from a questioning and detention warrant that the *Act* also governs. The distinction lacks substance because a person the subject of a questioning warrant cannot refuse to be questioned and is in effect detained for the period of questioning and for longer if desired. The warrant is issued by an ‘issuing authority’: a Judge appointed by the Minister pursuant to section 34AB. The requirement for an issuing authority removes the need to seek the assistance of a Federal Court judge who may not be suitable to ASIO or the Minister.
Under section 34D(4) the Minister needs to be satisfied of the following:

(a) that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and
(b) that relying on other methods of collecting that intelligence would be ineffective; and
(c) that there is in force under section 34C a written statement of procedures to be followed in the exercise of authority under warrants issued under this Division.

The authority may issue a warrant subject to any changes sought by the Minister if ‘satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence’. However, the issuing authority is not empowered by the Act to be satisfied that ‘relying on other methods of collecting intelligence would be ineffective’, that is a matter for the consideration of the Minister alone. The issuing authority has to rely on whatever information the Minister decides to provide before signing a warrant: making the requirement for an issuing authority to be involved appear to be no more than procedural. Burton, McGarrity and Williams point out that there is no definition of ‘intelligence’, the ‘intelligence must only be “important” (not “necessary”)’, and that the ‘person subject to the warrant need not actually possess any intelligence’. Additionally, that “‘in relation to’” goes significantly beyond what might be regarded as the main aims of the Special Powers Regime, being to either prevent terrorist acts or enable the prosecution of terrorism offences’. The combination of factors, they point out, allows for questioning of ‘a friend or family member of someone suspected by ASIO to have some sort of current or past connection with terrorism, or even an academic, journalist or innocent bystander’.

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421 s34E(1)(b) Ibid.
423 Ibid.
424 Ibid.
The inclusion of an issuing authority, who can be anyone appointed by the Minister, can be regarded as nothing more than an attempt to provide the appearance of having an independent authority separating the Minister from a coercive investigative function.

The person specified in the warrant must then appear before a prescribed authority for questioning pursuant to section 34E(2). The person subject to the warrant can contact a lawyer (s34E(3)) but subject to conditions that would normally only be found under authoritarian state governance. The restrictions and an analysis of them are provided later in this chapter.

The person can then be questioned before a prescribed authority, basically a former or current judicial officer appointed by the Minister pursuant to section 34B of the Act. If the person appointed is a judicial officer this appointment places them in the position of engaging in a policing function.

In the event that a person the subject of a questioning warrant wants to end the process and leave the interrogation, and the interrogators do not want them to leave, the chief interrogator (prescribed authority) can simply give a direction that the person be detained: s34K(1)(a). There is no requirement for reasons to be given for the detention, no need to charge the person with any offence, no need to bring the person before a court for the purpose of consideration of bail, as the power is unfettered. In effect the fundamental right to liberty is removed by fiat of a state operative. The High Court, as examined in Chapter 2, has held in a number of cases that the involuntary detention of a citizen was the exclusive function of the courts except in, as yet to be settled, exceptional cases. The support for the exceptions being that the detention is not punitive in nature.425 In the case of a non-suspect Australian citizen being taken into custody, it can be argued that any right thinking person would regard such detention as punitive and therefore an infringement of provisions of Chapter III of the Constitution.

Questioning and Detention Warrants

Where it is decided to go directly to detention for the purpose of questioning, the procedures are specified in sections 34F and 34G of the Act. The Director-General seeks the consent of the Minister to request a warrant and, subject to some procedural requirements and with the Minister agreeing, the Director-General seeks the warrant from an issuing authority: s34F. The issuing authority can then authorize the warrant pursuant to section 34G for a period remaining in force of not exceeding 28 days. The procedures are basically the same as for a questioning warrant. Once the person is taken into custody by the police they must be brought before the prescribed authority (the person appointed by the Minister for the purpose): s34H. The prescribed authority must then: tell the person about what the warrant authorizes (s34J(1)); the fact that they must answer questions or they can be convicted of an offence and go to gaol(s34J(1)(c)); that they can complain to the Inspector-General of Intelligence and Security, the Ombudsman or the police, presumably any complaints need to be made after the interrogation and a complaint to the police is made to those other than involved in the arrest and interrogation(s34J(c)(i)(ii)(iii)); that the person can seek a remedy from the federal court (ss34J(f)); that the role of the prescribed authority is to supervise questioning and that the supervisor can give directions including those extending the period in detention (s34J(3)); and inform the person about who is present if those present give their consent to being named. In effect a person can be questioned by a group of nameless people, presumably they can be seen, although this is not required in the legislation (s34J(4)); and who tell them every 24 hours that they can seek federal court intervention (s34J(5)).

A ‘Note’ included at the end of s34J(5) highlights the possibility of engaging the Judiciary Act 1903, section 39B and 75(v) of the Constitution. The reference to the Constitutional provision does no more than acknowledge what cannot be changed without a referendum. The reference to the federal court requires the person being interrogated to have an understanding of the law or a lawyer who understands and is willing to seek a remedy. The provision is very different to the common law requirement that a person be brought before a court as soon as possible after their arrest.
The prescribed authority has additional powers that can be seen as a threat or inducement to answer questions. The prescribed authority has powers outlined in section 34K to detain the person, give directions for arrangements about the person’s detention, allow the person to make contact with an identified person, defer questioning, give a direction for further appearance and give a direction that the person be released.

The powers to detain and question under threat of penalty are strikingly different to the common law, criminal statutes and laws of evidence. For example, in the traditional criminal justice system at the end of questioning by police a suspect is seen by another police officer and asked, in the absence of the interrogators, ‘has any threat, promise or inducement been held out to you to answer questions’. The reason for this question is well established in the common law and statute law. Gibbs CJ, in *Cleland v The Queen*, held that confessions that were not voluntary were inadmissible, and even if the evidence was given voluntarily but in circumstances where it would be unfair to admit the evidence, there was discretion to exclude it. Gibbs CJ stated:

> The principles governing the admissibility of confessional evidence are not in doubt. . . . A confession will not be admitted unless it was made voluntarily, that is in the exercise of a free choice to speak or be silent. But even if the statement was voluntary, and therefore admissible, the trial judge has a discretion to reject it if he considers that it was obtained in circumstances that would render it unfair to use it against the accused.

In a criminal case not involving Division 3 of the *Criminal Code*, the person being interviewed would be cautioned and not threatened with gaol if they did not answer, if the police conducting the interview expected to receive an admissible answer. The reliability of any answers given in such circumstances is also not properly considered by those who support threatening tactics as a method of getting answers. As referred to in Chapter 2, the criminal law has developed over centuries and gradually come to a stage where oppressive, threatening and other inappropriate behaviour was disapproved of for the purpose of wringing confessions out of individuals. The 21st Century has seen a move

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back to the 18th Century and earlier when crude methods were employed by those wanting to extract a confession. The individual is being, once again, exposed to state power without significant protections.

Restrictions on Communication

Under section 34K(10) communication by the person in custody can be severely restricted. The section allows the ‘prescribed authority’ to prevent the person ‘from contacting, anyone at any time while in custody or detention’, except as otherwise allowed under the warrant as provided for in subsection (11).

Under section 34K(11) a complaint can be made to the Inspector-General of Intelligence and Security, the Ombudsman about the Australian Federal Police, and the Australian Federal Police. Additionally, facilities must be made available for oral or written complaints. The provisions that allow for complaints about the detention are essentially just allowing a complaint to the gaoler.

The powers under this section are extraordinary. Holding a citizen effectively in secret has no lawful precedent in Australian legal history.

Penalties for Not Giving Information

Section 34L of the Act introduces severe penalties for not giving information or producing things, and it also reverses the onus of proof where there is non-compliance. The section removes the right to silence and imposes a series of penalties of 5 years imprisonment for: not attending for questioning; failing to provide the information sought, with the unusual addition that the subsection does not apply if the person does not have the information, although the person must prove they don’t have the information; making a false or misleading statement, but the subsection does not apply if the person can prove they did not make a false or misleading statement; failing to produce a record or thing, but the subsection will not apply if the person can prove they did not have the record or thing.
Section 34L(8) allows a person to decline to provide information or a record if the provision of such would incriminate them. In effect, subsection (8) requires a person to declare themselves as potentially guilty of an offence in order to avoid answering questions, and subsection (9) provides an inducement to answer by making the answer inadmissible in criminal proceedings. This procedure involves asserting that an answer would incriminate in order to avoid answering a question, thus effectively telling the interrogator that an offence has been committed. This type of privilege against self-incrimination is usually reserved for times when evidence is being given in a court by a competent and compellable witness in a criminal case, or before a Royal Commission or other lawfully constituted inquiry. Subsection (9) provides for a situation where the answer is given that incriminates by making such evidence inadmissible in a criminal prosecution. It allows for an interrogator to say to a person being questioned that any answer given by them cannot be used against them in a criminal prosecution. The claim that an answer will incriminate is usually to a specific question rather than to a line of questioning. This approach can allow an experienced interrogator to gather at lot of information and to in effect get a confession to a specific offence. For example, a line of questioning can reach a point that places the person at the scene of a crime without the person being able to claim self-incrimination. Hypothetically, the next question could be, ‘Did you shoot X?’ If the claim is then made that the answer would incriminate, the person is in effect confessing, and the answers given preceding it can provide a targeted approach to gathering evidence that will be admissible. However, the person answering the questions may not fully comprehend the approach being adopted and claim self-incrimination at a point when it does not apply. The obvious result of such an error is that the interrogator is misled and the evidence gathered unreliable.

The section allows for a person to be held in secret custody, for people to be forced to hand themselves into custody under penalty of imprisonment, reverses the onus of proof, and if the questions are not answered to the satisfaction of the interrogators, for a gaol term of 5 years to be imposed.
Interpreters Allowed
Section 34M(1) allows for an interpreter to be used where the prescribed authority ‘believes on reasonable grounds that the person is unable, because of inadequate knowledge of the English language or a physical disability, to communicate with reasonable fluency in the language’. Section 34N allows the person being questioned to ask for an interpreter and one to be supplied unless the prescribed authority disagrees. In cases where suspects are being interviewed by the police, the refusal to provide an interpreter when requested could result in the any evidence gathered being found to be inadmissible. Additionally, the lawyer representing the person would normally assist in deciding whether or not an interpreter was required. The obvious point is that where English is a person’s second or subsequent language they may not be aware of the true extent of their comprehension difficulties. This section, coupled with the sections that limit or exclude lawyers, could result in a person with language difficulties giving evidence that is unreliable.

Inspector-General Can Express Concern
Section 34P allows the Inspector-General of Intelligence and Security or an Australian Public Service employee to be present at questioning or when the person is taken into custody. Under section 34Q the Inspector-General can express a concern about impropriety or illegality to the prescribed authority about the exercise of powers under the Division, and this concern is then to be expressed to the Director-General ‘as soon as practicable afterwards’. In order to avoid doubt the prescribed authority ‘must consider the Inspector-General’s concern’: s34Q(3). This enclosed complaints system is not subject to external scrutiny.

Time Limits for Questioning
Section 34R provides a number of very liberal questioning time limits that basically make any limits discretionary. Section 34S limits the detention period to a continuous 168 hours (7 days), however, this limit may not bring to a conclusion questioning or detention. Further interrogation may be able to be done if the warrant is still in force (28 day
allowed), or upon formal release if another warrant is issued. There is no equivalent provision in the traditional criminal justice system.

**Person Must Be Treated with Humanity**

Section 34T specifies that a detained person must be treated with humanity. Section 34T(2) states:

(2) The person must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment, by anyone exercising authority under the warrant or implementing or enforcing the direction.

**Entering Premises and Use of Force**

Section 34U allows the entering of premises at any time on ‘reasonable grounds’ to take a person into custody. Section 34V allows for the use of ‘reasonable’ force to take a person into custody.

**Surrendering Passport and Not Leaving Australia**

Section 34W provides that, if the Director-General has sought the Minister’s consent to issue a warrant, then a person notified of this fact must deliver to an enforcement officer any passports they possess or control. The penalty for non-compliance is imprisonment for 5 years. Section 34Y requires the surrender of passports if a warrant has been issued, and carries a penalty of 5 years imprisonment for non-compliance. Section 34X provides that a person who is notified that a warrant is being sought must not leave Australia without the Director-General’s permission, on penalty of 5 years imprisonment. Section 34Z stops a person leaving Australia where a warrant has been issued and carries a penalty of 5 years imprisonment for non-compliance. The clear difference with traditional criminal law procedures is that restrictions on travel can be imposed on a person by a judicial officer only after a criminal charge has been laid and there has been a formal bail hearing. There is also scope for any a bail condition to be altered through the court process. Under the Act it is up to the Director-General whether restrictions on travel are imposed, and such restrictions can be put in place before a questioning or a questioning and detention warrant is authorized. The only requirement is that the person must be notified.
**Video Recording of Procedures**

Section 34ZA requires that the Director-General must ensure that video recordings are made of a person’s appearance before a prescribed authority for questioning or any other matter or thing the prescribed authority directs. The Director-General must also, if practicable, record a person’s complaint. An interesting aspect of this provision is the extent to which any recording would be disclosed to a person subjected to questioning, or a lawyer acting for that person. As the *Act* is currently worded, there is no right for a person accused of an offence to receive a video recording or even view it, and the *National Security Information (Criminal and Civil Proceedings) Act 2004* may be used in addition to other provisions in the *ASIO Act* to deny access. Indeed, there is no requirement that a person be allowed access to a video recording of them making a complaint. This disclosure limitation is markedly different to that provided for in traditional criminal procedural laws. The Director-General is given the statutory approval under section 34ZL to overcome any argument about disclosure by simply destroying records, including video recordings. The destruction of records is discussed below.

**Strip Searches**

Section 34ZB allows a police officer, with the approval of a prescribed authority, to conduct a strip search. Section 34ZC outlines the limits placed on those conducting a strip search.

**Power to Remove, Retain and Copy Things**

Section 34Z allows a warrant to authorize the removal, retention and copying of things.

**Special Rules for Young People**

Section 34ZE provides that the Division does not apply to people under 16 years of age. The section does, however, allow for the issuing of warrants for a person between the ages of 16 and 18 years. In circumstances where the person is in this age range they can be questioned in the presence of a parent or guardian if acceptable to the young person. If a
parent or guardian is not present, a person able to represent the young person’s interests must be present.

**Penalties for Contravening Safeguards**

Section 34ZF provides penalties for those engaged in the exercise of power under Division 3 who go beyond the allowed activities. As much of what happens is in secret, a breach of the laws governing the procedures may be more difficult to discover than is the case where police are engaged in traditional arrest, detention and questioning. Section 34ZG provides a limited group to whom a complaint can be made, and may, when considered in the light of the secrecy provisions, exclude exposure of a complaint to the public gaze though the media. Section 34G allows for complaints to be made about contravention of written procedures in force under section 34C. Section 34C allows the Director-General to prepare a written statement of procedures to be followed when authority is being exercised under a warrant. He does not have to prepare such a written statement, but if he does and the procedures are not followed a complaint can be made to the Inspector-General of Intelligence and Security, the Ombudsman, the Commissioner of Police or someone he has appointed.

The section is unclear about who can make a complaint. Presumably someone who is the subject of a warrant could do so, but it could also apply to anyone within the system. The section provides for 2 years imprisonment for a person who has not followed the written procedures, significantly less than the 5 years for a person subject to a warrant who does not answer a question. The significant difference in penalty seems to reflect the view of those who voted for the legislation, that law enforcement agents who actively go beyond their wide remit require greater consideration than an innocent person who simply remains mute when asked questions.

**Limited Reporting on Activities**

Section 34ZH provides that the Director-General must give the Minister a written report on actions taken under a warrant. Section 34ZI requires the Director-General to provide the Inspector-General with some information. Section 34ZJ allows the Inspector-General
to obtain additional information; and to provide the outcome of inspections in an annual report. Section 34ZK requires the Director-General to inform the Minister and the issuing authority, before a warrant expires, that the grounds for the warrant cease to exist. This procedure provides a very closed system of review and it is significantly different to the traditional criminal justice system where legal representatives for an accused person can gain access to documentation of procedures adopted by the police during the arrest and questioning.

**Destroying of Records**

Section 34ZL mandates the destroying of records, and thereby provides a legislated opportunity to destroy evidence of wrongdoing by the Organisation. It states: ‘The Director-General must cause a record or copy to be destroyed if: (a) the record or copy was made because of a warrant issued under this Division; and (b) the record or copy is in the possession or custody, or under the control, of the Organisation; and (c) the Director-General is satisfied that the record or copy is not required for the purposes of the performance of functions or exercise of powers under this Act.’ Assuming the Director-General was satisfied that a video recording taken pursuant to section 34ZA was no longer required, he must destroy it. This not only provides an opportunity to remove the historical record and thereby deprive individuals of proof of how they were treated when the fundamental right to liberty had been taken away from them, it also hides the Organisation from any subsequent investigation designed to examine its worth. The destruction of records is, however, not limited to video recordings, but concerns also any activity covered by Division 3.

This section is potentially one of the strongest secrecy provisions in the Act, in that it simply removes evidence rather than restricting access. Sections 27 and 29 of the Archives Act 1983, that require the release of records after 15 years, are obviously nugatory if the Director-General so decides. The result being that historical oversight of wrongdoing cannot be undertaken.
Status of Issuing and Prescribed Authorities
Section 34ZM gives an issuing authority or a prescribed authority the same protection and immunity as a Justice of the High Court. This is an extraordinary provision because it allows interrogators who largely operate in secret the same protections as a judicial officer functioning in court with assistance from both prosecution and defence counsel.

Limits on Contact with Lawyers
The next most significant section in Division 3 of the Act concerns the limits placed on contact with lawyers. Section 34ZO and subsequent sections of the Act allow a person to be denied their choice of a lawyer or a lawyer at all, and also impose limits on what a lawyer can do to assist, beyond those limits usually applied by the criminal law and ethical rules. The tone is set for the subsequent sections in section 34ZO which basically says, ‘a lawyer will only be able to be contacted if the prescribed authority allows’. Section 34ZO(b) states, *inter alia*, ‘the subject may be prevented from contacting a particular lawyer of the subject’s choice if the prescribed authority concerned so directs’. The section couches the discretion in very wide terms that are not subject to testing.

Subsection (2) provides the framework for the exercise of the discretion, stating: ‘(2) The prescribed authority may so direct only if the authority is satisfied, on the basis of circumstances relating to that lawyer, that, if the subject is permitted to contact the lawyer: (a) a person involved in a terrorism offence may be alerted that the offence is being investigated; or (b) a record or thing that the person may be requested in accordance with the warrant to produce may be destroyed, damaged or altered’. In case it could be argued that section 34K(11)(a) allows for contacting of people permitted under the warrant, for example a lawyer, subsection (3) of section 34ZO removes that possibility stating: ‘(3) This section has effect despite paragraph 34K(11)(a)’. In case the subject of the warrant wanted to contact another lawyer the prescribed authority did not like, subsection (4) removes that option stating: ‘(4) To avoid doubt, subsection (1) does not prevent the subject from choosing another lawyer to contact, but the subject may be prevented from contacting that other lawyer under another application of that subsection’.

The removal of lawyers from even giving advice, prior to interrogation, removes a fundamental legal right. As part of the common law and criminal statutory law in
Australia and in the common law world, an individual has a right to at least seek legal advice before being questioned by the police. That right is effectively removed by section 34ZO if a person is the subject of a warrant under Division 3 of the Act.

Section 34ZP allows for questioning in the absence of a lawyer. It has always been open for the police to question a person in the absence of a lawyer, if the person did not want one present. In order to avoid any doubt section 34ZP(1) removes the need for a lawyer to be present during an interrogation, stating: ‘To avoid doubt, a person before a prescribed authority for questioning under a warrant issued under this Division may be questioned under the warrant in the absence of a lawyer of the person’s choice’. The Act then contains a ‘Note’ providing what the parliament must have seen as a justification for removing a legal right. It states: ‘As the warrant authorises questioning of the person only while the person is before a prescribed authority, the prescribed authority can control whether questioning occurs by controlling whether the person is present before the prescribed authority’. This purported justification fails to take into account the fact the prescribed authority is not acting in a judicial capacity, does not even have to be a judicial officer, and most importantly is the inducer holding out threats of criminal penalty if questions are not answered. The prescribed authority is not present to represent the interests of the person being interrogated or to offer legal advice to the person: the prescribed authority is in fact one of the interrogators. Subsection (2) says that a person should not be questioned when the Division does not allow the person to be questioned, for example, if an interpreter is needed.

Section 34ZQ is poorly drafted but probably requires the monitoring of calls to a person who has a legal relationship with the person being questioned. Subsection (1) states: ‘This section applies if the person (the subject) specified in a warrant issued under this Division contacts another person as a legal adviser as permitted by the warrant or a direction under paragraph 34K(1)(d)’. Subsection (2) states:

Contact to be able to be monitored
(2) The contact must be made in a way that can be monitored by a person exercising authority under the warrant.
It can be assumed that an interrogator would be present listening or by way of external recording, but they would need to be in a position to stop any discussion if they could not hear it. Subsection (3) states that, ‘subsection (2) does not apply in relation to a warrant issued under section 34E if the contact is in circumstances covered by paragraph 34E(3)(a)’. This is simply saying that the call does not need to be monitored, not that it cannot be monitored, while a lawyer is speaking to his or her client and presumably providing advice and taking instructions, presuming the prescribed authority allows a lawyer to be contacted at all.

Subsection (4) requires that the legal adviser be given a copy of the warrant but nothing else. This is extraordinary when compared with the criminal law, as distinct from supposed politically, religiously or ideologically motivated crimes. It would be usual for a lawyer to know matters of substance about what was alleged or what was wanted before questioning commenced. In the event that insufficient information was provided an accused person would, assuming the lawyer was competent, be advised to say nothing: but the right to silence has effectively been removed by force of the threat of imprisonment under the Division.

Subsection (5) allows for breaks in questioning so that legal advice can be given. Subsection (6) bans the legal adviser from intervening during questioning, or from addressing the prescribed authority, except to request clarification of an ambiguous question. Subsection (7) allows the legal adviser to request an opportunity to address the prescribed authority, but under subsection (8) the prescribed authority can refuse the request. Just in case a mistake was made and a legal representative was allowed who was not tame, subsection (9) allows for the lawyer to be removed. It states: ‘If the prescribed authority considers the legal adviser’s conduct is unduly disrupting the questioning, the authority may direct a person exercising authority under the warrant to remove the legal adviser from the place where the questioning is occurring’. Subsection (10) allows another legal adviser to be contacted, if the prescribed authority allows.

Section 34ZQ(11) reflects somewhat tortured drafting stating: ‘If legal adviser also represents young person, (11) If section 34ZR also applies to the legal adviser in another
capacity in relation to the subject, this section does not apply to conduct of the legal adviser in that other capacity’. Presumably, the subsection is saying that section 34ZR applies if the person being interrogated is a young person. Different procedures apply but the legal representative can still be removed under section 34ZR(2). If this interpretation of subsection (11) is wrong, it matters little because the prescribed authority has wide powers to allow an interrogation to proceed.

The Independent National Security Legislation Monitor recommended the repeal of ‘questioning and detention’ warrants under Subdivision C, Division 3, Part III of the Act, but not ‘questioning only’ warrants. His view was that questioning and detention warrants were ‘not a justifiable further intrusion on personal liberty’.428 His recommendation was not accepted and the sunset provision was extended to 2026, without any acknowledgement that a parallel legal system has been created.

Division 4 of the Act – Special Operations

The next major changes that occurred to the Australian Security Intelligence Organisation Act 1979 were introduced by the National Security Legislation Amendment Act (No.1) 2014, No. 108, which introduced Division 4 into the Act and significantly expanded the powers and operations of ASIO. It is another paradigm shift from the days when ASIO was primarily an agency involved in surveillance and the vetting of people for public service employment. The movement has been from observation and reporting, to active evidence gathering through interrogation of people, to covert operations with wide immunity from criminal prosecution for acts that contain all the elements necessary for a criminal conviction.

Section 35B allows the Director-General, a senior-position holder or an ASIO employee to apply to the Minister for an authority to conduct a special intelligence operation. Section 35C(2) lists the matters that the Minister should take into account before authorising an operation. Subsection (2)(a) is broad, allowing a special intelligence

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operation where it ‘will assist the Organisation in the performance of one or more special intelligence functions’. Subsection (2)(b) requires that ‘the circumstances are such as to justify the conduct of a special intelligence operation’. Subsection (2)(c) introduces approval for unlawful conduct during an operation, stating: ‘any unlawful conduct involved in conducting the special intelligence operation will be limited to the maximum extent consistent with conducting an effective special intelligence operation’. In this context it should be understood that the coverage is for unlawful conduct in Australia, without the constraints normally applied to policing operations where public policy at the very least may stop unlawful activity by police if the application of the criminal law does not. The concern about the use of unlawful means to obtain criminal convictions was clearly expressed in the High Court case of *Ridgeway v R*, where Mason CJ, Deane and Dawson JJ, stated:

> More importantly, the considerations of "high public policy" which justify the existence of the discretion to exclude particular evidence in the case where it has been unlawfully obtained are likewise applicable to support the recognition of a more general discretion to exclude any evidence of guilt in the case where the actual commission of the offence was procured by unlawful conduct on the part of law enforcement officers for the purpose of obtaining a conviction. In both categories of case, circumstances can arise in which the need to discourage unlawful conduct on the part of law enforcement officers and to preserve the integrity of the administration of criminal justice outweighs the public interest in the conviction of those guilty of crime.

ASIO agents and those acting under the protection of the legislation apparently do not have to be concerned about ‘the need to discourage unlawful conduct on the part of law enforcement officers’ or the need ‘to preserve the integrity of the administration of criminal justice’, because parliamentarians have given them the power to avoid consideration of such matters. As examined in Chapter 3, corrupt behaviour by law enforcement agents is very hard to eliminate, and the more power such agents are given the more likely corrupt behaviour will flourish, to the detriment of the whole community.

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430  Ibid [17].
Subsection 2(d) allows for entrapment of a subject but without any overview to ensure that an individual is not induced to commit a crime beyond their normal offending range. It states: ‘the special intelligence operation will not be conducted in such a way that a person is likely to be induced to commit an offence against a law of the Commonwealth, a State or a Territory that the person would not otherwise have intended to commit’.

Subsection (2)(e) provides some limits on the extent of criminality allowed, it states: ‘(e) any conduct involved in the special intelligence operation will not: (i) cause the death of, or serious injury to, any person; or (ia) constitute torture; or (ii) involve the commission of a sexual offence against any person; or (iii) result in significant loss of, or serious damage to, property’. This section should be read in conjunction with section 35K which governs immunity from prosecution for conduct during a special operation and is considered hereunder; and section 35Q which requires reports by the Director-General to the Minister and Inspector-General of Intelligence and Security about special operations, which is also examined later in this chapter. Relevantly, for section 35B to have any meaning in terms of limits on criminality the Director-General would need to tell the Minister and Inspector-General about any unlawful activity not subject to immunity and they would probably have to expose the criminality, for the purpose of prosecution. It should be noted that the subjects of the criminality are not lawfully allowed to expose the crimes committed against them, which if serious may well involve breaches of fundamental legal rights. The difficulty of exposing criminal activity by state agents is not simply a moot point that will not arise because of the integrity of the people holding the power, an extremely weak safeguard at best, but it is compounded by the fact that, although torture is included as an criminal offence for which immunity cannot be claimed, there is no requirement under section 35Q that the Director-General report to the Minister or the Inspector-General that torture has occurred.

Section 35B(3) allows for unconditional or conditional authority to be given for special operations. Subsection (4) allows for written or oral authority from the Minister for a special operation. The section also contains other procedural subsections.
Section 35K provides immunity from prosecution for conduct during a special intelligence operation. There are a series of criminal law enforcement problems where agents of the state commit criminal offences and these go well beyond those already mentioned, relating to the need for three people in positions of power to lift the veil of secrecy before a prosecution can commence. The problems, by analogy, are most clearly manifested where police engage in corrupt behavior or engage in a culture of support for their colleagues who behave in a criminal way. Reference has been made to these problems in previous chapters and to the Fitzgerald Inquiry and Wood Royal Commission. This problem has the potential to be greatly exacerbated where criminal activity is authorised, where secrecy is paramount, and where there is only very limited access to the justice system for those who are the subject of the criminal offending. The perpetrators of the crimes on behalf of the state may simply not tell the Director-General about their criminal offending. Section 35K(1) states: ‘A participant in a special intelligence operation is not subject to any civil or criminal liability for or in relation to conduct’ if it is for the purpose of a special intelligence operation. Subsection (d) requires that ‘the conduct does not involve the participant intentionally inducing another person to commit an offence against a law of the Commonwealth, a State or a Territory that the other person would not otherwise have intended to commit’. Subsection (e) does not allow conduct that: ‘(i) causes the death of, or serious injury to, any person; or (ia) constitutes torture; or (ii) involves the commission of a sexual offence against any person; or (iii) causes significant loss of, or serious damage to, property’.

There are two other sections under Division 4 of the Act that are particularly significant so far as the derogation of fundamental legal rights. The first chronologically is section 35P dealing with unauthorised disclosure of information about special operations. (Other secrecy provisions in the Act are examined, along with other legislated secrecy sections, under the heading ‘The Growth of Secrecy Provisions and Increasing Penalties in Commonwealth Statutes’, in Appendix D.)

The Act allows, pursuant to section 18, a period of 10 years imprisonment for ‘unauthorised communication of information or matter’, and it is arguable that this section
would cover any revelation about a special intelligence operation; however, the Australian parliament in its wisdom has added additional penalties. Section 35P which allows for 5 years imprisonment for disclosing information about a special intelligence operation, and 10 years if they intended ‘to endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation’ or if the disclosed information ‘will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation’.

The second section that has significance is section 35Q that deals with reports by the Director-General. This section requires the Director-General to give the Minister and the Inspector-General of Intelligence and Security a report on special operations that must include the extent to which the operation assisted the Organisation. Section 35Q(2A) requires the Director-General to report whether the operation has, ‘(a) caused death of, or injury to, any person; or (b) involved the commission of a sexual offence against any person; or (c) resulted in loss of, or damage to property’. Presumably, by this caveat, the Director-General is not required to report on other criminal offences that may have been committed, of which there are very many possibilities, and the most common committed by Western security agencies is torture.

**Conclusion**

Since 2001 there has been a growth in anti-terrorism legislation that has seen the introduction of control orders, preventative detention, and powers given to ASIO to detain and question in secret anyone it deems of interest. ASIO has also been given special operations powers that allow it to engage in criminal activities. Its activities are cloaked in secrecy and those who do not comply with its dictates can be imprisoned for substantial periods of time. The anti-terrorism laws contained in the *Australian Security Intelligence Organisation Act 1979* provide further evidence of the extent of unprecedented restrictions on fundamental legal rights. The laws can properly be described as draconian and they go much further than any laws introduced at the height of the Cold War in the 1950s and 1960s. An analysis of the laws has also revealed their high potential to allow the collection of unreliable evidence whilst at the same time removing the right to liberty.
from individuals who are not even suspected of committing criminal offences. Furthermore, because of the powerful secrecy provisions contain in the Act, there is greater potential for abuses by law enforcement than exists under the traditional criminal laws, abuses that can directly impact on the right to a fair trial and that are criminal.

The anti-terrorism laws have been endorsed by both Labor and Liberal-National governments as well as State governments. In Chapter 7 an examination is made of the reasons given by Australian parliamentarians for their support for the laws.
Chapter 7

Reasons Given by Parliamentarians for Anti-Terrorism Legislation

The reasons given by parliamentarians for the introduction and growth of anti-terrorism legislation that diminishes fundamental legal rights were originally based on the need for preventative laws to meet the new terrorist threat, as described in Chapter 1. In this chapter an examination is made of parliamentary debates, along with consideration of some statements made by politicians outside of parliament. This examination is made in order to assist in evaluating their motivations to determine, if possible, whether they truly believe that there is a threat from terrorists that requires laws that derogate fundamental legal rights. The examination is also made to determine the extent of their understanding of the scope of the laws and whether or not they properly considered whether existing criminal laws were adequate before supporting the legislation. Additionally, the debates are examined to determine whether or not they based their decisions to support the laws on evidence showing they would be effective. The examination in this chapter also focuses on whether or not the parliamentarians considered the potential for abuse under the cloak of secrecy provisions contained in a number of the provisions.

The parliamentary debates that are considered relate to the Security Legislation Amendment (Terrorism) Act 2002 and other related legislative changes, the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003, the Anti-Terrorism Act (No.2) 2005, the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 and the National Security Legislation Amendment Act (No.1) 2014. The debates around these legislative changes have been chosen because they highlight the main developments in the laws and they show significant changes in the willingness of parliamentarians to acquiesce to increasingly draconian legislation. The range of reasons given for the anti-terrorism laws, as will be shown, is very limited. The debates chosen are sufficient to show the full range of reasons and consideration of other legislatives debates would involve unnecessary repetition.

Parliamentary Debates in 2002

The Security Legislation Amendment (Terrorism) Act 2002 introduced a definition of a terrorist offence and offences such as belonging to a terrorist organisation and planning a terrorist attack. The legislation was introduced in parliament on 12 March 2002 and was passed as amended by the Senate on 27 June 2002 with assent given on 5 July 2002. It was part of a package of legislative changes said to meet Australia’s obligations under United Nations Security Council Resolution 1373. The debate surrounding the legislation was superficial, with no relevant analysis being made of existing laws or how the new legislation would impact on fundamental legal rights as they might apply in the trial process.

During his second reading speech Liberal Attorney-General, Daryl Williams noted that ‘there was no specific threat to Australia at present’, but said that terrorists ‘through violent and intimidatory methods, are actively working to undermine democracy and the rights of people throughout the world’. The Liberal member for Wentworth Peter King probably reflected the motivation of many parliamentarians when he stressed the need to support the United States. He stated, *inter alia*, ‘It is important to note that Australia has made the decision that President Bush called on all nations of the world to make, to commit itself to driving out terrorism not only from this country but, by doing what we can, from around the globe itself.’ He went so far as to support the removal of the requirement for a person to have an intention to commit a criminal offence, without giving any cogent reasons for its removal. He stated on this issue:

Importantly, the person's mental state is not relevant. That, of course, is important, because it is often extremely difficult for the defence forces and the police to determine whether a person who is holding a weapon or is in proximity to those who appear to be conducting terrorist activities has a criminal intention or, more

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432 See detail in Chapter 5 and Appendix B.
435 Ibid 1043.
importantly, could be proved in court to have such an intention. This legislation, in the unusual circumstances of the case, ensures that that normal requirement of criminal legislation is waived. In my view it is a proper, supportable measure.\footnote{Ibid 1158.}

This level of analysis of the existing criminal law is both rudimentary and wrong. The example King uses of a person holding a weapon shows both contentions. If a person is holding a weapon, the example used, without lawful excuse, they have committed a criminal offence. If they attempt to use the weapon, in otherwise than a lawful way, they have committed a criminal offence. If they attack anyone with the weapon, except in self-defence, they have committed a criminal offence. The proof of the intention can be inferred from the facts. King’s emphasis was on ‘doing all we can to eliminate terrorism not only from our country but from the globe’. He did not provide any examples of terrorism in Australia that need to be removed or what limits, if any, should be placed on methods used to ‘eliminate terrorism’.

The Labor Leader of the Opposition, Simon Crean, made clear that legislation ‘to more effectively counter terrorism is essential and we support it’, and that ‘as a nation we must be tough on terrorism’.\footnote{Simon Crean, \textit{Second Reading Speech}, House of Representatives, Official Hansard, 13 March 2002, 1142.} His contribution to the debate was limited and his only reference to rights or freedoms was in respect of the power to ban organisations, when he stated: ‘The extraordinary new powers must be examined in great detail. Protecting our freedoms is as important as protecting our security’.\footnote{Ibid 1146.} Labor member and future Attorney-General, Robert McClelland, referred to the ‘interaction between terrorism and civil rights’ and stressed that: ‘I am one of those persons who say that the most fundamental human right that citizens have is the right to security – and we are of course protecting Australian citizens’.\footnote{Robert McClelland, \textit{Second Reading Speech}, House of Representatives, Official Hansard, 13 March 2002, 1160.} He went on to endorse the views of ‘the modern human rights’ thinker Thomas Hobbes and his promotion of the concept of a ‘strong state’ as securing a ‘civil society free from arbitrary violence’.\footnote{Ibid 1160.} Labor member Daryl Melham stressed that there were a number of areas where the proposed legislation needed further

\textsuperscript{437} Ibid 1158.  
\textsuperscript{439} Ibid 1146.  
\textsuperscript{441} Ibid 1160.
scrutiny, including: the wide definition of terrorism; the use of absolute liability offences; and the wide powers given to the Attorney-General or a minister to proscribe an organisation. He also noted that the Opposition was expected to consider the legislation overnight. With such a short time to consider the legislation the opposition members, at least, could be forgiven for not referring to existing criminal laws and how they may apply, or considering how the proposed legislation before them had similarities to the Menzies legislation banning the Communist Party in the 1950s. However, the Liberal-National government had no such limitations, having prepared the Bill for consideration by parliament. The sole reference by government members to existing criminal laws was a misleading passing comment by Peter King, referred to above.

Leader of the Opposition in the Senate, John Faulkner, referred briefly to the attempt to ban the Communist Party in the 1950s and said that historically ‘proscription has been a tool of political repression not law enforcement’. But he said that as long as the legislation was ‘properly focused on terrorists’ and there was a review process, the Labor opposition would support the legislation. The emphasis from Labor Senators was on how they forced amendments to the legislation. Senator Kate Lundy stressed that the government in its ‘haste to respond . . . sought to quash democratic freedoms along with terrorist threats – freedoms such as the presumption of innocence, freedom of association and the right to protest’. Further, she noted that in the Bill and related bills treason was so widely defined that ‘organisations such as the Red Cross and Amnesty International could have been exposed to criminal liability’. The amendments made did reduce the adverse legal impacts of the legislation, but they did not eliminate them, as shown in Chapter 5. Liberal Senator, George Brandis, conceded that the legislation in its amended form removed ‘absolute liability and . . . the original idea of a reverse of proof in respect of fault elements from terrorism offences’. When he became Attorney-General in the

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443  Ibid 1152.
445  Ibid 2338.
446  Kate Lundy, Second Reading Speech, Senate, Official Hansard, 20 June 2002, 2343.
447  Ibid 2344.
Abbott Liberal-National government, he successfully introduced anti-terrorism legislation that contained absolute liability offences and reversed the onus of proof.

Labor Senator Nick Bolkus emphasised the valuable work done by Labor opposition members to have the legislation amended. His emphasis was on democratic values and ‘for those of us deliberating these values to do so soberly, calmly, after balanced consideration.’ He noted the spread of the United States’ global activities as part of the anti-terrorism agenda and argued that an invasion of Iraq was antithetical to Australia’s interests. He stated: ‘Australia's indecent haste in lining up behind the hawks of the Bush administration as opposed to others in the administration does not serve our national interest nor does it serve the interests of world peace’. He made no relevant reference to how the laws impact on fundamental legal rights.

Speaking for the Greens, Senator Bob Brown expressed ‘total opposition’ to the legislation, foreshadowing an amendment to include a sunset clause that would allow a review in 5 years. Relevantly, he noted that the government, by regulation, had already banned the ‘PKK, the Kurdish freedom organisation, and the Sikh Youth Federation’, and that in ‘the future the government could ban separatist Papuan or Tibetan organisations’ under the provisions; as ‘they had banned Fretilin and the African National Congress’. He also pointed out that an ALP state conference had called for its members of parliament to oppose the legislation.

Nowhere in the debates was there a thorough analysis of traditional criminal laws. The approach was to simply dismiss them as inadequate to deal with the new terrorist threat. The parliamentary debates in 2002 and 2003 were the most vigorous and showed some willingness by the Labor Opposition to propose substantive amendments. This gradually

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450 Ibid 2393.
451 Ibid 2395.
453 Ibid 2404.
454 Ibid 2402.
diminished to the extent that, by 2014, it was enthusiastically adopting Liberal-National government proposals without relevant debate or suggestions for significant amendment. The key step towards what can be described as the Labor Opposition participating in a law and order campaign was when it embraced the removal of the fundamental right to liberty for people who were not even suspected of being involved in any criminal activity. This occurred in 2003 with the adoption of legislation amending the *Australian Security Intelligence Organisation Act 1979*, which is considered in the next section.

**Debates over ASIO Powers**

The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* was introduced through the two *Bills* in 2002 and finally commenced operation on 23 July 2003. It significantly amended the *Australian Security Intelligence Organisation Act 1979* and it, *inter alia*, allowed questioning warrants for suspects and non-suspects. Attorney-General, Daryl Williams, when introducing the amending bill, stressed its preventative nature, noted some of its features, linked it to the ‘horrific events of September 11’, and declared that the ‘measures are extraordinary, but so too is the evil at which they are directed’. Following an adjournment of six months to allow consideration by parliamentary committees, he added a few additional comments that were mainly directed at the Labor opposition. He contended that the ‘primary purpose of the bill is intelligence gathering’, and that Labor ‘seems to be prepared to risk a terrorist incident occurring and risk the lives of innocent people’. He also noted that ASIO ‘are not presently empowered to obtain a warrant to question a person’. Apart from making passing reference to ‘significant safeguards’ being in place, he did not refer to fundamental legal rights or to existing criminal procedural laws and whether they are effective or not. As acknowledged by Williams, the legislation is ‘extraordinary’, and it

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458 Ibid 1932.
460 Ibid 7115.
461 Ibid 7115.
can reasonably be said that the brevity of the debate in the House of Representatives in September 2002 was also extraordinary, considering the fundamental change it was making to the criminal justice system. It is probably the pivotal point after which a parallel legal system emerged and grew. The Senate, however, delayed the introduction of the legislation and some amendments were eventually made that focused on excluding a person under the age of 14 years from the provisions and introducing some safeguards for those between 14 and 18 years.

During the debates Daryl Williams introduced the claim that terrorism offences should be distinguished from other crimes based on the proposition that terrorists were organised. He claimed: ‘Terrorism is not like ordinary crime. The way terrorist networks are organised and the destruction that acts of terrorism cause, distinguish terrorism from other types of crime’. He ignored the fact that organised crime has been active in Australia for a very long time and the extent of destruction that can result from criminal offending is not a unique feature of a terrorist offence. Additionally, the anti-terrorism laws, whilst proscribing certain organisations, are not formulated to only deal with members of terrorist organisations: a terrorist offence can be committed by a person acting alone without any connection to another person or group.

Daryl Melham responded for the Labor opposition, saying that the ‘unprecedented new powers to detain in secret Australians who are not themselves suspected of any wrongdoing’ would be unequivocally opposed. He noted that a person who was detained ‘would have fewer rights than a person arrested by the Federal Police on suspicion of murder or treason’ and that these powers ‘may establish part of the apparatus of a police state’. He further noted that the Joint Committee on ASIO, ASIS and DSD made 15 ‘substantive recommendations intended to go some way towards making this

462 Daryl Williams, Second Reading Speech, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, 23 September 2002, 7040; Williams repeated the same words during a debate on 20 March 2003, 13175.
464 Ibid 7115.
legislation more acceptable’, and the Senate Legal and Constitutional Committee reserved its right to make recommendations.\textsuperscript{465} The Bill was carried with 73 Ayes and 61 Noes.\textsuperscript{466}

The ultimate position taken by the Labor Opposition in the Senate was put by Senator John Faulkner. He claimed that the amendments made through the work of Labor parliamentarians had greatly improved the legislation, including the fact that children could no longer be held in detention.\textsuperscript{467} But, ultimately, he took the fear approach adopted by other parliamentarians to provide support for the legislation. On this point he stated, ‘There is no question that we are facing an enhanced threat of terrorism in the wake of September 11 and the Bali bombings. We must respond to that threat’.\textsuperscript{468} In support of compulsory questioning, he drew a simple comparison with the powers of royal commissions, the Independent Commission Against Corruption, state crime commissions, and the Australian Securities and Investment Commission. He then posed the rhetorical question ‘but not for ASIO?’\textsuperscript{469} What Senator Faulkner did not say, or perhaps did not understand, was that royal commissions served executive government and can have a wide range of functions,\textsuperscript{470} but they do not have a judicial function and therefore should not be regarded as part of the criminal justice system. In the case of the Australian Securities and Investment Commission, it has objects that differ significantly from those traditionally attached to law enforcement and has a role in informing the public.\textsuperscript{471}

\begin{itemize}
\item \textsuperscript{465} Ibid 7116.
\item \textsuperscript{466} Second Reading Speech, House of Representatives, Official Hansard, 24 September 2002, 7118.
\item \textsuperscript{467} John Faulkner, Third Reading Speech, Senate, Official Hansard, 12 December 2002, 7924.
\item \textsuperscript{468} Ibid 7925.
\item \textsuperscript{469} Ibid 7295.
\item \textsuperscript{470} Scott Prasser, Royal Commissions and Public Inquiries in Australia (Butterworths 2006) 100 – 115.
\item \textsuperscript{471} AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 - SECT 1
\end{itemize}

\textbf{Objects}

(1) The objects of this Act are:

(a) to provide for the Australian Securities and Investments Commission (ASIC) which will administer such laws of the Commonwealth, a State or a Territory as confer functions and powers under those laws on ASIC; and

(b) to provide for ASIC’s functions, powers and business; and

(c) to establish a Corporations and Markets Advisory Committee to provide informed and expert advice to the Minister about the content, operation and administration of the corporations legislation (other than the excluded provisions), about corporations and about financial products and financial markets; and

(d) to establish a Takeovers Panel, a Companies Auditors and Liquidators Disciplinary Board, a Financial Reporting Council, an Australian Accounting Standards Board, an Auditing and
other examples, if they are analogous at all, have less extensive powers than provided by the anti-terrorism laws; and in the case of state crime commissions, which probably have the greatest powers of a non-judicial entity, Senator Faulkner provided no evidence of increased investigative effectiveness. None of the activities mentioned by Faulkner had occurred in Australia but more relevantly he provided no evidence that the new laws would be effective is stopping any known example of terrorist activity. In a statement at odds with the outcome, Senator Faulkner claimed that the opposition remained ‘very firmly of the view’ that it ‘cannot be justified’ that a person who is not a suspect should be treated worse than a murder suspect. The ambiguity of the statement in the light of the fact that the legislation created such a dichotomy is puzzling. A generous interpretation would be that he felt he had to compromise in order to gain the amendments he wanted, and in any event there was a sunset clause. Alternatively, an answer may be found in his comment in the Senate later that day, when he acknowledged that he was following what the ‘ASIO director, Dennis Richardson, wanted’, for his ‘ASIO officers to be able to question non-suspects’. The claim was then immediately made that ‘we have a questioning regime, not a detention regime’. There are only two real possibilities if he was serious when he put forward the proposition that there was a questioning rather than detention regime: first, he was being misleading in order to cover Labor’s capitulation; second, he did not understand the effect of the legislation he was passing.

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Assurance Standards Board and a Parliamentary Joint Committee on Corporations and Financial Services.

(2) In performing its functions and exercising its powers, ASIC must strive to:
(a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
(b) promote the confident and informed participation of investors and consumers in the financial system; and
(d) administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and
(e) receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it; and
(f) ensure that information is available as soon as practicable for access by the public; and
(g) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.

(3) This Act has effect, and is to be interpreted, accordingly.

472 John Faulkner, Third Reading Speech, Senate, Official Hansard, 12 December 2002, 7925.
473 Ibid 8154.
474 Ibid 8154.
Australian Democrats Senator Brian Greig stressed the removal of fundamental legal rights and emphasised the fact that the government had not shown that existing police powers were inadequate. He stated:

The legislation applies to all Australians, regardless of whether they are suspected of terrorism, and in this respect is more far reaching than legislation that has been enacted or proposed in either the UK or the USA. There is no right to silence and no privilege against self-incrimination. A detainee would bear the burden of demonstrating that they did not have the information ASIO is seeking and thereby effectively reversing the presumption of innocence until proven guilty. The government has failed, I believe, to demonstrate why the legislation is required and has failed to show where existing criminal laws and policing powers are inadequate to deal with terrorism and suspected terrorists.475

The Greens opposed the legislation, with Senator Kerry Nettle noting that fear was used to promote it. She stated: ‘This piece of legislation, in its entirety, really draws on the atmosphere of fear and suspicion that has been created in the post 11 September climate. It tries to use that atmosphere of fear to push through this undermining of our civil liberties. The Australian Greens oppose this piece of legislation because, even after the amendments put forward by the opposition, it allows for innocent people to be taken off the street without warning, to be interrogated in secret and to be jailed for five years if they refuse to answer questions’. 476

The debate showed that some Senators were aware of the breaches to fundamental legal rights allowed by the legislation, and therefore it can be reasonably assumed that those promoting it were also well aware. However, the legislation passed the Senate with Ayes 45 and Noes 12, a majority of 33.477

On 26 June 2003 in debate considering a Senate message concerning the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill [No.2] 2002, it was made clear by Kim Beazley that the Labor Party was willing to pass the legislation and he praised ‘those engaged in the negotiations with the government,’ in particular

477  *Third Reading Speech*, Senate, Official Hansard, 12 December 2002, 7934.
Senator Faulkner and Daryl Melham.\textsuperscript{478} He went on to note that: ‘They understand that these threats are real and demonstrable and not simply a chimera’.\textsuperscript{479} Daryl Melham confirmed that: ‘We didn’t take the route to oppose but to amend’, adding: ‘If we had said the laws were not necessary we would not have won the argument.’\textsuperscript{480} He also explained that, ‘some people were happy to forget about civil liberties’ and ‘most of the caucus was supportive of the laws’.\textsuperscript{481} This latter proposition is supported by the fact that Labor was elected to government on 24 November 2007 and remained in power until 7 September 2013, but no attempt was made to repeal the worst aspect of the anti-terrorism legislation. This failure to change draconian laws when Labor was in government occurred despite concerns expressed by the UN Special Rapporteur on terrorism and human rights, Martin Scheinin, particularly about powers gained by intelligence agencies in countries such as Australia to arrest and detain people who are expected to have information about terrorist activities.\textsuperscript{482}

Senator Faulkner expressed concern ‘because non-suspects may be questioned by ASIO’, and maintained ‘you have to ensure there are more than adequate safeguards and protections in place. I absolutely accept that principle, and that is certainly what the Senate and the Committee of the Whole have tried to achieve’. He also claimed that there was an ‘absolute responsibility not to turn ASIO into a secret police force’.\textsuperscript{483} In fact, as examined in Chapter 6, there are very few protections, and ASIO does operate, because of the anti-terrorism legislation, as an enforcement agency and in secret. The Labor Opposition, it can be reasonably be argued, assisted the government to establish a secret police force.

\textsuperscript{479} Ibid 17679.
\textsuperscript{480} Robert Cavanagh, \textit{Interview with Daryl Melham}, 7 October 2015.
\textsuperscript{481} Ibid: Daryl Melham was Chair of the Labor caucus in federal parliament from October 2004 to October 2012.
\textsuperscript{482} Martin Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc 4/HRC/10/3, 4 February 2009, 11-12.
Senator Bob Brown described the Labor position on the Bill as ‘a parcel of poppycock’. He went further, stating: ‘Let me reverse the patronising that comes out of what Senator Faulkner just said, the well-meaning but pie-eyed nonsense coming from the Labor Party, which has got into bed with the government on this legislation’.\(^484\) The suggestion by Senator Brown was that Faulkner was in effect talking as a drunk might who was talking pious nonsense, because, by passing the legislation, the Labor members were giving ASIO police state powers.

Part of the concern for the Labor Opposition may have been that if they stopped legislation passing, it could have been used as a trigger for a double dissolution election.\(^485\) Daryl Melham confirms that ‘the threat of a double dissolution was a worry for a lot of people.’\(^486\) Throughout most of 2003 the Liberal/National Coalition maintained a significant lead in the opinion polls, despite substantial public opposition to Australia’s involvement in the US invasion of Iraq.\(^487\)

The emphasis on fear did not abate in the parliamentary debates from 2001 to 2014, but there was a shift in focus from having to support the United States to the suggestion that an external terrorist enemy in the form of the ‘Daesh death cult’ was ‘coming after us’.\(^488\) It is extraordinary that, despite the extreme language of fear used throughout the debates, there have been only a few parliamentarians who have demurred to its use. Most have adopted or accepted it. The use of fear to promote the laws may show some underlying respect for the tradition that fundamental legal rights are usually withdrawn only in times


\(^{486}\) Robert Cavanagh, *Interview with Daryl Melham*, 7 October 2015.

\(^{487}\) For a discussion of the polls, in the context of the war against Iraq, written a few weeks before Labor supported the ASIO bill, see Murray Goot, ‘Public Opinion and the Democratic Deficit: Australia and the War against Iraq’, *Australian Humanities Review*, issue 29, May 2003. The first half of 2003 was the period when Prime Minister Howard’s rhetoric most magnified the threat from terrorism; see Krista De Castella, Craig McGarty and Luke Musgrove, ‘Fear Appeals in Political Rhetoric about Terrorism: An Analysis of Speeches by Australian Prime Minister Howard’, (2009) 30(1) *Political Psychology* 11.

of war, when the nation is under threat, as shown in Chapter 4. Yet no parliamentarian
directly addressed the issue of whether Australia was now actually confronting a similar
national emergency, although the promoters of the laws tried to convey that impression.
Simply pointing out that terrorist attacks were occurring overseas, and could happen in
Australia, was enough to enlist the necessary support for the passage of laws.

Jenny Hocking has analysed the legislative process involving changes to the *Australian
Security Intelligence Organisation Act 1979*. She points out that the Labor Party
‘accepted as a given the need for [the] package of Bills and has never raised, as either a
legal or a political issue, the necessity for such dramatic change in internal security’. She
contends that Labor took a ‘hesitant position’ and that it lacked ‘commitment on
matters of principle’. In the end there were only ‘two points on which the opposition
did not yield: the detention of children and the introduction of a three-year sunset
clause’. The sunset clause has been dramatically extended. Recent legislative proposals
may soon allow the detention of children. Hocking sees fear as a key motivating factor for
the Opposition, in particular fear of being ‘seen as “soft on security”’.

**Liberal and Labor Support for Anti-Terrorism in Legislation 2004**

The introduction of anti-terrorist legislation in the Australian parliament following 11
September 2001 was done by then Attorney-General Phillip Ruddock. His views about
the need for the legislation can be found in Hansard and in a journal article in 2004 titled,
‘Australia’s legislative Response to the Ongoing Threat of Terrorism’. In the article
Ruddock provides a superficial summary of the legislation enacted from 2002 to 2004.
Significantly, he claims that there is a new theory emerging ‘whereby national security
and human rights are not considered to be virtually exclusive’. The theory he contends

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489 Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (UNSW
490 Ibid 220.
491 Ibid 220.
492 Ibid 221.
493 Ibid 220.
494 Presumably also the views of the government and the majority of his parliamentary colleagues.
496 Ibid 254.
has been merged into fact. He claimed: ‘The Federal Government’s legislative response to September 11 has involved enacting laws that both enhance our national security and protect our civil liberties.’ Ruddock qualifies this proposition by acknowledging the traditional criticism of counter-terrorism legislation that it ‘is inevitably at odds with the protection of fundamental human rights’. Yet he then claims that ‘counter-terrorism laws enacted since September 11 achieve the twin objectives of targeting terrorism from all angles while possessing sufficient safeguards to limit the impact on fundamental freedoms and rights’. He does not explain how laws that allow non-suspects to be detained and that reverse the onus of proof could possibly involve sufficient safeguards to limit the impact on fundamental human rights, when such measures involve the removal of the rights.

Ruddock’s acknowledgement that the laws are intrusive but not ‘excessively intrusive’ was supported by the federal Labor opposition. The then Shadow Labor Minister for Homeland Security, Robert McClelland, echoed Ruddock’s concerns about the terrorist threats following September 11 and the need for a legislative response. He stated: ‘Following September 11, the Labor Party immediately committed itself to redressing the absence of specific anti-terrorist legislation in Australia. We did so with determination to confront this challenge . . .’

McClelland also endorsed Ruddock’s view that terrorism legislation is not incompatible with human rights. He went further than Ruddock’s qualified view on this point and stated: ‘Indeed, most Australians would share the common sense view that to protect citizens from terrorism is simply to safeguard their fundamental human rights to life, liberty and personal security’.

McClelland emphasised the role played by the Labor opposition in amending the legislation to avoid ‘destroy[ing] our institutions and values’, and claimed that

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497 Ibid 254.
498 Ibid 255.
500 Ibid 263.
‘[f]ortunately, through appropriate parliamentary scrutiny, Australia has largely been able to avoid such a disproportionate legal response’.\textsuperscript{501} He claimed that much legislation introduced by the Executive had been significantly amended to incorporate better safeguards for citizens before it had been enacted by the Parliament, resulting in superior legislation, which retains its effectiveness in fighting terrorism, but which allows greater community confidence that it will not be open to misuse.\textsuperscript{502} Neither McClelland nor Ruddock offered any explanation about how the community would be confident that the powers would not be misused. They provided no detail about how a system that is so significantly different to the traditional criminal justice system could offer a guarantee that it would not be misused, when there is a wealth of evidence showing that the traditional system has difficulty ensuring a fair trial.

Strikingly, although the debates up to 2004 make reference to human rights and briefly mention to the right to a fair trial, except for some dissenters, no reference was made to the right to silence and how various legal rights underpin the fundamental right to a fair trial. There was also no mention of this linkage in subsequent debates. What is perhaps even more remarkable is that there was no mention of abuses by law enforcement agencies that have been a feature of the criminal justice system and how perversions of justice might be avoided in the new system. The failure to properly consider how the criminal justice system operated extended to not even making reference to the fact that due process rights are not only relevant because they protect fundamental legal rights, but that those rights have also assisted in ensuring that evidence that is collected is reliable. This point is referred to in Chapter 2 with particular reference to the right to silence. The basic point being, leaving aside the effect of coercion and torture on reliability, that evidence given by a person who knows that they have a right to silence is more likely to be reliable than evidence given by a person who does not.

The support provided by Ruddock and McClelland for the terrorist legislation in 2004 did not diminish with the introduction of additional legislation in 2005. The legislative changes were always accompanied by an emphasis on fear, and by a manufactured drama

\textsuperscript{501} Ibid 263.
\textsuperscript{502} Ibid.
that emphasised the need for urgency. For example, the *Anti-Terrorism Act 2005* amended the *Criminal Code Act 1995* to allow for an offence to be committed even if a terrorist act did not occur. The original draft bill had shoot to kill provisions that were amended.\(^{503}\) The *Anti-terrorism Bill 2005* was introduced in the Senate on 11 November 2005 with Liberal Senator Ellison announcing: ‘The Prime Minister has announced that the government will introduce urgent amendments to Australia’s counter-terrorism legislation and to pass those amendments immediately.’\(^{504}\) Andrew Lynch examined the passage of the legislation and made a number of criticisms about how it was dealt with in parliament.\(^{505}\) Lynch notes that the legislation was accompanied by an announcement by Prime Minister John Howard that a potential terrorist plot had been uncovered and there was a need, according to Howard, for ‘immediate passage of this bill’ to allow ‘law enforcement to respond to this threat’.\(^{506}\) In fact the police had been carrying out a surveillance operation for 16 months and in the end 13 people were arrested, one pleaded guilty to being a member of a terrorist organisation, seven others were found guilty of being members, with an additional three also convicted of providing resources to a terrorist organisation and two of attempting to supply funds. Four were acquitted of all charges and the jury could not reach a decision about one of them.\(^{507}\) The reality was that there was no urgency, and laws already existed to deal with any offending behaviour. Additionally, it has been reported that ‘The tip-off came from members of Melbourne's Muslim community in 2004’ and, according to one expert, those involved belonged to a ‘small motley crew’.\(^{508}\) Kathleen Gleeson notes that Howard exploited the terrorist threat ‘in order to articulate to Australians the grave danger posed to the state by terrorism’, but she does not ‘suggest that the terrorist warning was fabricated or that domestic terrorism

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\(^{504}\) Christopher Ellison, *First and Second Reading Speeches*, Senate, Official Hansard, 11 November 2005, 12.


\(^{506}\) Ibid 749.


did not pose a threat in Australia’.509 In fact the relevant terrorists did pose a threat, but not such as to be a ‘grave danger posed to the state’. Howard, it can be reasonably argued, used the intelligence report in a misleading and deceitful way in order to avoid debate and to gain public support. The report was not open to scrutiny that would have enabled the degree of threat to have been assessed. The failure to allow police or intelligence agency risk assessments to be open for independent evaluation continues to allow unverified claims to be made, that are often later proved to be false or misleading. Gleeson makes the salient point that ‘[t]he majority of Australians supported the legislation because Howard’s construction of threat resonated with them to some extent’.510

Debates about Control and Preventative Detention Orders

The Anti-Terrorism Act (No.2) 2005 introduced control orders and preventative detention orders. The House of Representatives debates over the Anti-Terrorism Bill (No.2) 2005 provide additional insight into the reasons why both Liberal and Labor parliamentarians supported anti-terrorism legislation. The Leader of the Opposition, Kim Beazley, supported the bill ‘in the national interest’ but he continued to have ‘concerns about balance’.511 Beazley did not identify what he meant by concerns about ‘balance’. However, he did note that the Labor Opposition achieved a number of amendments including: the abandonment of ‘shoot to kill provisions’; better ‘judicial scrutiny of control orders’; a requirement that only an interim control order could be ‘obtained without the presence of the subject’; the provision of ‘a summary of reasons for the order’ and allowing a person to ‘make arguments about why it should not apply’; ensuring that judges were required to ‘specifically balance the need to protect the public against the effect of the order on the subject, including the loss of liberties’; and ensuring that similar changes had been made for preventative detention orders.512 The position of Beazley, it has been claimed, was that he supported the legislation without even seeing it.513

510 Ibid 179.
512 Ibid 64.
Liberal member, Malcolm Turnbull, emphasised the ‘dangerous times’ faced by Australians and said that there was ‘an assault on our free society from murderous totalitarians who in the name of Islam – a religion they defile with their violence and intolerance – are determined to destroy us’.\(^5\) He made no reference to rights and joined with the vast majority of parliamentarians in claiming there was an unprecedented threat. One of the questions for consideration, posed at the beginning of the chapter, was whether or not parliamentarians truly believed that the threat of terrorism was so great that there was a need to diminish fundamental legal rights. If repetition is any guide to determining truth, then nearly all of them claim there is a threat and, at least by inference, there is a need to be afraid. Whether or not they believe they are diminishing or even removing fundamental legal rights is perhaps not necessary to evaluate, because the legislation introduced before 2005 and after that date very clearly does this.

Labor member, Peter Garrett, focused his criticism of the proposed legislation on the sedition laws it contained and how they could adversely affect imaginative and creative work.\(^5\) He concluded by claiming that the ‘cumulative effect of laws of this kind is to make Australia a different country’.\(^5\) Labor member Wayne Swan asserted: ‘Labor supports these laws only because they are necessary to assist our law enforcement agencies to do their work.’\(^5\) Swan provided no evidence to support his contention that law enforcement agencies needed the laws. However, he was supported by the then Liberal member for Hasluck, Stuart Henry. Henry was of the view that democracy had to adapt ‘as it has done in the past during times of war’.\(^5\) The process of adaption required security and police services to be given ‘the necessary authority and the tools needed to do the job’.\(^5\) As in the case with Swan, Henry provided no evidence to support the

\(^5\) Ibid 48.
\(^5\) Wayne Swan, Second Reading Speech, House of Representatives, Official Hansard, 29 November 2005, 52
\(^5\) Ibid 56.
proposition that police and security agencies needed any additional powers. Interestingly, if Stuart Henry was correct and Australia was on a war footing, then the need for additional controls over the society would normally be considered as necessary. But the only war involving Australia was in Iraq.

The justification for legislation, apart from comments about jihad, was said by most of those involved in the debate as being the threat posed by external terrorist attacks, not the context of war. Labor member Simon Crean made the point in the following way:

The reasons we need tough laws to fight the terrorists are obvious, post September 11 and post Bali. Those events in 2001 and 2002 were graphically etched in the minds of Australians. They changed the security, the concerns and the issues that Australians have.520

Simon Crean did not provide any reasons showing how the type of legislation introduced in Australia would have stopped or even warned of terrorist attacks of the kind that occurred in New York or Bali. Moreover, he provided no basis for the assumption he made that Australians wanted the legislation. The closest Simon Crean came to mentioning fundamental legal rights was when he claimed ‘getting the balance right, protecting civil liberties, does not compromise the work of law enforcers’.521

Liberal Michael Johnson stressed the role played by law enforcement agencies in formulating the legislation: ‘Experts in law enforcement and counter-terrorism have been central to the government’s decision to draft the laws. It has been done on the advice and expertise of those far better placed to give advice than anyone sitting in the chamber’.522

The decision to give preference to law enforcement agencies to assist with anti-terrorism legislation seems to be a clear indication that the government was adopting a law and order approach, and that full consideration was not being given to how the laws might affect the interrelations between the law, fundamental legal rights and those who apply the

521 Ibid 61.
laws. Interestingly, Johnson drew an analogy between the Cold War era, ‘which divided the world from 1945 to 1989 until the collapse of the Berlin Wall’, and the ‘new era of terror in global affairs’. He noted that Communism and Soviet power threatened ‘nuclear annihilation’ and that terrorists were ‘equally determined to conquer free societies and free people’. What he did not mention was that laws of the kind introduced to deal with terrorist threats were not needed during a time when ‘nuclear annihilation’ posed a greater threat than terrorist bombs. The role of enforcement agencies in drafting laws had been acknowledged in previous debates, for example, when the ASIO detention and questioning warrants were being introduced, Attorney-General Williams said: ‘Our intelligence agency has indicated that it would rather no legislation at all than a fig leaf’.

In the Senate, where the government now had control, John Faulkner expressed opposition to the legislation. He stated: ‘This slipshod legislation makes only the briefest and most cynical gestures towards fulfilling the duty to protect and to respect’. A cynical view of this comment would be that it could have been made about much of the legislation he supported. However, he did make a relevant comment when he noted that the government was chasing an advantage ‘they find in the politics of fear’.

A notable dissident, on the Labor side, emerged during the debates over the laws. The views of one member of the House of Representatives, Daryl Melham, who in the previous parliament had been charged with the responsibility along with John Faulkner with negotiating the terrorist laws, showed that there was at least some dissent within the Labor caucus. In response to Attorney-General Williams’ comment about the intelligence agency ASIO and reference to no legislation rather than a ‘fig leaf’, Melham

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523  Ibid 73.
524  Ibid 73.
527  Ibid 16.
noted that it was for the parliament to decide ‘what an appropriate balance is’ between security, rights and liberty.\textsuperscript{529} He went further and recorded that the Director-General of ASIO had been ‘very active’ appearing before two parliamentary committees in both public and private sessions, and that ‘senior ASIO officers [had] also been active in the background, briefing members of the press’.\textsuperscript{530}

Ultimately, Melham’s views were not accepted in the Labor party room caucus or in the parliament. He stated: ‘my personal view remains opposed to the principles that underpin the key aspects of this legislation. If a division is held, I will vote for the legislation. I argued my case in the party room. I was in a minority. I take the view that the party makes a decision and then you are bound by that decision’.\textsuperscript{531} Daryl Melham, expressed his views in the Sydney Morning Herald in an opinion piece titled ‘The war on terrorism goes a step too far’ on 15 September 2005. He expressed an initial willingness to support anti-terrorism legislation, but gradually came to a point of opposition. He stated, amongst other things:

\begin{quote}
HOW much is enough? When will we have done all that can reasonably be done to protect Australia from terrorism while safeguarding our democratic freedoms? Since September 11, 2001, a great deal has been done. The Federal Government has spent more than $5 billion on counter-terrorism and security. This year alone expenditure on security will exceed $1.1 billion.

The states and territories have spent another $300 million. Our intelligence and security agencies have doubled in size. ASIO is literally throwing money at a vastly expanded network of informants.

Federal Parliament has enacted a wide array of new counter-terrorism laws. Between September 2001 and the last federal election, Parliament passed 26 counter-terrorism or security laws, including comprehensive terrorism offences and radical new powers for ASIO to interrogate and detain people who may or may not know something related to terrorism. Eight counter-terrorism and security bills have been introduced into the present Parliament.

But this isn't nearly enough. Last Thursday the Prime Minister announced yet more counter-terrorism measures. ASIO is to be granted power to detain
\end{quote}

\textsuperscript{529} Daryl Melham, \textit{Second Reading Speech}, House of Representatives, Official Hansard, 26 March 2003, 13597.
\textsuperscript{530} Ibid 13597.
\textsuperscript{531} Melham above n 528, 74.
somebody for up to 48 hours in a "terrorism situation", and the state and territory police will be allowed to detain people for up to 14 days. The Australian Federal Police will be able to seek court orders allowing them to electronically monitor people by using tracking devices and the imposition of travel and association provisions.

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Under the guise of being tough on terrorism, the Government is bringing in divisive and flawed laws and compromising our justice system. By targeting and alienating Australia's Muslims, the Government is jeopardising the co-operation and assistance vital for successful counter-terrorism efforts.

I supported previous counter-terrorism laws as I was convinced of their necessity and the adequacy of the safeguards that were put in place. However, I cannot support these new proposals for the Government has not made the case for them. Enough is enough. Preventive detention pushes the pendulum too far and should be resolutely opposed.532

Dr Carmen Lawrence, the Labor member for Fremantle, expressed the view that ‘key values of a liberal democracy are challenged’, and asked for an explanation why the existing laws were not adequate.533 She listed some of the rights being removed and stressed that ‘[a]t base, these laws overturn the right to individual liberty’.534 Lawrence further noted that Australia was alone amongst Western democracies in not having a bill of rights and therefore ‘no effective human rights framework’ with which to judge the anti-terrorism legislation.535

There was also some external dissent with 294 submissions being received by the Senate Legal and Constitutional Committee relating to the Anti-Terrorism Bill (No 2) 2005. The submissions came from individuals and organisations and the majority were critical of at least some aspects of the legislation.536

534  Ibid 106.
535  Ibid 108.
The speed with which the legislation went through the Senate is striking. The Leader of the Opposition in the Senate, Chris Evans, protested the gag placed on the debate, commenting to the Leader of the Government, ‘arrogance reeks out of your government. If you do not provide better opportunities for people to debate this legislation you will be condemned by the Australian people’. Greens Senator Bob Brown made clear his views: ‘Here comes the guillotine on democracy and here comes the failure of this government to defend the most draconian incursions into civil and political rights, including the freedom of speech, in this country since at least the middle of the last century’. Three days after the passage of the legislation Brown deplored the speed with which anti-terrorism legislation passed through the Senate. He identified the fact that ‘the Howard government [allowed] 100 amendments cutting across democracy [to be] given 3½ hours for debate’ in the Senate, and that this compared with the legislation to ban the Communist Party, when ‘under the Menzies government 15 days were given to that debate in the Senate’.

The speed with which debates occurred is perhaps a reflection of the what Andrew Lynch described as an ‘executive driven process’, where ‘new counter-terrorism initiatives tended to be announced by the Commonwealth executive’ and, ‘using its numbers in the Parliament’, the executive acts to ‘foreclose meaningful debate and rush enactment’. Lynch also notes that ‘parliamentary committees and independent inquiries, even when commissioned by the government itself as a legislative tactic’, have a ‘negligible impact upon the content of the laws’. A very damning conclusion is reached by Dominique Dalla-Pozza, who analysed the amount of time spent on anti-terrorism debates. She found that more time was spent on debates at the beginning of 2002 than in 2005 and 2006, but that, ‘the Australian Parliament did not reliably function as a deliberative democratic

539 Bob Brown, Senate Debates, Official Hansard, 8 December 2005, 70.
541 Ibid 3.

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political assembly as they were enacting the counter-terrorism laws’. Dalla-Pozza’s ultimate finding is reinforced by the virtual absence of debate as anti-terrorism laws were introduced in 2014. She also referred to the rhetoric about ‘balance’ that parliamentarians used, and noted that it ‘was not matched by a practical commitment to the processes of democratic deliberation’.

The tone of the Australian parliamentary debates from the time of the 11 September 2001 attack in the United States is suggestive that fear was a continuing reason for parliamentarians supporting the legislation. Carmen Lawrence suggests that, ‘humans live uneasily with the knowledge of our own death; the certainty of our own inevitable annihilation. Rather than experiencing the full intensity of such fear, we learn to employ a range of psychological defence mechanisms to keep it at bay. When these techniques are overwhelmed, we may relinquish our autonomy in order to gain protection from others we believe have the resources and power to protect us’. If fear is the paramount reason, without coherent and cogent evidence to support the changes, then the legislation can be said to have been introduced because of the irrational fears of individual parliamentarians. In order to find out why parliamentarians voted as they did Hansard and the literature is of some assistance. The legislation cannot be said to have been introduced because of any fear of terrorist attack being experienced by the public, because there is no clear evidence of a public demand for legislative reform, although, as alluded to by Julian Burnside, there is no public sympathy for terrorists. Alternatively, another proposition is that the executive rationally promoted the legislation, citing fear of terrorist attacks to quell public concerns about the removal of civil rights and further accrual of power to the executive.

The parliamentary debates do not provide examples of foreign anti-terrorism laws and their effectiveness, and the government has enacted legislation which in at least one striking instance has gone further in abrogating human rights than that introduced in the

543 Ibid 485.
544 Carmen Lawrence, Fear and Politics (Scribe Short Books, 2006) 73.
United States, United Kingdom, Canada or New Zealand. It enacted legislation that allows non-suspect citizens to be detained incommunicado for questioning to see if they have any information about terrorism offences.\textsuperscript{546} Greg Carne notes that the government placed emphasis on international examples when it introduced such legislation, but that it did so without the assistance of a bill of rights, available in some other common law democracies, and without highlighting the differences.

Reference to international and comparative examples is used to defend against and deny claims that the Australian legislation forms an excessive response when compared to counter-terrorism legislation in common law democracies. That defence and denial similarly ignores the influence of bills of rights in those common law jurisdictions upon the drafting of counter-terrorism legislation and the legislative environment so created. It also diverts attention from an incremental concentration of executive power, a greatly enlarged discretion in how such executive power is to be exercised, and increasing fragility of democratic assumptions and expectations occasioned by novel counter-terrorism laws such as the detention and questioning powers.\textsuperscript{547}

Carne is one of the few academic commentators who comments on how the laws concentrate power in the executive arm of government. He records the fact that the introduction of control and preventative detention orders involved ‘an increasingly executive dominated and executive determined disposition’.\textsuperscript{548}

The parliamentary debates also make no reference to how the courts might approach the laws. The courts are often held out as providing a fetter to the unbridled excesses of the executive. Michael Kirby makes this point when he states:

Even in countries like Australia, that do not have an entrenched charter of rights, courts are not without legal means to uphold fundamental civil rights. In appropriate cases, they may apply settled principles of statutory interpretation that

\begin{footnotesize}
\textsuperscript{546} ASIO Act 1979 (Cth) Division 3, Part III.
\textsuperscript{548} Greg Carne, ‘Prevent, Detain, Control and Order?: Legislative Processes and Executive Outcomes in Enacting the Anti-Terrorism Act (No 2) 2005 (Cth)’ (2007) 10 Flinders Journal of Law Reform 17, 76.
\end{footnotesize}
require that laws depriving individuals of longstanding and basic rights must be clear and without ambiguity. As well, there is an increasing realisation within the courts of Commonwealth countries that national laws should, where relevant, be construed so as to conform to the developing law of human rights.549

The views of Michael Kirby, a former Australian High Court judge, are relevant when considering terrorism laws and the role of courts. However, in Australia, the case law provides very little assistance. The cases cited by Kirby, in his article, to support the proposition that statutory interpretation can be used by courts to protect civil rights do little more than say that the statutes should have been better worded if rights are to be removed. His suggestion that there is an increasing realisation within the courts of Commonwealth countries that laws should conform to the developing law of human rights can be accepted, but is yet to find a stable home in Australian courts: the cases he cites to support his proposition come from the European Court of Human Rights.

The focus of Australian courts on statutory interpretation to the exclusion of international law also finds expression in refugee law. Mary Crock notes:

The tendency in the Australian Courts to focus on text rather than context is reflected more broadly in a tendency to concentrate very much on relevant domestic legislation to the exclusion of norms of international law. It is neither possible nor desirable to prove that this tendency reflects domestic political pressures brought to bear on the courts. Having said this, it is in the most politically charged refugee cases that the trend towards judicial introspection is most marked.550

The courts in Australia have shown a reluctance to do more than use statutory interpretation to limit the derogation of legal rights. There are notable exceptions where the High Court has clearly moved against the will of the government, such as in the Communist Party case, or has introduced substantial change to the common law to pressure governments to change, such as the Mabo case. Yet there are no comparable

cases regarding anti-terrorism laws. Kirby expressed his disappointment with his High Court colleagues when interim control orders were endorsed by them in *Thomas v Mowbray*.

The laws introduced between 2001 and 2005 were, it is contended, introduced with an emphasis on the need to prevent terrorism based on the fear of it. There is little else in the parliamentary debates to show any other reasons. There is no evidence provided in the debates that shows why the laws would be effective by comparison with the effectiveness of laws in other countries or compared with existing criminal laws. This approach to law making continued through the debates around the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*.

### Anti-terrorism Parliamentary Debates 2014

The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* introduced, amongst other things, harsh absolute liability offences for entering declared areas of foreign countries. It was claimed that Australians leaving the country to fight in Syria and Iraq would return home to engage in terrorist activities. This required more legislation, as stressed by Attorney-General Brandis in the second reading speech for the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 on 24 September 2014*. He stated:

> The risk posed by returning foreign fighters is one of the most significant threats to Australia’s national security in recent years. Our security agencies have assessed that around 160 Australians have become involved with extremist groups in Syria and Iraq by travelling to the region, attempting to travel or supporting groups operating there from Australia. While this is not the first time Australians have been involved in overseas conflicts, the scale and scope of the conflicts in Syria and Iraq, and the number of Australians presently involved, is unparalleled and demands specific and targeted measures to mitigate this threat.

Senator Brandis on 24 September 2014 referred the proposed legislation to the Parliamentary Joint Committee on Intelligence and Security. The Committee, made up of

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551 See Chapter 5.
only Liberal and Labor members, made 27 minor recommendations\(^{553}\) and tabled its report on 17 October 2014. Labor Senator Stephen Conroy, who was a member of the Committee, urged the acceptance of the legislation during the very brief Senate debate on 28 October 2014. He stated:

The most notable recent development has been the movement of Australian citizens to other nations to participate in foreign wars. We know that around 160 Australians have already become involved with extremist groups in Iraq and Syria either through travelling to the region or by providing support from within Australia. If they successfully join up with extremist groups, foreign fighters learn the skills, develop the networks and adopt a hardened ideology that makes them a serious threat to Australians if they return home. I support the great work that our security agencies do in identifying individuals who are planning to leave Australia to join organisations such as ISIL. It is vital that parliament provides our national security agencies with the tools that they need to keep Australia safe. That is what this legislation does, and that is why Labor supports it.\(^{554}\)

The Greens opposed the legislation, noting it was rushed through parliament while the National Security Legislation Monitor position, that was designed to report on such legislation, was vacant. Senator Scott Ludlum stated:

The idea that agents or police can enter your home, or enter the home or premises of somebody who is not actually suspected of any offence, and not even have to notify anybody that that has occurred until months afterwards is characteristic of a police state. Preventative detention is characteristic of a police state. These are very, very dangerous powers that we play around with here, and once they are on the statute books, as Mr Walker quite correctly points out, they are inordinately difficult to get rid of. That is why the Greens believe, firstly, that the bill should not pass in the current form and, secondly, that the government—perhaps with the support of the opposition; I do not know—should rethink the unnecessary haste with which this legislation is being bashed through the parliament. The one thing that we do not want to see is a repeat of what happened after the ASIO bill. That bill was passed late at night in extraordinary haste and then in the following days the editorial pages, the TV shows, and the op-ed opinion pieces that came out said, 'What the hell have we done? How did we let this happen? Why was this done?' We are hoping for that kind of critical thinking and analysis before the bill passes, not after.\(^{555}\)

\(^{553}\) Parliamentary Joint Committee on Intelligence and Security Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Chapter 2, Schedule 1.


The Ayes were 46 the Noes 12, there was a majority of 34 Senators in favour.

The House of Representatives gave consideration to the legislation before passing it on 30 October 2014, and it was assented to on 3 November 2014. The speed of introduction of the legislation and the brevity of the debate set a new record for the passage of anti-terrorism legislation. The debate in the House of Representative was very brief, with the only one Labor member, Mark Dreyfus, speaking.\textsuperscript{556} He noted that Labor ‘offered the government our bipartisan support for measures to ensure our national security’.\textsuperscript{557} The only dissent came from the crossbench. Greens member Adam Bandt, in opposing the legislation, mainly focused on the criminalization of entering a declared area and the fact that merely by entering such a zone the person was ‘presumed to have committed an offence’.\textsuperscript{558} He relevantly questioned what a person needed to do to prove their innocence, providing a number of examples, including: ‘What do you do if you have been over to visit your grandmother, who might be illiterate in her own language let alone being able to speak English, and when you come back you are asked to prove why you went there. What do you do?’\textsuperscript{559} Bandt was referring to one of the exceptions allowed in section 119.2(3)(g) of the \textit{Criminal Code 1995}, and is making the point that, because it is an absolute liability offence, a person who went to a declared area would need to prove that they were covered by one of the approved exceptions. Independent member Andrew Wilkie made a number of relevant objections to the legislation.\textsuperscript{560}

Michael Keenan, the Minister for Justice, stressed his belief in the intelligence community and law enforcement, stating that it was his experience that the intelligence community and certainly the law enforcement community ‘are very judicious about what they ask government to do and are very conscious of trampling on the rights and freedoms of

\textsuperscript{556} Mark Dreyfus, \textit{Second Reading Speech}, House of Representatives, 30 October 2014, 12582-12589.
\textsuperscript{557} Ibid 12589.
\textsuperscript{558} Adam Bandt, \textit{Second Reading Speech}, House of Representatives, Official Hansard, 30 October 2014, 12593.
\textsuperscript{559} Ibid 12593.
\textsuperscript{560} Andrew Wilkie, \textit{Second Reading Speech}, House of Representative, Official Hansard, 30 October 2014, 12597.
Assuming the Minister meant to say ‘conscious of not trampling’ on rights and freedoms, history does not support him in this regard.

The *National Security Legislation Amendment Act (No.1) 2014* gave additional powers to ASIO. The approach to the legislation by the both Liberal, National and Labor parliamentarians was to embrace it. The legislation, examined in Chapter 6, gave further extensive powers to ASIO. Mark Dreyfus QC, Deputy Manager of Opposition Business, in the House of Representatives stated:

> SIOs are counterespionage and counterterrorism operations in which ASIO officers work undercover, infiltrating groups which would do us harm. In the course of working undercover in such groups, undercover ASIO officers may have to break the law. The new SIO scheme is modelled on the arrangements which have applied to undercover AFP operations for some years now. It provides immunity from criminal prosecution for ASIO officers in such circumstances, though this immunity does not extend to torture, to any conduct causing serious harm or death, to sexual offences or to serious damage to property."^{562}

The legislation went quickly through the House of Representatives, with only Adam Bandt, Andrew Wilkie, independent member Catherine McGowan and Labor member Melissa Parke speaking in opposition to it.

Daryl Melham’s reticence in 2005 may have been a reflection of the views of a significant number of parliamentarians at the time. Although there has been some opposition to the legislative changes introduced in 2014 and 2015, it was nowhere near as forthcoming as Melham was in 2005. The motivations of parliamentarians to introduce the laws, as shown in the debates, have not significantly changed since 2001. Their pronouncements reveal a number of motivations, including: fear of terrorists, a desire to protect the community from terrorists, and perhaps the desire to win votes by appearing to be tough

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on crime. There is also a submissive posture adopted by legislators who followed the lead of England and the United States.

In an attempt to delve further into the reasoning of parliamentarians a questionnaire was posted to all sitting parliamentarians in 2014 and to a number of former parliamentarians. Only five parliamentarians or former parliamentarians responded to the questionnaire. The questionnaire was designed to assess the extent to which parliamentarians understood the anti-terrorism laws and their impact on fundamental legal rights, and also whether they had an understanding of existing criminal laws. Three of the people who responded were willing to put their names on the questionnaire and two were not. The two who declined to provide their names were in favour of the anti-terrorism laws. One of those who declined to provide a name, in response to the question, ‘Have you seen any evidence that providing ASIO with coercive questioning detention powers has stopped a terrorist attack? said, “Wouldn’t tell you.”’ The same person, who supported the anti-terrorism laws and would support increased powers for ASIO, provided the response that, if a child was killed in a Special Intelligence Operation, the parents should be told ‘if possible’ but not if the ‘safety of Australia’ or ‘National Security’ were involved. The answers provided from the limited responses do not allow for any conclusions to be drawn that go beyond those that have been revealed from the parliamentary debates and public pronouncements.

Conclusion

What is shown from the examination of the parliamentary debates and statements outside of parliament is that no consideration was given to the effect the new laws would have on the interdependent relationship between fundamental legal rights and those who enforce and apply the laws. The expectations by the parliamentarians about how the laws would operate, if they had any, involved, it is assumed, an assumption that the enforcement agencies, lawyers and judges could utilize the laws in a way that would ensure a fair trial. The difficulty with accepting the assumption as a reasonable one is that not even those parliamentarians who opposed the legislation make reference to the difficulties involved
in ensuring a fair trial even when legal protections are in place. The dissenters have, however, emphasised the adverse effects on some of the procedural rights.

The parliamentary debates reveal a very shallow understanding of the anti-terrorism laws by the parliamentarians who voted for them. Additionally, they show no evaluation of how existing laws could be applied or where they were deficient. There is also no indication that they had any evidence to show that the laws would be effective. The fact that the secrecy provisions under the *Australian Security Intelligence Organisation Act 1979* go further that anything allowed in the traditional criminal justice system received scant mention, as did the accrual of power to an unaccountable few.

The parliamentarians relied on advice received from intelligence agencies and the police, but they did not review what evidence was being relied upon to recommend the laws. It can be safely assumed that those advising government had no evidence that the laws would be effective. The initial promoter of preventative laws, Robert Cornall, offered only the proposition that the traditional laws would not be effective against the new threat, because such laws only dealt with crimes after they had been committed. His proposition is as cogent as the submissions get for those promoting the laws. Yet he did not explain why the existing criminal laws of conspiracy, attempt and the like would not be sufficient, or how taking away fundamental legal rights made anyone safer. The ‘preventative’ laws approach had no foundation in evidence, and can reasonably be described as a policy developed in a vacuum.

The debates further reveal that fear of terrorist attacks has been the paramount reason for supporting the laws, supplemented by fear of electoral disadvantage as a result of opposing the laws. Strikingly, the debates reveal that no real consideration was given to the potential for corruption, and abuse of individuals, by law enforcement agents and politicians. Although some of the laws require that a person detained for questioning be advised of their rights, those rights are so few as to be of little value. Where there are some protections, the debates do not reveal that the politicians actually understood how easily abuse could occur even with them in place.
The compressed time of the debates is a remarkable feature which can be understood on the basis that fear was the driving force, rather than consideration of the impact and probable effectiveness of the laws as the key factors. The next chapter examines the role of fear in an historical context, considers its psychological basis and examines how it has been used to promote laws that derogate fundamental legal rights.
Chapter 8
The Role of Fear in Restricting Fundamental Legal Rights

This chapter examines the reasons, methods and effectiveness of the language of fear that is used to promote change that derogates fundamental rights. The controlling strategies and techniques used to allow the fear-induced changes to occur are listed and a model approach outlined. Consideration is given to the physiological and psychological effects of the emotion - fear. The ultimate fear, the fear of death, is placed in a political context with North Korea used as the main example of its use as a dissent control method directly imposed by the state. This approach is juxtaposed against the democratic method of using it to control by directly suggesting or implying that others will inflict death if obedience is not given.

Some of the theories of the political use of fear, along with historical examples, are reviewed and the consequences of politics based on fear-inspired changes to the law are highlighted. Examples are drawn from previous chapters and some additional ones are introduced. The main fear based themes endorsed by Western governments during the second half of the 20th century and the 21st century, anti-communism and anti-terrorism, are compared and used to show the effect of fear on political decision making. The role of coercion as a fear-inducing method forms part of the examination.

The motivations of the promoters of fear and whether they are fearful themselves and truly believe that others should be fearful are considered, and distinguished from situations where an artificially created crisis is designed to achieve a political result. Apart from whether the promoters are engaged in a cynical, self-interested approach or are true believers, a disturbing aspect of the politics of fear is the fact that it is so unquestioningly accepted as an appropriate way of garnering support for derogative changes. Some of the reasons why this is so are examined.

The fact that fear now forms part of the normal decision making process is referred to and the history of its repeated use resulting in adverse outcomes is examined. Hysterical
messaging using the language of fear, as illustrated in the folk tale approach described by ‘chicken little’ where the hysterical cry of ‘the sky is falling in’ is identifiably false, is not considered. Health and environmental messages that may also include the language of fear which are designed to activate people to behave in a positive way are beyond the scope of this work. Additionally, consideration is not given to the negative aspects of fear that focus on the aversion to risk taking that, it is suggested, gives rise to cynicism and apathy.\textsuperscript{564} The emphasis is on how the language of fear is used in the political arena in a way that can result in decisions that are not based on evidence sufficient to meet even the legal civil stand of proof – the balance of probabilities.

\textbf{Fear-Inducing Techniques}

The fear-inducing techniques form what appears to be an internationally and historically consistent model: the variations in approach being more a matter of coercive degree rather than formulaic difference. The politics of fear, so far as it relates to the deprivation or diminution of liberty and where it involves a domestic focus, adopts an approach that involves the demonisation of people, usually a small number, by promoting the conclusion that they are a threat to the majority, isolating those who oppose, and gathering support during the process. This process involves the highlighting of difference to obtain the desired result, rather than celebrating a \textit{vivre le difference} understanding. The isolation of those who oppose the change involves stigmatising and/or inducing the potential opponents to adopt a position that involves concluding ‘the alternative could be worse’. Reliance is also placed on getting a percentage of potential opponents to support the methods employed through perceived self-interest. The results are always adverse for the individual or minority, even where a majority of people do not fear those being demonised. The consequence can also be adverse for those who allowed the changes to occur. Where the fear is focused on an external source, the model varies to the extent that the larger the perceived threat the better for the authors of fear.

In order for there to be success for the promoters, there needs to be the absence of an independent judiciary, or, instead, a judiciary that does not accept that the liberty of the

\textsuperscript{564} Sees Frank Furedi, \textit{Culture of Fear Revisited} (Continuum, 2006) 174-198.
individual is a fundamental right; or at the very least a judiciary that will remain mute or accepting during the process of concentrating executive power. The aim of the promoters is to maintain, enhance or achieve power, and in a number of instances a fringe benefit can be the diversion of the attention of electors from the failures of the government.

**The Physiology of Fear**

The Shorter Oxford Dictionary defines fear as: ‘The painful emotion caused by the sense of impending danger or evil . . . A state of alarm or dread. Apprehension or dread . . . A feeling of mingled dread and reverence towards God or (formerly) any rightful authority . . . A reason for alarm’. The use of this emotion for survival purposes, called a flight or fight response, is generally accepted as a positive evolutionally adaptation: the positive aspect of fear being its use for self-preservation. There is scientific literature supporting the proposition that the emotion, fear, is a physiological response that is hard wired in the brain. The scientific literature points to that part of the brain known as amygdala, as being central to the emotion.\(^{565}\) How the emotion is communicated is gradually being understood using genetic techniques that have identified long-range neurons running from the central amygdala.\(^{566}\) The physiological underpinnings for the emotion have only recently been explored with the earliest research being a 1939 study of the brains of monkeys.\(^{567}\) The emotion can have damaging psychological consequences that have been described in different ways over time, as psychologists and psychiatrists develop their theories. The damaging consequences are seen in anxiety disorders, including: panic attack; agoraphobia; generalized anxiety; post-traumatic stress disorder; and specific phobias.\(^{568}\)

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568 A listing with descriptions can be found in the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, DSM-IV-TR, a consensus document, under the heading ‘Anxiety Disorders’.
Apart from the identification of the involvement of long-range neurons in a fear response, the steroid hormone, cortisol (a glucocortical), produced by the adrenal gland, is also involved. In a research paper on ‘rumination, fear and cortisol’, McCullough et al, revealed an increase in cortisol levels where participants ruminated about non-traumatic interpersonal transgressions.569 The researchers cite other studies showing the relationship between thoughts and the release of cortisol, and that such thoughts do not need to relate to real time incidents in order to induce a cortisol response.

One need not experience such life threatening stimuli in real time for them to elicit cortisol release: Activating autobiographical memories of such threats is apparently sufficient. Consistent with evidence that mental rehearsal of stressful memories elicits cardiovascular reactivity (Mc Nally et al., 2004; Witvliet, Ludwig, & Vanderhaan, 2001), people with high levels of ruminative thought about life events, including disasters (Aardal-Eriksson, Eriksen & Thorell, 2001), motor vehicle accidents (Delahanty, Raimonde, Spoonster, & Cullado, 2003), and sexual abuse (Elzinga, Schmahl, Vermetten, van Dych, & Brenner, 2003), experience increases in cortisol.570

Rumination on traumatic events and the production of cortisol can be ‘dynamic and reciprocal rather than unidirectional’.571 This circularity has the potential, it would seem, to prolong the physiological and therefore the psychological effects.

The adverse consequences of elevated cortisol have been recorded in numerous studies that do not form part of the consideration in this work. Suffice to say that prolonged exposure could not assist with health or with appropriate decision making about events that did not require an immediate flight or fight response. Humans are biologically susceptible to fear situations and this has the potential to make them vulnerable to fear mongers.572 The assumption is made that the physiological reaction to politically induced fear would be similar to non-traumatic rumination about interpersonal transgressions.

570 Ibid 126.
571 Ibid 130.
572 There does not appear to be any available research findings on cortisol levels and politically induced fear.
The adverse consequences of prolonged fear-induced stress on physical and mental health are well accepted and documented. The consequences of fear induced decision making in the political arena are not documented in scientific literature.

In the event that an individual is doubtful or confused about whether to support a legislative change, then fear-induced physiological responses probably add to the confusion, and allow conditioned biases to enter and make it easier to decide, especially where the people about whom the decision is being made are different. Logically, adopting a biased approach to decision making could not help achieve a fair result.

The assumptions adopted are that there is an emotion called fear, which has a physiological basis and that it can have both positive and negative outcomes. It is also assumed that individuals will respond differently to fear stimuli, and in a small percentage of cases the emotion is not available or is controlled to the extent that it has no influence on decision making. Having adopted the immediate preceding assumptions, this analysis concludes that fear can be a significant influence that clouds political and legal decision making.

History is replete with examples of the promotion of fear to induce certain behaviour. The definition of fear contained in the Shorter Oxford indicates a long standing promotion of fear in order to obtain religious observance. The bible is full of fearful language and the various institutions promoting religious observance focus on fear to widen their influence. The examination, in this work, of the extent of the use of fear is largely limited to examples relevant to the derogation of fundamental legal rights over the last two centuries.

**Theories of the Use of Fear**

Thomas Hobbes$^{573}$ wrote during the English Civil War of 1642 to 1651 about fear and its role in maintaining the state under the control of the King. He maintained that the terror of

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death or corporal punishment, if used by the King, played its part in maintaining order, all ultimately for the benefit of the individual and society:

To pray to a King for such things, as hee is able to doe for us, though we prostrate our selves before him, is but Civill Worship; because we acknowledge no other power in him, but humane: But voluntarly to pray unto him for fair weather, or for any thing which God onely can doe for us, is Divine Worship, and Idolatry. On the other side, if a King compell a man to it by the terrour of Death, or other great corporall punishment, it is not Idolatry: For the Worship which the Soveraign commandeth to bee done unto himself by the terrour of his Laws, is not a sign that he that obeyeth him, does inwardly honour him as a God, but that he is desirous to save himselfe from death, or from a miserable life; and that which is not a sign of internall honor, is no Worship; and therefore no Idolatry. Neither can it bee said, that hee that does it, scandalizeth, or layeth any stumbling block before his Brother; because how wise, or learned soever he be that worshippeth in that manner, another man cannot from thence argue, that he approveth it; but that he doth it for fear; and that it is not his act, but the act of the Soveraign.574

Corey Robin stresses the anti-revolutionary theme of Hobbes’ work and maintains that fear, as theorized by Hobbes, is promoted as a legitimate adjunct to reason and is ultimately used for ‘preservation and peace’.575 Robin notes that the frontispiece of the first edition of the Leviathan has an illustration of ‘an apparition king hovering over a walled city. This imposing sovereign keeps watch over the city’s inhabitants and protects them from their enemies’.576 The concept of fear as a good is designed to use fear ‘to pacify rather than arouse, to instill quiescence rather than awaken hatred’.577 Robin interprets Hobbes as having a view of fear as being a positive element because people’s view of what is ‘good’ ‘was not shared, self-preservation – and its companions, the fear of death – was no more than a regulative principle among different persons’ irreconcilable conceptions of the good. It was a point of agreement among people who disagreed, requiring of them no substantive, shared, moral foundation, only an acknowledgment of their irresolvable differences’.578 The justification for inducing fear through threats and then claiming it is necessary for peace is a tactic used over the centuries to pacify those

574 Under a section titled ‘Idolatory What’.
576 Ibid 40.
577 Ibid 46.
578 Ibid 36-37.
who might object to the punitive activities of governments. It has been most recently used to support the introduction of anti-terrorist and anti-gang legislation. The Hobbesian view is one that seems to reject the notion that people can make agreements and adopt ethical positions without the need for fear to play a role. As a theory it was designed to support the idea that a powerful ruler is required to keep the peace.

Hobbes died in 1679. In 1689 Charles Louis de Secondat, baron de Montesquieu, was born and went on to have a significant impact on the development of the political theory and the role of fear. His approach to the use of fear was markedly different to that of Hobbes and provides a theoretical justification for opposition to tyrannical behaviour and the use of fear to maintain such dominance over society. Montesquieu believed that government power should be limited and institutions should play a mediating role. Robin contends that there is an agreement between the approaches of both men in that they both suggest fear is a useful tool to gain their vision of the state. He claims:

Like Hobbes, Montesquieu turned to fear as a foundation for politics. Montesquieu was never explicit about this; Hobbesian candor was not his style. But in the same way that fear of the state of nature was supposed to authorize Leviathan, the fear of despotism was meant to authorize Montesquieu’s liberal state. Just as Hobbes depicted fear in the state of nature as a crippling emotion, Montesquieu depicted despotic terror as an all-consuming passion, reducing the individual to the raw apprehension of physical destruction. In both cases, the fear of a more radical, more debilitating form of fear was meant to inspire the individual to submit to a more civilized, protective state.579

Alexis-Charles-Henri Clérel de Tocqueville was born on 29 July 1805, fifty years after the death of Montesquieu. He was best known for his works Democracy in America and The Old Regime and the Revolution. Robin credits de Tocqueville with transforming ‘fear’s political meaning and function, signaling a permanent departure from the worlds of Hobbes and Montesquieu. Redefined as anxiety, fear was no longer thought of as a tool of power; instead, it was a permanent psychic state of the mass’.580 Tocqueville’s view was

579 Ibid 53.
580 Ibid 75.
that democratic nations may stray into despotism but that the consequential degradation would be of a milder form than that experienced before.

Hobbes, Montesquieu and de Tocqueville provide some perspectives on how the use of fear as a controlling force might apply to their societies. In current times Frank Furedi contends that fear reflects a ‘wider cultural mood’, although it has been ‘consciously politicized’. The purpose of engendering fear in a population ‘is to gain consensus and to forge a measure of unity around an otherwise disconnected elite’. This proposition is perhaps saying no more than that fear is used to achieve power over others without the necessity of using brute force or the threat of it. From another perspective it could be said to be a form of consensus building using an emotion to achieve power. The conclusion about the effect of the political use of fear is, as Furedi says, ‘to enforce the idea that there is no alternative’. Discussing alternatives and whether or not change is needed at all is a rational approach. Couching language in terms that provide no alternatives is not productive of rational discussion, especially where it is linked to traumatic events. What it does do is focus attention on the result the promoter of fear wants to achieve and heightens the potential for physiological responses to be engaged in a way that further clouds reason.

The Ultimate Fear

The ultimate fear for most people, it is assumed, is the fear of death. From this ultimate potential outcome a descending list indicating an order of severity of consequence could be developed. Such a scaled approach, however, could not factor in individual susceptibility to a threat. For example, individuals are affected differently by fear of criticism which could lead to social ostracism. There is no objective measure for the level of anxiety created by the language of fear, or what role fear played in allowing an individual to accept or even promote a change. The ability to determine the extent to which fear motivated the majority of a population to accept change would be even harder to measure. Surveying the population has resource limitations as well as substantial

581 Frank Furedi, Politics of Fear (Continuum, 2005) 132.
582 Ibid 132-133.
583 Ibid 133.
methodological problems that would probably make any attempt of limited worth. What has some value is to examine the extent to which individuals using the language of fear engage in a straightforward manipulation, or if they are also suffering from the effects of fear such that they believe the change is necessary for the good of the community. The distinction is drawn between authors of fear who use the language to maintain or enhance power in a cynical way, and those authors who are using it because they believe they must for the general good. It is assumed that at some point even the most cynical manipulators could suffer anxiety because they fear the loss of power.

If history is any guide an anxious society is likely to question less and be more accepting of authoritarian rule. The greater the anxiety, the easier it is for political leaders to control their populations. The language of fear is also more effective where there is a compliant population that has been conditioned to unquestioningly accept figures of authority. The unquestioning acceptance comes, at least in part, because it is believed that those in authority are more knowledgeable and can be trusted. People tend to be conditioned from childhood not to question authority, and this seems to travel with many into adulthood. A striking example was Malcolm Fraser’s immature acceptance of American assurances that they would be successful in the prosecution of war in Vietnam.\(^{584}\) The acceptance by the majority of Germans of Hitler’s authority is an example of how a nation can be moved to agree with the persecution and destruction of a minority, and the prosecution of a war.

There are a number of examples in the 21\(^{st}\) century of societies where language of fear and the direct application of terror that invokes the ultimate fear of death leads to anxiety that can be seen to paralyse a population and provide a tyrant with absolute power. A good example can be found in North Korea. The best available documentation to support this proposition can be found in the United Nations Human Rights Council Report that details findings of the commission of inquiry on human rights in the Democratic People’s Republic of Korea.\(^{585}\) The North Korean all powerful, Supreme Leader, and his Party use

\(^{584}\) Malcolm Fraser, with Cain Roberts, Dangerous Allies (Melbourne University Press, 2014) 145.  
\(^{585}\) Report of the detailed findings of the commission of inquiry on human rights in the People’s Democratic Republic of Korea, A/HRC/25/CRP.1, 7 February 2014. The Commission, headed by Michael Kirby and including Marzuki Darusman and Sonja Biserko, found that North Korea had
death, perhaps the ultimate fear, as one method to control its population. The Commission of Inquiry found that all citizens, including children, have witnessed brutal executions. It states:

Almost every citizen of the DPRK has become a witness to an execution, because they are often performed publicly in central places. In many cases, the entire population living in the area where the execution takes place must attend, including children. In other cases, executions are conducted in stadiums or large halls in front of a more selected audience.\(^586\)

The Commission of Inquiry provided many examples of the eyewitness testimony of executions, torture and other fear inducing activities. It also revealed how these methods resulted in unquestioning obedience to the regime. It found no examples of organised political opposition or revolutionary activity. North Korea is perhaps the best 21\(^{st}\) century example of how a population can be made subservient to the will of a tyrant, and how fear plays a central role in this successful control strategy. It appears to be a regime exercising absolute control; and unlike other people that have overthrown oppressive regimes, for example, in Timor Leste, there is no organised resistance.

It is axiomatic that the rule of law based on principles of fairness and due process is incompatible with the operation of a totalitarian state where fear is all pervasive and an independent judiciary does not exist. The Commission in its recommendations stressed the need for a fair trial and due process to become part of the North Korean system, as well as the abolition of the death penalty.\(^587\)

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\(^586\) Ibid 827-830.
\(^587\) Ibid 1220 (c) (d).
The Supreme Leader in North Korea is perhaps carrying to an extreme Hobbes’ theory of the use of fear to control the population. Whether the North Korean leaders actually fear rebellion or invasion, or for that matter whether Hitler or Stalin suffered fear or a serious mental illness is of little moment, because they can be accepted as so perverted as to not warrant concern about whether they genuinely feared an external or domestic threat. It can be accepted that their rigid controls were put in place because they wished to maintain tyrannical power, and the best interests of the populations they controlled were not relevant to them.

It can be reasonably assumed that the North Korean approach to politics does not apply to leading politicians in Australian or other Western democracies. Politicians in democracies are probably deserving of consideration as to whether they actually believed that derogative changes were necessary, to avoid bad consequences for the community. However, the ultimate fear is used by governing bodies in Western democracies when seeking change domestically or for international interventions. It is not usually suggested that if obedience is not forthcoming the state will impose death on its citizen, but rather that if compliance is not forthcoming those who threaten will kill. A good example of this type of fear-inducing manipulation was provided by Liberal member Andrew Nikolic during the short debate on the *Counter-Terrorism Legislation (Foreign Fighters) Bill 2014* when he stated: ‘The Prime Minister's description of Daesh as a 'death cult' is most fitting and apt. Such obdurate evil is rare in modern times . . . The Daesh dilemma, and the real danger it poses to humanity, is its ability to harvest, enrage and export malevolence and poisonous disaffection and mayhem, without regard for borders or boundaries. What is certain, however, is that this parasite is hell-bent on killing and barbarity, and this is precisely what this bill is designed to help prevent in Australia.’

Using this approach the ultimate fear still has a significant role to play in influencing attitudes towards anti-terrorism legislation.

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The Language of Fear

The many forms of the language of fear can include a suggestion that there is some external threat to the country or that there is an internal threat that requires action. Often the promoters of fear will claim that the threat is present both internationally and domestically, thus providing a basis for an all pervasive fear effect. Where the proposed threat is internal, examples of how other counties are dealing with the same type of problem are used. Australia usually follows the United States or the United Kingdom when it engages in the promotion of fear based legal change. Australia has engaged in most of the wars both metaphorical and actual that the United States and the United Kingdom have embarked upon in the 20th and 21st centuries. Where coercion is used to induce fear, it is designed to deter the individual from non-compliance and opposition. This approach fits neatly with legal sentencing principles of specific and general deterrence; but it can be distinguished in that deterrence from performing a criminal act, such as murder, bears little relationship to deterrence designed to stop opposition to a change of law designed to limit freedoms.

Fear of punishment is only one form of coercion; it can take a number of forms. It can also be used to suggest a disloyalty to one’s country, which leads to the opprobrium of the community. There are many examples of this approach, all of them relying on the concept of being sent to Coventry - shunned. This is a simple but effective ploy that may have effect on some people. There are numerous examples, most notably when people are urged to engage in physical warfare. A cultural acknowledgement of the opprobrium that attaches to those who do not want to fight, that has carried relevance for over a century, can be found in the A. E. W. Mason adventure novel *The Four Feathers* published in 1902. A young male, Faversham, suffers disgrace and receives four white feathers from his friends when he quits the army rather than fighting in the Mahdist War. The feathers symbolised cowardice. Faversham redeemed himself by acts of courage in saving his friends. He also won over his love. The story is simple: either agree, fight and be rewarded, or show cowardice and be shunned.
The language of fear is conveyed in a number of ways: by words that are without ambiguity; by words that are designed to allow an inference to be drawn that is adverse to an individual or group – this can be in the form of dog whistle politics; by actions of the ruling elite that result in damage to their opponents; by penalties imposed; and by the infliction of torture or death. In whatever form it takes, the language is designed to show that there was a threat posed. The induced fear is used to assist with stopping resistance to change, to isolate those who oppose the change, and to garner supporters. If a sufficient reaction can be achieved, the outcome is not one that has been achieved through the process of calm reflection on options available to deal with the perceived threat, or to even consider whether there is a real threat: the more colourful and dehumanizing the language, the greater the result that is being sought to be achieved. An example of such extreme language occurred before the second invasion of Iraq in 2003 when it was claimed that weapons of mass destruction were in abundance and terrorists abounded. Alexander Downer, Minister for Foreign Affairs, was adept in his use of the language of fear, linking the need to invade Iraq with international obligations, weapons of mass destruction and the need to protect Australians from devastating consequences. An example of his rhetoric is when he said in the House of Representatives: ‘Australia will take its place in a coalition to disarm Iraq through military force because we firmly believe we must not resile from our longstanding commitment to rid Iraq of weapons of mass destruction. We should continue to meet our responsibility to . . . enforce disarmament and to protect Australians from a new and potentially devastating threat’. Alexander Downer, *Iraq Debate*, House of Representatives, Official Hansard, 18 March 2003, 12553. 
Prime Minister John Howard had promoted a similar line of argument and also raised the potential for the weapons of mass destruction to be obtained by terrorists. He said: ‘As the possession of weapons of mass destruction spreads, so the danger of such weapons coming into the hands of terrorist groups will multiply. That is the ultimate nightmare which the world must take decisive and effective steps to prevent. Possession of chemical, biological or nuclear weapons by terrorists would constitute a direct, undeniable and lethal threat to Australia and its people’. John Howard, *Iraq Debate*, House of Representatives, Official Hansard, 18 March 2003, 12506.
The fact that the claims about weapons of mass destruction and the potential for them to be obtained by terrorists were not true mattered not at all – the desired result was achieved, without sufficient opposition. The fiction promoted and the result achieved entered, at least for a time, the public arena as truth. Once the falsity of the ‘truth’ is revealed, it becomes largely insignificant because the elite has obtained what it wanted and the public has moved on, becoming diverted with other matters: the lie gets archived.

The language is designed to induce fear in the population in order to bring about change that might otherwise meet overwhelming resistance. It has frequently been successfully employed in Australia and other Western countries. This language is primarily used by politicians and media commentators, but many other players including judicial officers and members of the public join in as the debate intensifies. Results achieved by the use of the fear that are based on lies and that have bad consequences do not result in punishment for the authors of the fear mongering. The commentators continue to exploit fear and the politicians remain in comfort: it is a safe, accepted and effective method carrying no punitive outcomes for its users. The outcome for those who are the object of the lies can be very severe. Less frequently the threat of coercion designed to induce fear if cooperation is not forthcoming is used during the introduction phase of legislation, in Western countries. For example, when conscription was introduced in Australia during the Vietnam War, the penalty of imprisonment was threatened for conscripts who did not accept that Vietnamese communists needed to be feared or fought by them. In most cases, the desired change is one that carries a punitive element if it is not complied with, once encased in a statute. In the case of anti-terrorism legislation, the penalties for non-compliance are very harsh, even for a person who is not a suspect and refuses to be questioned by the agents of the state. Throughout the process of change fear is used to initiate, promote, establish and maintain the change.

The language used is designed to elicit the emotion of fear, and it is irrelevant whether the response is flight or fight because the objective has been achieved: the facilitation of a

591 In the case of Iraq the number of civilian deaths as a result of the invasion in 2003 is estimated by the Iraq Body Count Project to be between 124,573 – 138, 882 up to 2014, and if combatants are included approximately 188,000.
change that may not otherwise be supported. Where it is being used to promote a law that reduces rights, it is usually targeted at a group that does not support the ideology of the government or is culturally different. There are many examples in Australian history where race has been a driving feature. The language does not have to do more than suggest an adverse outcome; it does not have to supply proof that a particular adverse outcome will result if the changes are not adopted. It is often left to the creative abilities of the listener to imagine the consequences. This approach is especially effective if the audience does not have any first-hand experience of the group or individuals being subjected to the laws. Humans, it seems, are very susceptible to fear of the unknown. Racial differences have historically been the easiest to exploit. The yellow peril and the White Australia policy are some of the best known examples. The violent treatment of Aboriginals, in an extra curial way, in colonial times and the early twentieth century is another example. The white population accepted and promoted the exclusion of Asians, and if they knew about the murder of Aboriginals, most at the very least remained mute in tacit acceptance.

The ease with which a fear can be promoted to the detriment of powerless people is most evident in recent years in the hostility shown by many Australians to refugees. It seems that once fear has been successfully invoked, it is surprisingly easy for those who use it to support specific agendas, to extract from the population the sought after responses. Some Australians have even adopted the callous view of the fear mongers that people should be placed back on dangerous boats to return to the place from which they came, revealing total indifference to the plight of those people even if some of them are children. Writing in 2001, Peter Mares noted that, whilst the majority of asylum seekers did not arrive by sea, those who did were the object of hostility. His words are still pertinent over a decade later:

There is a contradiction at the heart of Australian society. Like the United States and Canada, Australia is one of the world’s true immigration nations. If we are not Aborigines, then we are migrants, or their recent descendants. Yet, this is a nation hostile to its foundations. For much of our brief history we have been preoccupied
with controlling our borders to prevent the entry of others. The White Australia policy is recent, not ancient history; its influence is still felt.  

The reason for the hostility remains a fear of those who are perceived to be different. The fear is not rationally based, because Australia is a multicultural nation: but fear is not a rational response to a non-existent danger from boat people. The hostility is fostered and fomented when it suits the political agendas of those inducing fear in the population.

The use of fear has been a historically consistent theme. Perhaps the most striking examples over the past seventy plus years have been the invoking of the communist threat followed, once this threat was no longer available, by the terrorist threat. The attacks in the United States on 11 September 2001 provided fertile ground for the language of fear. This was especially the case in the United States where Tom Pyshczynski suggests that the attacks were the ‘most traumatic events the United States ever experienced’ and that they ‘shook the American people to their core, making them keenly aware of . . . their vulnerability’.  

This description perhaps cannot be so readily applied to the impact on the Australian population; however, because of the tendency to follow trends in the United States, actual feelings are probably not as relevant.

Even if there is a threat to the community by a group or individuals bent on crime, the language of fear does not require proof that the legislative changes are necessary to deal with that threat. The requirement to show necessity is glossed over to the extent that there is no need to show that a past destructive incident would not have occurred if the law was in place or that the existing laws are insufficient. All that is required is that the words used are sufficiently emotive to give rise to fear that if something is not done bad things will happen. The judiciary is not reticent to engage in use of the language of fear to support otherwise objectionable restrictions on liberty. Callinan J., in Thomas v Mowbray, engages in the process of decision making by reference to events in other countries in a similar, but more constrained way, to that of Menzies. When deciding on the validity of

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592 Peter Mares, Borderline (UNSW Press, 2001) 5.
legislation, he introduces events that are largely irrelevant to the matter he needed to consider, but seemingly for him they provided at least some justification for his judgment. The words ring with a justification based on fear:

Judges should keep in mind that distortion, bias, sensationalism, emotion and self-interest are at times common currency in ordinary social intercourse, and in the media. That does not mean that judges should disregard reliable reports and the genuine photographic depiction of, for example, relevantly here, the circumstances preceding, and after, the destruction of the Twin Towers in New York, the bombing of trains in Madrid, and of people and buildings in Bali, and the like.\(^{594}\)

There was apparently no need to consider whether the laws under consideration would have had any effect on the events outlined, even if they had been in place in the countries where the incidents occurred.

A requirement for the language of fear to be effective is that it identifies a group or individuals as being different. It also needs to be clear that any coercive element will apply only to those who are different and those who oppose. Thus, for example, bikie gang legislation only applies in a punitive sense to those who are gang members and terrorist legislation only applies to terrorists, or those not willing to accept the laws procedural requirements. For members of the public not falling into these categories, comfort can be had that they will not be adversely impacted. This simplistic approach dovetails well with coercion designed to ensure compliance from those who may wish to oppose the legislation but who are fearful of the impact it may have on them.

**The Influence of McCarthyism**

Senator Joseph R. McCarthy rose to fame in the United States between 1950 and 1954. His surge magnified a threat from the Soviet Union to the United States that, in the words of US Secretary of State Dean Acheson, needed to be presented in terms that were ‘clearer than truth’.\(^{595}\) McCarthy’s influence commenced on 9 February 1950 when he gave a speech to a small Republican gathering in Wheeling, West Virginia – as part of the

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\(^{594}\) [2007] HCA 33, 523.

unrecorded speech he claimed that there were 205 communists in the State Department.\textsuperscript{596} He was a symbol of the times giving his name as a descriptor for the anti-communist activities of the times: McCarthyism.

The 1940s and 1950s in the United States was a period of fanatical anti-communism in which the use of fear was prevalent in order to gain support for legislative change, even when those changes diminished legal rights. The process involved the persecution of members of a minor political party and the isolation and acceptance of this by those who would ordinarily be expected to oppose the attacks on civil liberties. Such monumental change required the acquiescence of the judiciary and the compliance of the community.

Australia has traditionally followed either the United Kingdom or the United States in foreign and related policies. After the Second World War, Australian governments followed with increasing enthusiasm political trends in the United States. Prior to Menzies’ attempts to ban the Communist Party, there were popular anti-Communist activities in the United States. The \textit{Alien Registration Act 1940} (Smith Act) was a notable example. It included an anti-sedition section that was authored by Congressman Howard Smith of Virginia.\textsuperscript{597} As with Communists in Australia, there was no evidence that any had behaved illegally, yet they were prosecuted and convicted under the law in the United States. Albert Freid notes about the persecution of Communists in the United States and the fact they never behaved illegally:

\begin{quote}
Whatever one thought of their authoritarian style and modus operandi and their attachment to the Soviet Union, they never behaved illegally until the government decided they did in 1948. By then, moreover, the number of party members was falling rapidly, and so was whatever prestige it still possessed. In any case, the American Communist Party was the smallest and most marginal of any among the world’s democracies. Yet no other democracy prosecuted Communists for being Communists, much less imprisoned them for upwards of five years (some served longer), a miscarriage of justice if ever there was one.\textsuperscript{598}
\end{quote}

\textsuperscript{597} The Act has been amended a number of times; it can be found at 18 \textit{U.S. Code} § 2385 (2000).
\textsuperscript{598} Albert Fried, \textit{McCarthyism: The Great American Red Scare} (Oxford University Press, 1997) 27.
The fear of domestic communism during the 1940s and 1950s did not need to be one held by the majority, let alone based on real concerns, it was sufficient that all potentially effective opposition was muzzled by the fear of being stigmatised as a Communist sympathiser or worse – a Communist. There seems to be an acceptance that over time the public sentiment did grow in favour of the witch hunters. McCarthyism has been frequently compared to the witch trials of earlier centuries. Arthur Miller’s 1953 play *The Crucible*, a story about the Salem witch trials in Massachusetts in 1692 and 1693, was written as an allegory of McCarthyism. Miller’s penalty for opposing McCarthyism was to be questioned by the House of Representatives’ Committee on Un-American Activities in 1956, where he was asked to inform on Communist writers he knew in 1947. He refused and was convicted by the Federal District Court of ‘contempt of Congress’, but the conviction was overturned in the United States Court of Appeals in 1958. Following his successful appeal, one editorial piece noted:

The real objection to the proceedings taken against Mr Miller was [that] people were required to inform on other people, not because of what they had done but because of what they had been. McCarthyism flouted the principles of Western justice.

Secondly, people were required to inform as a means to their own ritual penance and purification. Congressional committees already knew the names; as in the Inquisition, what was wanted was an "act of faith."

The growth in criticism of the inquisitional approach did not seem to reduce the anti-communist rhetoric which continued unabated for decades.

Apart from the *Smith Act*, the *Labor Management Relations Act 1947* (Taft-Hartley Act) was also introduced and it prohibited a number of union activities and notably in terms of anti-communist positioning required union officers to swear affidavits that they were not

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599 *The Guardian*, Friday 8 August 1958. The relevance of McCarthyism was highlighted by Daryl Melham in November 2005 when he said, about the *Anti-Terrorism Bill (No. 2) 2005*, that: ‘The legislation basically takes us back to the McCarthyist era – that era of communism in the fifties, where people were smeared and dealt with very badly. They were not dealt with properly through proper processes. … I assert that the control orders, as proposed by this government, are about the state sanctioning the terrorising of its citizens.’ Melham opposed the Bill in Caucus but lost the argument there and consequently voted for legislation that he regarded as entirely unjustified. Melham above n 528, 74-5.
communists. There soon followed the *Subversive Activities Control Act 1950* (McCarran Act) which came into force on 23 September 1950. Apart from requiring Communist organisations to register with the United States Attorney General, it created a Subversive Activities Control Board and contained a provision that allowed the President to apprehend and detain people who may conspire to engage in acts of espionage or sabotage. Its various provisions bear some similarity to the anti-terrorist legislation introduced in Australia over fifty years later.

The liberal communities’ reaction to the rise of McCarthyism is summarised by Fried when he refers to the response of the Civil Liberties Union. Fried notes that ‘liberal groups did not take long to fall in line with the ethos of McCarthyism’ and that the American Civil Liberties Union conducted its own purge of Communists or fellow travelers, the philosopher Corliss Lamont chief among them’.600

In Australia the use of the language of fear is clearly shown in the election speech in 1949 of the politician Robert Menzies. He linked a foreign power with Australian communists and stressed the cultural difference between such people and the majority of the population. This group, so he claimed, was so different that they were ‘opponents of religion’. The race difference could not be used because the threat at the time was said to be Russian communism, but religion and law and order were useful invocations that allowed people to use their imaginations to create an outcome that was bad. He stated:

> The Communists are the most unscrupulous opponents of religion, of civilised government, of law and order, of national security. Abroad, but for the threat of aggressive Russian Imperialism, there would be real peace today. Communism in Australia is an alien and destructive pest. If elected, we shall outlaw it.601

There was no need to provide proof that if the group was not outlawed they would damage the society. For the language of fear to be effective it only requires a belief that some future calamity will occur. Interestingly, despite his vehement rhetoric about the

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600 Furedi above n 581, Ibid 49-50.
destruction that would be visited upon the community, Menzies not only failed, by 52 thousand votes, to get the Communist Party outlawed, but there was no destruction wrought upon the community by Australian or foreign communists. His failure to provide evidence and accurately foretell the future did not affect Menzies’ popularity sufficiently to cause him to lose an election: possibly it did not affect his popularity at all. He would have to wait until the 1960s before he could introduce racial difference and link it with a communist threat, when he promoted Australia’s disastrous and futile intervention in the Vietnam War.

The Use of Fear in the Vietnam War

An example of the use of an external threat where the application of punishment and shunning was used to obtain compliance was conscription for Australia’s involvement in the Vietnam War. It involved a continuation of the anti-communist theme. The propaganda framework for the war was established by US President Eisenhower in 1954 when he proposed the domino theory, that was subsequently adopted and used as a justification by Presidents Kennedy and Johnson, and ultimately by Prime Minister Menzies. In a news conference on 7 April 1954, Eisenhower expounded the simplistic domino theory. A year later this image was used by Menzies to justify Australia’s increasing involvement in the Vietnam War. He claimed:

. . . it is our judgment that the decision to commit a battalion in South Vietnam represents the most useful additional contribution which we can make to the defence of the region at this time. The takeover of South Vietnam would be a direct military threat to Australia and all the countries of South and South East Asia. It must be seen as part of a thrust by Communist China between the Indian and Pacific Oceans. The task of holding the situation in South Vietnam and restraining the North Vietnamese is formidable.

All the propositions put forward by Menzies as justifications proved to be misleading or simply untrue. Menzies did have form in this regard, his dire warnings about the threat of domestic Communism in the early 1950s were also wrong. Whether he believed his own

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cant is a moot point, but what is clear is that the level of analysis he applied was simplistic and the language of fear direct and strong. It relied on the long standing fear of the ‘yellow peril’ to the north, the acceptance of White Australia, anti-Communism, and a desire to follow America. The fact that the approach was bereft of any analysis about what the Vietnamese nationalists actually wanted, or whether there was any real possibility of winning a war for America and its corrupt South Vietnamese government puppets, did not seem to matter to the majority of the Australian electorate or the Australian government. The times were right for the language of fear to be successfully used.

Malcolm Fraser Liberal member for Wannon was Minister for the Army from 26 January 1966 to 28 February 1968, and Minister for Defence from 12 November 1969 to 8 March 1971: periods of increasing Australian involvement in Vietnam. His reflections about Australia’s role provide an insight into the decision making processes involved, and the lies told. Fraser notes that as part of the decision making process, ‘We accepted too easily that South Vietnam represented something that was good and that Vietminh and North Vietnam represented something that was wrong, very much to be opposed. We cast the issue as a simple case of good and evil when, in reality, it was so much more complicated. If we look at what Australia has done in Iraq and Afghanistan, it is not only America that has failed to learn lessons’. He attempts to justify some of the government’s actions by pointing out that he did not have access to CIA briefings that were not optimistic about success. He even points out that ‘Australian troops were not deployed to Vietnam in response to a request from South Vietnam, [as claimed at the time] but rather as a result of American pressure’. His account shows a government that truly believed they were engaged in fighting evil, and he stresses the integrity of the people involved when he states:

Despite strategic dependence, I still find it impossible to believe that any Australian Government would have taken the course that we did take if they had been fully advised of the assessments McNamara was in fact making and giving to the President. This is regardless of our broader aims at the time of keeping the

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604 Malcolm Fraser, with Roberts Cain, Dangerous Allies (Melbourne University Press, 2014)145.
605 Ibid 143, 145.
606 Ibid 142.
United States engaged in South-East Asia and adhering to our policy of forward
defence and despite our deeply rooted fear of the communist threat. If we had
known what the CIA and McNamara both believed at that time – that the cause for
which America was fighting in Vietnam was hopeless, and that America and
South Vietnam could not succeed – we would never have become so involved.
There was information within the US Administration, although the White House
was paying no attention to it, that should have been put before an ally.607

The claim that the Americans did not allow Australians to have access to views and
evidence about the situation in Vietnam is a childlike refrain. His attempt at a justification
in hindsight fails to explain why an independent nation did not gather its own evidence
and conduct its own analysis of the situation prior to engaging in a process that caused
substantial harm and many deaths. There is no reason to doubt that Fraser genuinely
recalled events and presented a truthful view. What his recollection and views reveal is
that individuals who are affected by fear (in Fraser’s case a belief that good was
confronting evil) can fail to make rational and reasonable decisions, and that they can
make decisions without necessary proof, even where their actions have internationally
adverse consequences.

On 5 November 1964, National Service scheme was announced to assist with increasing
the strength of the army and in a short time later with fighting in Vietnam.608 The
National Service Act 1964 required 20 year old males, who were selected by ballot, to
serve in the Army for a period of twenty four months; this was reduced to eighteen
months in 1971. After the period of two years’ service a further three years’ service in the
Reserve Army was required. In 1965 relevant amendments were made to the Defence Act
to allow conscripts to serve overseas. Compliance with the scheme was usual and over
800,000 men registered, 63,000 were conscripted and over 19,000 served in Vietnam. The
coercion used to ensure compliance was imprisonment.

Draft evasion grew as the futility of the war became apparent and organisations opposed
to it gained increasing publicity. The coercion used to maintain Australian involvement in
the war ended with the first decision of the Whitlam Labor government in 1972.

607  Ibid 146-147.
Attorney-General, Senator Lionel Murphy recommended to the Governor-General that he exercise his prerogative of mercy and release seven men serving eighteen months gaol. Jenny Hocking notes that following this decision, ‘All pending prosecutions of more than 300 draft resisters would now be dropped and the “lottery of death” that conscription had become would be immediately abolished’. The pain may have ended for those subjected to the draft but no compensation or apology was given to those in Vietnam who lost their lives or who were maimed. As is often the case, those who engaged the language of fear to allow the destruction went on to live in comfort and to prosper; for example, Menzies went into a peaceful retirement, and Malcolm Fraser became Prime Minister.

**Fear of Terrorism in Contemporary Australia**

The historical landscape had changed by the 2000s: anti-Communism and the ‘yellow peril’ could no longer be fertile ground for fear mongers. However, the American allies were still present, and the Australian desire to follow remained in place. The new peril of terrorism replaced the communist threat and the purveyors of fear became active. Race and religion joined the fear rhetoric with Muslims replacing atheists and the yellow peril being replaced by the foreigners from Middle Eastern countries. The role of coercion still played its part for those who did not want to obey the legislative changes. The difference is that there is no ground swell of opposition to the laws, probably because the children of the middle class were not being asked to fight and die, and certainly not being gaoled: there is no need for a ‘Save Our Sons’ movement as in the days of the Vietnam War.

Carmen Lawrence emphasises the need for caution when dealing with the perceived terrorist threat:

> The mantra of our times is that the biggest risk to our safety comes from terrorists who might attack us at any moment . . . . In its extreme formulation, this threat is portrayed as evil itself. To the extent that we accept this personification, we are tempted to abandon caution and agree to extreme measures to defeat such an implacable and elusive foe. In all the panic surrounding the rhetoric of the so-called war on terror, little attention has been given to understanding terrorism . . .

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Calls for caution were ignored during the period of the Vietnam War, as were calls for caution before a decision was taken to invade Iraq for a second time. The fear rhetoric, it can reasonably be concluded, was used for cynical purposes. In the United States the linking of terrorism and fear, according to Al Gore, was devised to meet political ends and the fear campaign ‘aimed at invading Iraq was precisely timed for the kickoff of the midterm election campaign in 2002’.  

He noted in terms of domestic law-making that: ‘The administration also did not hesitate to use fear of terrorism to launch a broadside attack on measures that have been in place for a generation to prevent a repetition of gross abuses of authority by the FBI and the intelligence community that occurred at the height of the cold war’.

The real motivations for those who took the decision to invade Iraq do not actually need to be provided by the critics of the war. It is sufficient to show that the reasons given publicly were lies. It is for the authors of fear to reveal their true motives and for others to determine if their explanations are truthful or not. What can reasonably be excluded as a justification for the invasion of Iraq is that the decision makers actually feared what the Iraqi government could do to cause damage and death in the United States or Australia.

The genuine fear suffered by Fraser, and presumably other members of the government, during the Vietnam War, also appears to be a diagnosis applicable to Liberal Prime Minister, John Howard, when terrorism was introduced as the next major threat to democracies, following the 11 September 2001 attacks in the United States. Howard, if his words are accepted, seems to have had a bona fide belief that there was a need to change the criminal laws in Australia. He was in the United States at the time of the attacks and in his autobiography, Lazarus Rising, he is clear about how he felt: ‘Being in Washington meant that I absorbed, immediately, the shocked disbelief, anger and all of the others emotions experienced by the American people. They were outraged by the audacity and stunned by the chilling effectiveness of the terror mission’. The fear effect

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612 Ibid 783.
614 Ibid 448.
was carried with him through the years he was Prime Minister, if the legislative changes are any guide. The depth of his concern is shown in hindsight reflections about feelings during the evening of the attacks:

Janette and I decided to spend the evening at the embassy residence and that afternoon decamped there with a lot of our staff and later had an informal barbecue. We were all still quite numb. It was a sombre occasion and a sad contrast to the spirited optimism felt only two days earlier. It seemed the world had irrevocably changed in 24 hours and that so many things that seemed important just a day or two earlier would no longer be issues troubling us in the months ahead.615

Where Robert Menzies had been unsuccessful in promoting legislative change designed to outlaw communists in Australia, John Howard was much more successful with his legislative changes designed to defeat terrorists in Australia. Significantly, there were thousands of communist party members in Australia during Menzies’ time as Prime Minister, but hardly any terrorists for Howard to defeat, if criminal convictions are an indicator. The attempt to derogate fundamental legal rights in the 1950s and the successful derogation in the 2000s were both unnecessary.

The politicians who could normally be expected to oppose changes that derogate fundamental legal rights often resile from taking action or limit their response to trying to make minor amendments to the proposed legislation. Where no real opposition is offered, this can be as a result of a personal visceral fear that involves an unwillingness to oppose because opposition may result in electoral defeat. A striking example of this type of fear involves the Australian Labor Party and its historical attitude to the Communist Dissolution Act. The Labor politicians allowed anti-terrorism laws to go through parliament that included the detention of non-suspects, and the removal of the right to silence and the presumption of innocence, whereas in the 1950s Labor vigorously fought the outlawing of the Communist Party of Australia and laws that would have removed similarly important rights. However, fear of a double dissolution election caused the

615 Ibid 449.
Labor parliamentarians to allow the passage of the *Communist Party Dissolution Bill 1950* [No 2].\(^{616}\)

Prime Minister John Howard continually used fear to promote legislative changes and Australia’s involvement in wars in Afghanistan and Iraq. An example of his use of the language of fear can be found in an ABC interview in 2005 with reporter Maxine McKew, where he dramatized the terrorist threat to Australia as unprecedented and claimed it would be ‘morally bankrupt’ not to oppose the ‘fanatics’. He stated:

> The terrifying thing now is that the weapons available to the fanatics are both more lethal and more easily delivered, and that's what makes terrorism, modern terrorism, so much more threat threatening.

> Maxine, these people are opposed to what we believe in and what we stand for, far more than what we do. If you imagine that you can buy immunity from fanatics by curling yourself in a ball, apologising for the world - to the world - for who you are and what you stand for and what you believe in, not only is that morally bankrupt, but it's also ineffective. Because fanatics despise a lot of things and the things they despise most is weakness and timidity. There has been plenty of evidence through history that fanatics attack weakness and retreating people even more savagely than they do defiant people.\(^{617}\)

Krista De Castella, Craig McGarty and Luke Musgrove analysed John Howard’s speeches between September 2001 and November 2007 for their fear arousing content.\(^{618}\) The analysis was derived from content coded sentences ‘containing core-relational themes of threat or danger, statements which were motivationally relevant, motivationally incongruent, and statements that promoted low or uncertain ability to cope with the present threat’.\(^{619}\) All but three of the 27 speeches that involved terrorism between 2001 and 2007 revealed the presence of the four key coded components of the fear appraisal.\(^{620}\)

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\(^{619}\) Ibid 7.

\(^{620}\) Ibid 9.
They concluded that ‘the majority of Howard’s political speeches about terrorism met the criteria for promoting fear-consistent appraisals’.\textsuperscript{621}

Essentially, John Howard did not have to make public statements about anti-terrorism legislation; his main focus was on supporting the United States in its interventions in other countries. His interest in the rise of the anti-terror laws was perhaps ancillary to his main interest, that of supporting the United States. His rhetoric of fear was stronger in the lead up to the invasion of Iraq in 2003 than it was in 2001. The conclusion I have reached is supported by the analysis of De Castella, McGarty and Musgrove who state: ‘Across other speeches, prevalence of appraisal content varies over time from less than 10% after the terrorist attacks of 9/11, up to approximately 40% just prior to the U.S.-led invasion of Iraq. This finding suggests that Howard’s use of potentially fear-invoking language changed over time and context’.\textsuperscript{622}

Like Malcolm Fraser, Howard was later to regret his words in the lead up to the invasion of Iraq, once no weapons of mass destruction were found. In an interview in September 2014 he is reported as saying: ‘I was struck by the force of the language used in the American national intelligence assessment late in November 2002. It brought together all the American intelligence and paragraph after paragraph, they said, we judge Iraq had weapons of mass destruction. I felt embarrassed, I did, I couldn't believe it, because I had genuinely believed it. So, I felt embarrassed and I did my best to explain ... that it wasn't a deliberate deception. It may have been an erroneous conclusion based on the available information but it wasn't made up.’\textsuperscript{623}

In November 2007 the federal Liberal-National government was replaced by a Labor one and there was less emphasis on anti-terrorism laws, although there was no repeal of any of the draconian provisions. In 2013 the Labor government was defeated and a Liberal-National one led by Tony Abbott came to power. With Abbott’s ascendancy new life was

\textsuperscript{621} Ibid 9.  
\textsuperscript{622} Ibid 9; see also analysis at 17.  
given to anti-terrorism laws and ASIO was given significantly more powers. Tony Abbott employed some of the same techniques as John Howard and linked foreign threats to the need for more anti-terrorism laws. In a statement to the House of Representatives on 22 September 2014, Tony Abbott stressed the number of Australians going to fight in Syria and Iraq and linked that to unexceptional and mostly fruitless anti-terrorist raids in Sydney and Brisbane. His aim was to promote further derogating laws and announce the shift of a balance between security and freedom to security. He stated, once again using fear to support his approach:

Regrettably, for some time to come, Australians will have to endure more security than we are used to and more inconvenience than we would like. Regrettably, for some time to come, the delicate balance between freedom and security may have to shift. There may be more restrictions on some so that there can be more protection for others. After all, the most basic freedom of all is the freedom to walk the streets unharmed and to sleep safe in our beds at night.

Again in 2014 an external threat was used to allow for a military intervention in Iraq and Syria, and to allow for the introduction of legislation breaching fundamental legal rights. The Australia Security Intelligence Organisation had raised the official terrorist threat level without providing evidence for the rise or even attempting to justify it. Yet parliamentarians accepted the new level, without questioning the basis on which it had been made. Then Prime Minister Tony Abbott simply stated:

Based on advice from security and intelligence agencies, the Government has raised the National Terrorism Public Alert level from Medium to High.

The Australian Security Intelligence Organisation (ASIO) independently determines the threat level.

The advice is not based on knowledge of a specific attack plan but rather a body of evidence that points to the increased likelihood of a terrorist attack in Australia.

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624 Apparently 900 police were use in the raids, 15 people were arrested and only 2 charged with criminal offences, www.abc.net.au/news/2014-09-18/live-blog3a-anti-terrorism-raids-in-sydney-and-brisbane/5752074.


The secrecy and lack of oversight of ASIO does not allow for an independent assessment of the conclusion that the threat level needs to be raised. ASIO does not even allow access to the ‘body of evidence’ upon which it claims it makes an assessment. There is a substantial body of evidence, some of it referred to in Chapter 4, which clearly shows that assessments by ASIO should not be accepted without first having an independent review of the facts upon which they are basing an assessment. Furthermore, as noted by John Mueller and Mark Stewart, writing in 2012 about the situation in the United States since 2001, there has been ‘no terrorist destruction that remotely rivals that inflicted on September 11’. They claim that Americans have been delusional about the extent of any terrorist threat, yet there is no sign of the condition abating with ‘trillions of dollars’ having ‘been expended and tens of thousands of lives . . . snuffed out in distant wars in a frantic, ill-conceived effort to react to an event that, however tragic and dramatic in the first instance, should have been seen, at least after a few years had passed, to be of limited significance’.

In all the cases referred to in this chapter, fear has been used to promote the changes sought by governments. There are many examples where fear has been used to introduce anti-terrorism laws. However, there appear to be no instances where it is simply said that the new laws will improve a situation by making the administration of justice fairer for all concerned; or that they will promote the rehabilitation of a group or individuals who are behaving in an aberrant fashion. The need for the change is invariably immersed in simple and frightening language suggesting that, if the change is not made, worse things will happen.

**Conclusion**

The politics of fear will continue to thrive while no real attempts are made to expose it as a dangerously flawed approach, which adversely affects decision making. Such exposure, with the aim of rejecting the approach, may not suit politicians or a community that has been conditioned to accept authority and is hardwired for fear. Fear has become a normal

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628 Ibid 83.
part of decision making about postulated security threats in Australia, as is evident from the analysis of parliamentary debates in Chapter 7 and the analysis in this chapter. In such circumstances, there is little reason to feel sanguine that history will not repeat itself. A reasonable prognosis is that Australia will continue to make decisions about responding to terrorism based on fear, and on what is the latest trend determined by American or British governments. The examples of entry into the Vietnam War based on lies told to the Australian government, and engaging in an invasion of Iraq in 2003 based on either failed intelligence or alternatively another lie, have not stopped the vast majority of Australian parliamentarians from acting without cogent evidence in supporting anti-terrorism laws.
Conclusion

The central thesis of this work is that there is a positive binding interrelationship between the criminal law, fundamental legal rights, those who apply the laws and those who enforce laws, such that a diminution or corruption of one leads to the failure of the criminal justice system in ways that adversely impact on individuals and the community as a whole. The corruption of the relationship and the establishment of a parallel legal system, it is posited, have been caused by the introduction of anti-terrorism laws since 2001. Evidence for the corruption of the first part of the relationship, the criminal laws, can be found in the legislation. In order to understand why this is so, it is helpful to have some understanding of how the criminal justice system operates. Whilst reference has been made to best practice requirements in a number of chapters, for the purpose of showing how the system operates reference is made in this conclusion to the adversarial system, evidence gathering and analysis, and ethics.

The criminal justice system functions reasonably well because, amongst other things, the criminal laws contain protections for people alleged to have committed offences, and place constraints on those who apply and enforce the laws. The criminal trial in common law countries is described as adversarial. In the High Court case of Gipp v The Queen, McHugh and Hayne JJ provide a classical description of how the adversarial system works:

A criminal trial under the common law system remains today, as it has been for many centuries, based on the theory that it is an adversarial contest between the Crown and the accused. Each party gathers its own evidence, tenders its own evidence and cross-examines the evidence of the opposite party. Each party selects the grounds upon which it relies and argues them without assistance from the court. For its part and subject to statutory exceptions, the court’s role is generally limited to determining what legal rules govern the issues selected by the parties and whether the evidence and contentions of the parties are within those rules. 629

This description, however, describes only some parts of the relationship, but significantly mentions the rules that govern the operation of a trial. Those rules involve the

admissibility of evidence and a substantial consideration in that regard is whether the fundamental legal rights of an accused person have been protected.

The relationship between those who enforce and apply the law is also based on the evidence brought forward in each case. McHugh and Hayne JJ suggest that ‘each party gathers its own evidence’ and to some extent that is correct but in criminal cases the prosecution is required to prove its case beyond reasonable doubt and to do this it relies on the evidence gathered by the police. This evidence is also relied on by the defence in a number of ways. First, that all the relevant evidence has been disclosed; second that the evidence is not fabricated; and third, that it is available for testing through cross-examination. The defence can also gather evidence and present it at trial where it can be tested by the prosecution. The foundation of every case is therefore evidence. The approach to fact gathering and analysis which should be adopted is summarised by Anderson and Twining, who emphasise the importance of integrity when undertaking factual analysis, which is distinct from legal analysis:

Factual analysis is different... The skills necessary are those required to organize and analyze a mass of raw data - the evidence actually or potentially available – and to determine the inferences that can properly be drawn from that data in relation to the ultimate facts in issue in a case. To illustrate the distinction, factual analysis ordinarily assumes that the applicable legal principles are given.

Ultimately, if the facts relied upon are false, the trial process is corrupted, and if the false evidence is not identified, then a miscarriage of justice will occur. The interrelationship of the parties involved in the traditional justice system relies on the ability of each party to behave ethically. The requirement for high ethical standards is stressed for both enforcers and appliers of the law because such standards are so often missing and as a consequence abuses occur.

Blind acceptance by politicians of limited transparency and control over the police and other enforcement agents flies in the face of reason and history. Yet the anti-terrorism...
laws have unleashed the potential for significant destructive behaviour by not having relevant controls and transparency embedded in legislation.

Existing criminal laws assist in maintaining the integrity of the justice system by identifying the elements of offences and the limits of the criminal laws. The laws also assist by establishing procedures and rules of admissibility that include fundamental legal rights. The objective, at the most fundamental level, of the justice system is to prosecute and punish those who hurt others, whilst protecting the liberty of those who have not offended. However, if the fact gathering is unreliable, as distinct from being fabricated by law enforcement, it can also lead to a perverted outcome. The most draconian of the anti-terrorism laws allow for this possibility, especially where they require answers from suspects and non-suspects alike on penalty of imprisonment. At the most fundamental and the most important level of fact gathering, the anti-terrorism laws by their very design are substantially flawed.

The evidence shows that the anti-terrorism laws were introduced to meet a threat that had not eventuated in Australia. The laws were introduced by parliamentarians who suggested there needed to be a balance between the need to meet the terrorist threat and civil liberties. What has in fact happened is that weight has been given to draconian laws while little, if any, consideration has been given to fundamental rights. Such rights have been treated by both legislators and commentators as separate, and where anti-terrorism laws are concerned, as not essential. But, as Jenny Hocking observed these basic rights are ‘precisely the means through which justice is achieved’. The result of removing rights, so far as the criminal justice system is concerned, is that the balance between the criminal laws, fundamental rights and the enforcers and appliers of the laws has become disturbed to the extent that it has fractured, and a parallel legal system has been established. Each of the preceding chapters has provided evidence of the importance of balance within the justice system, how it can be easily undermined and how the fundamental rights have been derogated. Commentators and legislators who talk of an external balance between

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executive action (ostensibly for national security) and retaining basic rights do not acknowledge the importance of the balance between different elements within the criminal justice system.

In Chapter 1 the genesis of the anti-terrorism laws was examined along with some of the academic commentary. The anti-terrorism laws were introduced as part of the so-called war on terror launched by an American President following attacks on 11 September 2001. The laws were designed, it was claimed, because the existing laws could not prevent attacks in Australia. They were to be preventative laws and the language used to promote the preventative approach was that of fear that attacks were imminent. The laws were introduced as a matter of urgency, and Australia coupled its domestic response with international actions led by the United States. As previously mentioned, John Mueller and Mark Stewart have made the point that there have been no attacks in the United States on the scale of 11 September 2001.633 Their claim is that the American response is delusional about the extent of the terrorist threat.634

If the American response was delusional when based on a significant attack, then the Australian response falls into the same category, because of the extremely limited criminal activity that has met the very broad legal definition of terrorist offending. Law making on the basis of unlikely events can be regarded as ill-advised, but law making without an evidential basis is dangerous, especially where those laws remove fundamental legal rights. The effectiveness of the efforts to stop terrorist attacks is doubted by Mueller and Stewart, who give the example of Washington Post’s Dana Priest who continually asks officials about what plots have been stopped by US intelligence efforts and gets no response.635 In Australia in one of the few relevant cases, as noted in Chapter 7, the prosecution of some people found to have belonged to a terrorist organisation was the

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634 Ibid 83.
635 Ibid 93. When interviewed in late 2013, then Director General of ASIO David Irvine claimed, without giving any details, that ‘we have stopped four or more terrorist attacks’ since 1998 and ‘any number of smaller potential incidents’. Frank Moorhouse, Australia Under Surveillance, (Vintage Books 2014), p 194.
result of community members identifying them for the police. Mueller and Stewart note that ‘when a terrorist plot has been uncovered, policing agencies have generally been anything but tight-lipped about their accomplishments’. In Australia the arrest of anyone on a terrorist charge receives significant publicity, but there is no evidence provided that control orders, preventative detention orders or the interrogation of a non-suspect or any other draconian enactment has had any relevance. It can therefore be inferred that any arrests were the result of normal policing and traditional investigative methods.

The right to liberty, for the purpose of this work described as the paramount right, has been fundamentally undermined to the point where even non-suspects can be arrested and held in detention. In a significant number of instances the right to silence has been removed and the presumption of innocence dispensed with. These rights, as shown in Chapter 2, are substantive rights that underpin the fundamental legal right to a fair trial which protects the right to liberty. In a number of instances the onus of proof has also been shifted from the prosecution to the defence, the right to silence removed, disclosure has been removed or diminished, and legal representation neutered. The rights that have been developed by the common law, statutes and through international treaties and covenants have been derogated by the anti-terrorism laws. The first parts of the interrelationship have therefore been corrupted by anti-terrorism laws introduced since 2001. The extent of the corruption has resulted in the creation of a parallel legal system that has some of the features of the tradition criminal justice system, but only to the extent that it shows a similar outline without the necessary substantive detail. The role of the courts in protecting fundamental legal rights was also examined in Chapter 2, and the limits of the courts’ power identified. The power of the courts is limited to exercising control over the right to a fair trial, but only so far as being able to stay a trial if it is going to be unfair. The extent to which an Australian court can still do this where anti-terrorism laws are involved remains to be tested. The very limited role the courts have when

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637  Mueller and Stewart, n 633 above, 94.
parliaments pass derogating legislation means they cannot be relied upon to rectify mistakes made by parliamentarians, and the reform of the laws needs to be advanced through democratic processes, rather than through the development of the common law.

Chapter 3 provides examples of where law enforcement agencies, sometime in unison with politicians, have behaved in a corrupt manner. The corruption has resulted in many examples of miscarriages of justice and increased criminal offending by the law enforcement agents. The justice system relies on truth being told by those who apply and enforce the laws. In the case of the police, history shows that they too frequently engage in lying to the court and in criminal behaviour generally. When this type of process corruption happens, the interrelationship fractures and miscarriages of justice occur. The lies, when given in court, may also be sufficiently significant to amount to the criminal offence of perjury. The parliamentarians who promote and support the anti-terrorism legislation have given virtually no thought to the problem of corruption and abuse of power by law enforcement agencies. The legislation has in fact removed any transparency that existed, restricted accountability and introduced secrecy. This approach has the effect of encouraging contamination of the system and removal of any trust between law enforcement agencies and the appliers of the law, such that the system becomes deeply flawed to the extent that it can be regarded as a different parallel system. The failure of parliamentarians to give consideration to corruption may be a cultural failing. The acceptance of lies and deceit amongst their own ranks, with the only possibility of punishment being removal at election time, may influence the way they approach the criminal justice system. That is they show scant regard for how truth needs to be a necessary element if the criminal justice system is to function properly. The parliamentary debates do not reveal any consideration of the very real potential for law enforcement agents to act corruptly while exercising the powers given to them. When asked a number of questions about what consideration was given by the Labor members to the potential for abuse by law enforcement agents, a senior Labor parliamentarian gave the following responses: ‘It was never raised. It was not central to the issue. They were seen as good guys.’ He added: ‘It was not articulated.’ Further, he added: ‘There was discussion about
safeguards’ but affirmed, ‘No one thought they were going to act corruptly’ and ‘there was blind faith in the authorities.’

Chapter 4 examined some historical examples of where fundamental legal rights were either ignored or attempts were made to remove them. The 19th Century and the first part of the 20th Century saw a criminal justice system that, especially where Aboriginals were concerned, to a large extent disregarded fundamental legal rights and even the right to life. The relationship between the laws and those who applied and enforced them was broken. Those who enforced the laws often simply killed Aboriginals, or deprived them of their liberty in the most brutal of ways. Courts showed little interest in the depredations visited upon Aboriginal people. Where they became involved prosecutors would seek penalties rather trying to seek justice. This problem has not been eliminated; a recent example of prosecutorial zealotry can be seen in the High Court case of *Walden v Hensler*. In terms of the penalty imposed by a Magistrate’s Court and then by the Supreme Court of Queensland it is a trivial case. However, as an example of the unthinking treatment of Aboriginal people by a prosecuting authority and lower courts it is significant. The significance is acknowledged by the fact that the High Court entertained the appeal and altered the sentence result without referring the case back to a lower court. In February 1984, the appellant, an Elder of the Gungalida people in the area of Burketown and Doomadgee in Queensland, shot a plain turkey on Carlton Hill station. He shot it to take home and eat. His son also took a turkey chick home as a pet. The appellant was in breach of the Queensland *Fauna Conservation Act 1974-1979*. He had permission from the station manager to go hunting and was not aware of the provisions of the Act. He was convicted and fined in the Mount Isa Magistrates Court. The Full Court of the Supreme Court of Queensland upheld the magistrate’s decision and increased the penalty when he appealed.

After considering various possible defences and the English common law, Brennan J, with whom all the other judges agreed, found that it was an injustice and upheld his appeal.

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Brennan J said:

To deprive an Aboriginal without his knowledge of his traditional right to hunt for bush tucker for his family on his own country and then to convict and punish him for doing what Aborigines had previously been encouraged to do would be an intolerable injustice. It adds the insult of criminal conviction and punishment to the injustice of expropriation of traditional rights. It can and should be avoided by discharging the appellant absolutely . . . . 640

The fact that justice was not obtained in the lower courts is not just an adverse reflection on how prosecutors and courts viewed traditional Aboriginal rights, or how they displayed an eagerness to enforce a law without consideration of the context in which it was being applied; it also showed how important it is to ensure that the laws are appropriate and fair, because if they are not, they will probably still be enforced.

The role of defence lawyers during the 19th Century and much of the 20th Century, as far as Aboriginals were concerned, was muted at best. It was not until 1970 that a largely volunteer Aboriginal legal service was established in Redfern, Sydney. The criminal justice system during most of the white settlement of Australia did not really exist for many people. What existed for Aboriginal people for many generations after the British occupation was a parallel legal system that offered little or no protection of their rights, including the right to life. The fight for justice is far from over for Aboriginal people as was show by the Royal Commission into Aboriginal Deaths in Custody and the Bringing Them Home Report.

Chapter 4 also showed how a political campaign, coupled with fear mongering, can create vulnerability for a significant segment of the population; the main example provided being that of Communist Party members and their supporters. The evidence and analysis provided in Chapter 4 reveals that resistance by people and the courts to the attempt to outlaw the Communist Party stopped parliamentarians from creating a legal system that distinguished between people and that would have unfairly made criminals of thousands. What was not stopped were the rise of the surveillance state and the entrenchment of a

640 Ibid [26].
secret organisation to spy on people going about their lawful activities. ASIO was created in secret by Chifley and its rise to the point where it now has significant powers that can directly diminish fundamental legal rights took over 50 years. The Cold War was the context in which ASIO initially grew to operate largely free of the constraints imposed by legal rights. It was the creation and extension of ASIO in the Cold War that established a foundation that allowed for the easier development of laws in the 21st Century that have elements of a police state. The increased powers given to ASIO by anti-terrorism laws after 2001 have created a legal distinction between people, and introduced a fracture in the interdependent relationship to the extent that a parallel system has been established. In the parallel system those who are forced to engage with it are not as equal before the law as those brought before the traditional criminal justice system. The point is also made that the laws that were introduced during periods of war were temporary when there was a far greater threat, a point made by A.C. Grayling about Britain in 1940 when it faced ‘the imminence of invasion (and the actuality of daily aerial attack)’, but that now ‘Western liberal democracies are enacting permanent legislation of even more draconian kinds’.641 In the case of the attempted anti-communist legislation the threat was also greater but the legislation was shown to be unnecessary.

Chapters 5 and 6 have detailed the main laws that derogate fundamental legal rights. These chapters directly answer the research question: ‘To what extent have anti-terrorism laws introduced in Australia since 2001 involved unprecedented restrictions on fundamental legal rights?’ As shown, the anti-terrorism legislation contains very extensive and unprecedented restrictions on fundamental rights. The sheer volume of the legislation in the parallel system covers a very substantial number of offences and it is growing. A reasonable fear is that the diminution of rights will spread into the traditional criminal justice system because of the ease with which the anti-terrorism laws have been introduced. Anti-terrorism laws that involve surveillance and in particular meta data laws have been referred to, and are the precursors to those laws that directly diminish or remove the fundamental legal rights that protect the right to liberty. They are part of surveillance state activities that by themselves are invasive and attack the right to privacy,

641 A.C. Grayling, Towards the Light (Bloomsbury, 2007) 5.
but it is other anti-terrorism laws that directly restrict or remove the right to liberty. In the case of the laws contained in the *Australian Security and Intelligence Organisation Act 1979*, much of the power is vested in three people. They can engage in the exercise of discretionary power not constrained by precedent, or in any meaningful way by laws. Their decisions and actions can be hidden forever by the exercise of personal fiat. The fact that anti-terrorism laws derogate fundamental legal rights is by itself a danger for those forced to confront the laws. However, of potentially greater significance is that a few people can exercise substantial power in secret and authorise criminal activity. This type of legal power has never existed before in peace time Australia, as shown by the analysis in Chapter 4 of restrictions on fundamental legal rights before 2001. It poses a threat to a fragile justice system and potentially to the rule of law as normally accepted in a democratic society.

Being free from danger or threat from terrorists was the declared objective of legislators. Those most stridently in favour of the anti-terrorism laws claimed that a number of the legal rights that existed in the criminal laws needed to be removed or diluted to achieve the desired objective, security. Alternatively, where objection was taken to this approach, the idea of balance between rights and security was promoted to overcome the objectors. This approach was initially adopted by the Howard Liberal-National government and the Labor opposition. In every case, if balance means ‘equal weight to both elements’, then no balance was achieved, legal rights were removed and primary consideration was given to security from terrorist threats. If balance means ‘correct proportions’ then those who promote the laws can simply claim the reduction in rights was correct in order to allow security to be achievable. In either case the promotion of balance was nothing more than a meaningless salve designed to ease the introduction of the laws. The debates in parliament simply ignored the fact that legal rights were introduced historically to provide security from persecution and their removal opened the way for state sponsored abuses. Except for a few academic commentators, the potential for criminal abuse by enforcement agencies was also ignored.
In any event the focus on the balance metaphor shifted to a policy that emphasised security under the Abbott Liberal-National government in 2014, when it was claimed the activities of the Islamic State made Australia vulnerable to attack. In Chapter 7, an examination of parliamentary debates reveals that both Liberal-National and Labor governments committed to anti-terrorism laws in the absence of evidence that they would be effective against terrorist attacks. The right to Liberty is referred to in the parliamentary debates but usually in a way that suggested it existed in isolation from the right to a fair trial. For example, Labor Shadow Attorney-General Robert McClelland took the position that the ‘fundamental principal of liberty’ meant the ‘right to be let alone unless you transgress the law’. 642 Although reference was made by dissenting parliamentarians to the importance of the rights, the overwhelming majority of parliamentarians uncritically accepted the recommendations made by police and security agencies who in effect drafted the laws. The debates also reveal inconsistent positions being taken by Labor, for example, at one point opposing the law that allowed the detention of non-suspects then approving it, and certainly not attempting to repeal it. The parliamentary debates can be accepted as revealing the real reasons why the legislation was introduced, because there is no evidence pointing to fabrication. Daryl Melham supports this contention asserting that: ‘The debates can be relied upon to show the views being expressed in private about the laws.’ 643 There is no reason to disbelieve Melham in this regard. The arguments advanced by the promoters of the laws were simple. All Australians, it was claimed, must be afraid of terrorists and if the laws were not introduced bad things would happen. The rhetoric of fear was very similar to that used in the 1950s to try and outlaw the Communist Party. An analysis of the debates answers the second research question: ‘What consideration was given when anti-terrorism laws were enacted to the effectiveness of existing criminal laws, and to the consequences of restricting fundamental legal rights?’ The answer to the first part is none, and to the second part only in a very superficial way.

When Liberal, National and Labor parliamentarians have supported anti-terrorism laws

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643 Robert Cavanagh, Interview with Daryl Melham, 7 October 2015.
they have ignored evidence that has shown that those enforcing the laws are prone to abusing their positions of power. This is despite the fact that there has been vastly more proven criminal offending, in Australia, by police than by people who fit the legal definition as terrorists. Moreover, parliamentarians have engaged in removing legal protections that were introduced to reduce the possibilities for abuse of power, without even properly considering why the protections were introduced. The proposition that there needs to be a balance between rights and security or a balance in favour of security makes the assumption, without supporting evidence, that such an approach is necessary. Without evidence such arguments are no more that artificial constructs without substance. There is not one scintilla of evidence that shows that removing the right to silence is an effective way of dealing with terrorists. Similarly, there is no supporting evidence that being able to detain non-suspects does anything other than allow for individuals to be abused. If there was any evidence, there is little doubt that it would be paraded for all to see. The artificial arguments advanced by politicians do not seem to involve any consideration of how they are adversely affecting the criminal justice system. The reason for such dangerously poor decision making may be found, at least in part, in the possibility that they actually believed their own fear based reasoning. Some support for this possibility and also an explanation, although not an excuse, for the evidence-free approach to decision making that threatens civil liberties, is provided by Cass R. Sunstein. He suggests that a heuristic approach is adopted ‘when strong emotions are involved’, and that ‘[f]ear can be impervious to the fact that it is highly unlikely that the risk will come to fruition’.644

The position adopted by the promoters of the laws was the position taken by all Australian governments since World War II, that of following the lead of the United States. The uncritical acceptance of policy and action positions taken by the United States has been shown, as examined in Chapter 8, to be contra indicated. Yet past failures in this regard are barely mentioned. So far as anti-terrorism laws are concerned, the approach has been even more zealous than that adopted by the United Kingdom and the United States, and yet there has been little terrorist activity in Australia. In Chapter 8 the language of fear and its power to influence was examined, along with the examples of engagement in the

Vietnam War and the invasion of Iraq in 2003. In both cases fear and lies were used with devastating consequences for the Vietnamese and Iraqi people. The fact that both interventions were based on lies or at least false facts was acknowledged by those most involved in the decisions to invade: Malcolm Fraser in the case of Vietnam and John Howard in the case of Iraq. The invasion of Iraq is particularly significant in terms of the anti-terrorism laws, because they were part of the ‘war on terror’, as was the invasion. In a similar way to the invasions, the Australian anti-terrorism laws have been introduced using the language of fear and are based on the lie that they are necessary. If they were necessary there would be evidence of need, not speculation based on fear. The evidence, as shown in Chapter 8, is that draconian legislation of the type introduced belongs in police states not democracies. The case example of North Korea was used because it is contemporary, and its laws are devoid of legal rights and fear is used to maintain control. The answer to research question three: ‘Has fear contributed to the enactment of anti-terrorism laws that have restricted fundamental legal rights?’ is found in Chapters 7 and 8, with the historical precedent for the use of fear found in Chapter 4. The answer is that fearmongering was an essential element, without which it may not have been possible to remove rights.

There has been very limited opposition to the anti-terrorism laws and their growth continues. Only time will tell how far the laws that remove rights will extend into the traditional justice system. There is real reason to be afraid that the continual removal of rights will lead to a corrupt legal system, where any justice dispensed will be by accident rather than design. The traditional criminal justice system requires each of its constituent parts to function to protect procedural and fundamental rights and to do so in a robust fashion. Those who enforce and apply the laws are also duty bound to act with honesty and integrity. Each of the parties relies on the other to act to ensure the protection of rights and to act with integrity. Where the law requires the police or a prosecutor to ignore rights they will fail to fulfil both requirements. At the very least respect and trust amongst judges, prosecutors and defence lawyers has to be diminished, and where police or other agents of the state actively withhold evidence all the parties engage in a sham process that corrupts the criminal justice system, and breaks the interdependent relationship that is
essential if justice is to be done. Observed internationally, Australia’s anti-terrorism laws can be seen as in breach of United Nations recommendations, including Resolution 1456 that urged governments to frame laws in a way that was consistent with international law: ‘States must ensure that any measure taken to combat terrorism complies with all their obligations under international law’. At the very least a number of the rights contained in Article 9 of the International Convention on Civil and Political Rights have been violated.

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Appendix A

Chronological List of Commonwealth Anti-terrorism Bills and Acts since 2001

The information provided indicates the time the Bill was introduced into the House of Representatives or Senate and when assent was given to the Act. The gist of the Bill or Act is also provided.646

- **Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002**
  Introduced in House of Representative on 13 February 2002
  A Bill to amend Part 10.5 of the Criminal Code Act 1995 by adding new offences relating to the sending of dangerous, threatening or hoax material through the post or similar services. It replaced sections 85S, 85X and 85Y of the Crimes Act 1914.

**Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002**
Assented to on 4 April 2002

- **Security Legislation Amendment (Terrorism) Bill 2002**
  Introduced 12 March 2002 along with:
  Suppression of the Financing of Terrorism Bill 2002;
  Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002; and
  Border Security Legislation Amendment Bill 2002
  The Security Legislation Amendment (Terrorism) Bill 2002 introduced a definition of terrorism, introduced terrorist offences, and introduced proscribed organisation provisions. It also contained a new treason offence to replace the existing treason offence in section 24 of the Crimes Act 1914.

**Security Legislation Amendment (Terrorism) Act 2002**
Assented to on 5 July 2002

**Suppression of the Financing of Terrorism Act 2002**
Assented to on 5 July 2002

**Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002**
Assented to on 3 July 2002

**Border Security Legislation Amendment Act 2002**
Assented to on 5 July 2002

- **Telecommunications Interception Legislation Amendment Bill 2002**
  Introduced 12 March 2002

**Telecommunications Interception Legislation Amendment Act 2002**
Assented to on 5 July 2002

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646 The information has been taken from Parliament of Australia websites.
• Proceeds of Crime Bill 2002
  Introduced 13 March 2002
Enabled the freezing and confiscation of property used, intended to be used or derived from terrorism offences.

Proceeds of Crime Act 2002
  Assented to on 11 October 2002

• Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002
  Introduced 13 March 2002
Supplemented provisions in the Proceeds of Crime Bill 2002 and made amendments to other Commonwealth legislation. The Bill also repealed the existing money laundering offences in the Proceeds of Crime Act 1987 and replaced them with new provisions in the Criminal Code.

  Assented to on 11 October 2002

• Crimes Amendment Bill 2002
  Introduced 22 October 2002

Crimes Amendment Act 2002
  Assented to on 23 October 2003
Allowed State or Territory DNA databases to be disclosed to: any law enforcement agency (within the meaning of the National Crime Authority Act 1984); or a foreign law enforcement agency (within the meaning of that Act); or the International Criminal Police Organisation; or any other agency or body of the Commonwealth, a State or a Territory, or of a foreign country, prescribed by the regulations. Additionally, in the case of a missing person to a relative, guardian, spouse, de facto partner or friend of the deceased person.

• Criminal Code Amendment (Terrorist Organisation) Bill 2002
  Introduced 23 October 2002

Criminal Code Amendment (Terrorist Organisations) Act 2002
  Assented to on 23 October 2002
Amended the Criminal Code so that regulations made from the commencement of the Act specifying organisations for the purpose of the definition of terrorist organisation in Division 102 took effect in accordance with section 48 of the Acts Interpretation Act 1901. It ensured the existing regulation specifying Al Qa'id/Islamic Army as a terrorist organisation took effect on 21 October 2002, the date the regulation was notified in the Gazette.
• **Criminal Code Amendment (Offences against Australians) Bill 2002**
 Introduced 12 November 2002

**Criminal Code Amendment (Offences against Australians) Act 2002**
Assented to on 14 November 2002
Amended the Criminal Code to allow for prosecution for murder, manslaughter, intentionally or recklessly causing serious harm of an Australian citizen or a resident of Australia outside of Australia.

• **Charter of the United Nations Amendment Bill 2002**
  Introduced 14 November 2002

**Charter of the United Nations Amendment Act 2002**
Assented to on 10 December 2002
The primary purpose of the Bill was to amend section 22 of the Act to give to holders of freezable assets the same ability as owners of assets to apply to the Minister for Foreign Affairs for permission to deal with the assets.

• **Australian Protective Service Amendment Bill 2002**
  Introduced 16 May 2002

**Australian Protective Service Amendment Act 2002**
Assented to on 29 June 2002
Amended the Australian Protective Service Act 1987 to transfer responsibility for the Australian Protective Service from the Secretary of the Attorney-General's Department to the Commissioner of the Australian Federal Police.

• **Australian Crime Commission Establishment Bill 2002**
  Introduced 26 September 2002

**Australian Crime Commission Establishment Act 2002**
Assented to on 10 December 2002
Established the Australian Crime Commission (ACC) in accordance with the agreement reached between the Prime Minister, the Premiers of the States and the Chief Ministers of the Australian Capital Territory and the Northern Territory. It combines the functions of the National Crime Authority (NCA), the Australian Bureau Crime Intelligence (ABCI) and the Office of Strategic Crime Assessments (OSCA). The body has roles in relation to both criminal intelligence and the investigation of federally relevant criminal activity.

• **Australian Protective Service Amendment Bill 2003**
  Introduced in Senate on 26 June 2003

**Australian Protective Service Amendment Act 2003**
Assented to on 8 December 2003
Amendments give AFP officers the power to request a person's name and address where there are reasonable grounds to suspect the person might have committed, might be
committing or might be about to commit a prescribed offence. Amendments also give AFP officers power to search persons and seize items in circumstances that give rise to legitimate security concerns. AFP officers can conduct searches and seize items in the vicinity of a place, person or thing, in respect of which the APS has functions. This includes airports, diplomatic and consular missions, and Commonwealth government buildings.

- **Criminal Code Amendment (Terrorism) Bill 2002**  
  Introduced 12 December 2002

  *Criminal Code Amendment (Terrorism) Act 2003*  
  Assented to on 27 May 2003  
  Amended the *Criminal Code Act 1995* (the Criminal Code) to re-enact federal counter-terrorism offences and thereby give them comprehensive national application. Re-enacts Part 5.3 of the Criminal Code (which contains federal terrorism offences enacted in June 2002, and amended in October 2002) so that the offences attract the support of State references of power in accordance with section 51(xxxvii) of the Constitution.

- **Criminal Code Amendment (Hizballah) Act 2003**  
  Introduced 29 May 2003

  *Criminal Code Amendment (Hizballah) Act 2003*  
  Assented to on 24 June 2003  
  Amended the *Criminal Code Act 1995* and created a basis for the identification and listing of the Hizballah External Security Organisation as a terrorist organisation under Australian law, if the Minister is satisfied that the Hizballah External Security Organisation is engaged in terrorist activity. The effect was to remove the requirement that an organisation be first identified in, or pursuant to, a decision of the United Nations Security Council relating wholly or partly to terrorism, or using a mechanism established under the decision, as a condition precedent to specifying the organisation in regulations as a terrorist organisation.

- **Terrorism Insurance Bill 2002 then 2003**  
  Introduced 12 December 2002

  *Terrorism Insurance Act 2003*  
  Assented to on 24 June 2003  
  It deals with a range of insurance issues in the event of a terrorist attack and has been amended since.

- **Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Bill 2003**  
  Introduced 5 November 2003

  *Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003*  
  Assented to on 7 November 2003
Created a basis for the identification and listing of Hamas' military wing (Izz al-Din al Qassam Brigades) and Lashkar-e-Tayyiba as terrorist organisations under Australian law, if the Minister is satisfied that either or both Hamas' Izz al-Din al Qassam Brigades and / or Lashkar-e-Tayyiba are engaged in terrorist activities. The effect of this is to avoid the requirement that an organisation be first identified in, or pursuant to, a decision of the United Nations Security Council relating wholly or partly to terrorism, or using a mechanism established under the decision, as a condition precedent to specifying the organisation in regulations as a terrorist organisation. Neither Hamas' Izz al-Din al Qassam Brigades or Lashkar-e-Tayyiba had been identified in a relevant decision.

- **Maritime Transport Security Bill 2003**
  Introduced 18 September 2003

  **Marine Transport Security Act 2003**
  Assented to on 12 December 2003
Established a regulatory security system

- **Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002**
  Introduced 21 March 2002

  Empowered ASIO to seek a warrant for detention and questioning. Consent for the warrant to be given by the Attorney-General, who had to be satisfied other methods of collecting intelligence would be ineffective. It allowed for detention for 48 hours before a prescribed authority.

  The Bill had its second and third reading in the House of Representatives on 24 March 2002.


  On 12 December 2002 the House of Representatives considered a Senate message and the Bill was laid aside.

- **Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill [No.2] 2002**

  The first and second readings happened in the House of Representatives on 20 March 2003. It was further debated on 26 and 27 March 2003. The Bill introduced additional safeguards including: if the person subject to the warrant was between 14 and 18 years the Attorney-General had to be satisfied that the person was likely to commit an offence or had committed and offence; warrants could not be issued for a person under 14 years; approved lawyers could be contacted; and ASIO’s unclassified report needed to include the total number of requests made for warrants.

  **Australian Security Intelligence Organisation (Terrorism) Act 2003**
  Assented to on 22 July 2003

  Amended the **Australian Security Intelligence Organisation Act 1979**
• **ASIO Legislation Amendment Bill 2003**
The first and second readings happened in the House of Representatives on 27 November 2003. The *Bill* was designed to amend Schedules 1 and 2 of the *Australian Security Intelligence Act 1979*. It allowed for increase the time for questioning from 24 to 48 hours if an interpreter was required, the taking of passports and secrecy provisions related to disclosure of information about questioning and detention.

**ASIO Legislation Amendment Act 2003**
Assented to on 17 December 2003

• **Australian Federal Police and Other Legislation Amendment Bill 2003 [2004]**
Introduced in Senate 4 December 2003

**Australian Federal Police and Other Legislation Amendment Act 2004**
Assented to on 22 June 2004
Integrated the Australian Protective Service into the Australian Federal Police (AFP) and enables the AFP to access Commonwealth investigative powers when investigating State offences which have a federal aspect.

• **Australian Security Intelligence Organisation Amendment Bill 2003**
Introduced 17 November 2004

**Australian Security Intelligence Organisation Amendment Act 2004**
Assented to on 14 December 2004
Expanded the circumstances in which ASIO can furnish security assessments to States and Territories. In the second reading speech emphasis was placed on assessments in relation to a wider range of activities which may be carried out in relation to, or which involve, ammonium nitrate, including purchasing, importing, manufacturing, storing, guarding, transporting, supplying, exporting, using, possessing, disposing or handling. It also relates to other hazardous materials.

• **Aviation Transport Security Bill 2003**
Introduced 27 March 2003

**Aviation Transport Security Act 2004**
Assented to on 10 March 2004
Amongst other things: introduced power to control the movements of an aircraft on the ground; introduced power to control the movements of an aircraft in Australia, or an Australian aircraft, following an aviation security incident; and codified the power of an airport screening officer to request a person subject to screening to undergo a limited frisk search.

• **Aviation Transport Security (Consequential Amendments and Transitional Provisions) Bill 2003**
Introduced 27 March 2003

Assented to on 10 March 2004
An Act to deal with consequential and transitional matters arising from the enactment of the Aviation Transport Security Act 2003

- Criminal Code Amendment (Terrorist Organisations) Bill 2003
  Introduced 29 May 2003

Criminal Code Amendment (Terrorist Organisations) Act 2004
Assented to on 10 March 2004
Amends the Criminal Code 1995 section 102 and requirements for the making of regulations proscribing terrorist organisations.

- Telecommunications (Interception) Amendment Bill 2004
  Introduced 19 February 2004

Telecommunications (Interception) Amendment Act 2004
Assented to on 27 April 2004
Amongst other things, amended the Telecommunications (Interception) Act 1979 (the Interception Act) to extend the availability of telecommunications interception warrants to additional serious offences, extended the Act in relation to text based communications, facilitated the recording of calls to publicly-listed ASIO numbers and clarified the application of the Act to delayed access message services.

- Surveillance Devices Bill 2004
  Introduced 24 March 2004
  Lapsed 16 November 2004

- Surveillance Devices Bill (No 2) 2004
  First and Second Reading Speeches 24 June 2004

Surveillance Devices Act 2004
Assented to on 15 December 2004
Allows law enforcement officers of the Australian Federal Police, the Australian Crime Commission or a state or territory police force or other specified agencies investigating a Commonwealth offence to use a greater range of surveillance devices, including data surveillance devices, optical surveillance devices and tracking devices. It also allows for a surveillance device warrant or authorisation to be issued in relation to a wider range of offences.
Permits emergency authorisations to be given by a senior executive officer of the law enforcement agency to a law enforcement officer for the use of a surveillance device in circumstances of urgency. Where there is an imminent threat of serious risk to a person or substantial damage to property, to recover a child who is the subject of a recovery order,
and where there is a risk of the loss of evidence in relation to specified Commonwealth offences, including terrorism, serious drug offences, treason, espionage and aggravated people smuggling.

- **Anti-Terrorism Bill 2004**

  **The Anti-Terrorism Act 2004**
  Assented to on 30 June 2004
  The Act amended the Crimes Act 1914 to only allow bail for someone charged or convicted of a terrorist offence in exceptional circumstances and amended sections related to parole periods. It extended the investigation period to 48 hours. It also amended the Crimes (Foreign Incursions and Recruitment) Act 1978, the Criminal Code Act 1995 and the Proceeds of Crime Act 2002.

- **Anti-Terrorism Bill (No 2) 2004**
  Introduced 17 June 2004

  **Anti-terrorism Act (No 2) 2004**
  Assented to on 16 August 2004
  Amended the Criminal Code 1995 to make the offence of associating with a terrorist organisation. Also, inter alia, amended the Transfer of Prisoners Act 1983.

- **Anti-Terrorism Bill (No 3) 2004**
  Introduced 24 June 2004

  **Anti-Terrorism Act (No 3) 2004**
  Assented to on 16 August 2004
  Amended the Passports Act 1938 to allow for confiscation of passports for, inter alia, being suspected of being likely to engage in terrorist activities. Also amended the Australian Security Intelligence Organisation Act 1979 to ensure that those subject to a request by the Director-General of Australian Security Intelligence Organisation to the Minister for consent to apply for a questioning warrant are prevented from leaving Australia. Additionally, amended forensic procedure provisions in the Crimes Act 1914 to facilitate disaster victim identification.

- **National Security Information (Criminal Proceedings) Bill 2004**
  Introduced on 27 May 2004
  Lapsed at dissolution 31 August 2004

- **National Security Information (Criminal Proceedings) Bill 2004**
  Introduced in Senate 17 November 2004

  **National Security Information (Criminal Proceedings) Act 2004**
  Assented to on 14 December 2004
(See detail below and in Chapter 5)

- **National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004**
  Introduced 27 May 2004
  Lapsed at dissolution 31 August 2004

- **National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004**
  Introduced in Senate 17 November 2004

  **National Security Information (Criminal Proceedings) (Consequential Amendments) Act 2004**
  Assented to on 14 December 2004


- **National Security Information (Criminal Proceedings) Amendment (Application) Bill 2005**
  Introduced 9 February 2005

  **National Security Information (Criminal Proceedings) Amendment (Application) Act 2005**
  Assented to on 21 March 2005

  Amended the National Security Information (Criminal Proceedings) Act 2004 to clarify how the Act applies to certain federal criminal proceedings to ensure that it applied to future proceedings even though the proceedings began before 11 January 2005 when the Act commenced. It requires the prosecutor to give notice to the court and defendant after the proceeding begins.

- **National Security Information Legislation Amendment Bill 2005**
  Introduced 10 March 2005

  **National Security Information Legislation Amendment Act 2005**
  Assented to on 6 July 2005

  The Act amended the National Security Information (Criminal Proceedings) Act 2004 to extend the operation of the Act to include certain civil proceedings. At Schedule 1 states: ‘Omit “(Criminal Proceedings)”, substitute “(Criminal and Civil Proceedings)”’. It adopts the process for federal criminal proceedings under the Act, with some departures to account for the nature of civil proceedings.

  **National Security Information (Criminal and Civil Proceedings) Act 2004**
  Incorporates the National Security Information (Criminal Proceedings) Act 2004
as amended by the National Security Information Legislation Amendment Act 2005

Commenced on 11 January 2005
Allows prosecutors and courts to use information (national security information) in criminal proceedings while preventing broader disclosure of such information including, disclosure to the defendant. It also allows certain witnesses, whose mere presence might disclose national security information, to be excluded from criminal proceedings, and requires defence lawyers to undergo security clearance before they can view national security information that might be relevant to a criminal trial.

- **Maritime Transport Security Amendment Bill 2005**
  Introduced 25 May 2005

  **Maritime Transport Security Amendment Act 2005**
  Assented to on 26 June 2005
Amended the *Maritime Transport Security Act 2003* by extending coverage to Australia’s offshore oil and gas facilities, and to allow for the introduction of the Maritime Security Identification Card.

- **Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005**
  Introduced 14 September 2005

  **Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005**
  Assented to on 15 November 2005
Allowed, *inter alia*, the use of video link evidence from overseas witnesses in proceedings for terrorism and other related offences and proceeds of crime proceedings

- **Anti-Terrorism Bill 2005**
  Introduced 2 November 2005

  **Anti-Terrorism Act 2005**
  Assented to on 3 November 2005
Amended the *Criminal Code 1995* to clarify that it was not necessary for a prosecution to identify a specific terrorist act.

- **Anti-Terrorism Bill (No 2) 2005**
  Introduced on 3 November 2005

  **Anti-Terrorism Act (No.2) 2005**
  Assented to on 14 December 2005
It amended: the *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Criminal Code Act 1995* and *Customs Act 1901* to extend the definition of terrorist organisation; *Criminal Code Act 1995* and *Financial Transaction Reports Act 1988* in relation to financing terrorism offences; *Criminal Code Act 1995* to provide for control orders and
preventative detention orders; Crimes Act 1914 to: extend stop, question, search and seize powers to all Commonwealth places and prescribed security zones; and provide for a notice to produce a regime to ensure compliance with lawful requests for certain information; Crimes Act 1914, Criminal Code Act 1995, Migration Act 1958 and Surveillance Devices Act 2004 to update sedition offences; Aviation Transport Security Act 2004 to authorise the use of video surveillance at Australia’s major airports and on aircraft; Financial Transaction Reports Act 1988, Proceeds of Crime Act 2002 and Surveillance Devices Act 2004 in relation to financial transaction reporting; Australian Security Intelligence Organisation Act 1979 to: strengthen ASIO’s special powers warrant regime; provide ASIO with enhanced access to aircraft and vessel information; strengthen the offence for providing false or misleading information under an ASIO questioning warrant; and clarify that obligations, prohibitions or restrictions imposed by control orders will not be prescribed administrative action; Customs Act 1901 and Customs Administration Act 1985 to broaden Customs powers for security and intelligence purposes; and Migration Act 1958 to clarify the power to deport non-citizens on security grounds.

- **ASIO Legislation Amendment Bill 2006**
  Introduced 29 March 2006

  **ASIO Legislation Amendment Act 2006**
  Assented to on 19 June 2006

  Amended the Australian Security Intelligence Organisation Act 1979 which contained a sunset clause (existing section 34Y will become section 34ZZ in Item 2 of Schedule 1) that provided Division 3 will cease to be in force three years after commencement (23 July 2006). The Act extended the existing sunset provision by 10 years (requiring review by 22 January 2016, and Division 3 ceasing to have effect on 22 July 2016). Also amended Divisions 3 warrants procedures.

- **Anti-Money Laundering and Counter-Terrorism Financing Bill 2006**
  Introduced 1 November 2006

  **Anti-Money Laundering and Counter-Terrorism Financing Act 2006**
  Assented to on 12 December 2006

  Requires the reporting entities must report suspicious matters and international funds transfers above a threshold to the Australian Transaction Reports and Analysis Centre.

- **Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006**
  Introduced 1 November 2006

  **Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006**
  Assented to on 12 December 2006

  Relevant description is provided by title.
• **Telecommunications (Interception) Amendment Bill 2006**
  Introduced 21 February 2006

  **Telecommunications (Interception) Amendment Act 2006**
  Assented to on 3 May 2006
  Provides a warrant regime for access to stored communications held by a telecommunications carrier and, inter alia, enables interception of communications of a person known to communicate with the person of interest.

• **Law and Justice Legislation Amendment (Marking of Plastic Explosives) Bill 2006**
  Introduced 7 September 2006

  **Law and Justice Legislation Amendment (Marking of Plastic Explosives) Act 2007**
  Assented to on 19 February 2007
  Gives effect to the Convention on the Marking of Plastic Explosives for the Purpose of Detection (Montreal, 1991) (the Convention). The Convention arose as a consequence of the bombing of Pan Am Flight 103 over Lockerbie, Scotland, in December 1988. It was drafted and is administered by the International Civil Aviation Organization. The Act makes it an offence to manufacture, import, export, traffic in, or possess plastic explosives which have not been marked with a detection agent as prescribed within the terms of the Technical Annex to the Convention. The Act provides exemptions to the main offences, where the plastic explosives are manufactured or held in limited quantities for use in authorised research, development and testing of plastic explosives, for forensic science purposes and authorised training exercises, or where the plastic explosives are destined to be incorporated into an authorised military device within three years from the date of the Convention’s entry into force for Australia. Provides that the unmarked plastic explosives manufactured and held for authorised defence purposes, and not incorporated into an authorised military device shall be used, destroyed, marked or rendered permanently ineffective, within fifteen years from the date of the Convention’s entry into force.

• **Aviation Transport Security Amendment (Additional Screening Measures) Bill 2007**
  Introduced 7 February 2007

  **Aviation Transport Security Amendment (Additional Screening Measures) Act 2007**
  Assented to on 29 March 2007
  Allows screening measures to limit the amount of liquids, aerosols and gels that can be taken through international screening points by people flying to or from Australia.

• **Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007**
  Introduced 21 June 2007
Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007
Assented to on 28 September 2007
Refuses Classification for publications, films or computer games that advocate terrorist acts

- Customs Amendment (Enhanced Border Controls and Other Measures) Bill 2008
  Introduced 3 December 2008

Customs Amendment (Enhanced Border Controls and Other Measures) Act 2009
Assented to on 22 My 2009
Amend the Customs Act 1901 introduce additional powers and penalties.

- Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009
  Introduced 24 June 2009

Crimes Legislation Amendment (Serious and Organised Crime) Act 2010
Assented to on 19 February 2010
Amended, inter alia, the Crimes Act 1914, the Criminal Code Act 1995, the Customs Act 1901, the Proceeds of Crime Act 2002 and the Telecommunications (Interception and Access) Act 1979. The Act, inter alia, strengthened criminal asset confiscation, including introducing unexplained wealth provisions (Schedules 1 and 2), gave police additional powers to investigate organised crime by implementing model laws for controlled operations, assumed identities and witness identity protection (Schedule 3) and gave greater access to telecommunications interception for criminal organisation offences (Schedule 4, Part 2).

- Independent National Security Legislation Monitor Bill 2009
  Introduced in Senate 25 June 2009

Independent National Security Legislation Monitor Act 2010
Assented to on 13 April 2010
Act provides for the appointment of a National Security Legislation Monitor

- National Security Legislation Amendment Bill 2010
  Introduced 30 September 2010

National Security Legislation Amendment Act 2010
Assented to on 24 November 2010
Amends various Acts and, inter alia, deals with treason, urging violence and extend the investigation period under the Crimes Act 1914.

- Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010
  Introduced 30 September 2010
Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011
Assented to on 22 March 2011
Amended the Telecommunications (Interception and Access) Act 1979, the Australian Security Intelligence Organisation Act 1979 (the ASIO Act) and the Intelligence Services Act 2001 enabling greater cooperation and information sharing.

- Defence Legislation Amendment (Security of Defence Premises) Bill 2010
  Introduced 29 September 2010

Defence Legislation Amendment (Security of Defence Premises) Act 2011
Assented to on 12 April 2011
Allows, inter alia, a security authorised member of the Defence Force to use force causing death or serious injury where that person believes on reasonable grounds that: doing that thing is necessary to prevent the death of, or serious injury to, another person (including the official); and the threat of death or injury is caused by an attack on defence premises, or on people on defence premises, that is occurring or is imminent. If a person is attempting to escape being detained by fleeing, a security authorised member of the Defence may cause the death of, or grievous bodily harm to, the person: if the person has, if practicable, been called on to surrender; and the official believes on reasonable grounds that the person cannot be apprehended in any other manner.

- National Security Legislation Amendment Bill (No 1) 2014
  Introduced 16 July 2014

National Security Legislation Amendment Act (No 1) 2014
Assented to on 2 October 2014
Amended the Australian Security Intelligence Act 1979, the Telecommunications (Interception and Access) Act 1979 and the Intelligence Services Act 2001. Amongst other things, made easier the issuing of warrants, searching premises and people, use of listening and tracking devices, the inspection of postal articles, and gave authority for special operations.

- Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014
  Introduced 24 September 2014

Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014
Assented to on 3 November 2014
Amended 22 Acts to respond to the threat posed by Australians engaging in, and returning from, conflicts in foreign states by: providing additional powers for security agencies; strengthening border security measures; cancelling welfare payments for persons involved in terrorism; and implementing recommendations made by the Independent National Security Legislation Monitor’s second and fourth annual reports and the Report of the Council of Australian Governments Review of Counter-
Terrorism Legislation. Repealed the *Crimes (Foreign Incursions and Recruitment) Act 1978* and relocated to new Part 5.5 of the *Criminal Code Act 1995*.

- *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015*
  
  Introduced 30 October 2014

*Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*

Assented to on 13 April 2015

Amended the *Telecommunications (Interception and Access) Act 1979* to require a service provider to keep data. Required data to be kept by a service provider for a minimum period of two years. Specified the information required to be stored, including the source of the communication, its destination, the date, time and duration of the communication, and excluded information that is the contents or substance of a communication.
Appendix B

Terrorist Organisations Listed Under the Criminal Code

1. **Abu Sayyaf Group**

2. **Al-Murabitun**
   Listed 5 November 2014

3. **Al-Qa'ida (AQ)**

4. **Al-Qa'ida in the Arabian Peninsula (AQAP)**
   Listed 26 November 2010, re-listed 26 November 2013

5. **Al-Qa'ida in the Islamic Maghreb (AQIM)**

6. **Al-Shabaab**
   Listed 22 August 2009, re-listed 18 August 2012 and 11 August 2015

7. **Ansar al-Islam**

8. **Boko Haram**
   Listed 26 June 2014.

9. **Hamas' Izz al-Din al-Qassam Brigades**

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647 See Australian National Security
   www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/default.aspx

10. **Hizballah's External Security Organisation (ESO)**


11. **Islamic Movement of Uzbekistan**


12. **Islamic State**


13. **Jabhat al-Nusra**

Listed 28 June 2013

14. **Jaish-e-Mohammed**


15. **Jamiat ul-Ansar**


16. **Jemaah Islamiyah (JI)**


17. **Kurdistan Workers' Party (PKK)**

18. **Lashkar-e Jhangvi**


19. **Lashkar-e-Tayyiba**


20. **Palestinian Islamic Jihad**

Appendix C

Questionnaire for Parliamentarians

Name:

Part 1 – Control orders and preventative detention

The following is a brief summary identifying the relevant legislation and providing some details of what restrictions can be placed on people who are the subject of control orders or preventative detention orders. This summary is designed to assist in refreshing memories and to provide a path for further research, if required, before answering the questionnaire.

The *Anti-Terrorism Act (N0.2) 2005* introduced control orders and preventative detention orders, which became part of the *Commonwealth Criminal Code Act 1995* (Division 104) in 2005. Control orders place a variety of prohibitions and restrictions on people subjected to them. For example, a control order can require a person to wear a tracking device, stay in a certain place at specified times, prevent a person from talking to specified people and from going to certain places, and restrict what communication devices can be used. Control orders can be imposed for 12 month periods. There is a 5 year imprisonment penalty for contravention of a control order. Preventative detention orders, like control orders, allow for a person to be detained without being charged with an offence. An interim preventative detention order allows a senior member of the Australian Federal Police to detain a person for 24 hours; this can be continued by a federal judge or magistrate, acting in a personal capacity, for a further 24 hours.

Please place a cross in the relevant box

1. For parliamentarians at the time the *Anti-Terrorism Act (N0.2) 2005* was passed. Did you vote for or against the legislation?

<table>
<thead>
<tr>
<th>For</th>
<th>Against</th>
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2. For parliamentarians at the time the legislation was passed. If you voted for control orders and preventative detention orders are you still in favour of them?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
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3. For current parliamentarians who did not vote on the legislation. Do you support the retention of control orders and preventative detention orders?

Yes   No

Current and Past Parliamentarians

Please circle around the relevant number

4. How important did you think control orders are?

1  2  3  4  5  6  7

Not at all important  Extremely important

5. How important do you view the preventative nature of control orders to be?

1  2  3  4  5  6  7

Not at all important  Extremely important

6. How important is it to you that civil liberties are removed from people subject to control orders?

1  2  3  4  5  6  7

Not at all important  Extremely important

7. How important is it that evidence be provided to you about the effectiveness of control orders and preventative detention orders?

1  2  3  4  5  6  7

Not at all important  Extremely important

8. How important is it for the Attorney-General to be involved in seeking control orders?

1  2  3  4  5  6  7

Not at all important  Extremely important
9. How important is it for a judicial officer to be involved in deciding control orders?

1 2 3 4 5 6 7

Not at all important Extremely important

10. How important is it for police to provide a person subject to a control order or preventative detention order with the basis for seeking the control order or preventative detention order?

1 2 3 4 5 6 7

Not at all important Extremely important

11. What importance do you place on security reasons for giving only limited information about the basis for seeking a control order to the person subject to the order?

1 2 3 4 5 6 7

Not at all important Extremely important

To be answered only by parliamentarians who voted on the legislation. Others please go to Part 2.

12. How important was it for you to consider the effectiveness of existing criminal laws before voting on the legislation?

1 2 3 4 5 6 7

Not at all important Extremely important

13. How important was it for you to consider anti-terrorist legislation in other common law countries before voting on the legislation?

1 2 3 4 5 6 7

Not at all important Extremely important
14. When voting on the legislation did you rely only on what your parliamentary party had determined about the need for and potential effectiveness of the law?

Yes       Other reasons

☐       ☐

[If you ticked ‘Yes’ only there is no need to proceed further with Part 1 of this questionnaire]

15. If you relied on other factors did these considerations involve one or more of the following:

(a) An increase in terrorist attacks generally?

Yes       No

☐       ☐

(b) The terrorist attacks in the United States on 11 September 2001, and the terrorist attack in London on 7 July 2005?

Yes       No

☐       ☐

(c) Evidence that control orders and preventative detention were effective against terrorist attacks?

Yes       No

☐       ☐

(d) Evidence that control orders and preventative detention were not effective against terrorist attacks?

Yes       No

☐       ☐

16. If ‘Yes’ to (c) or (d):

(i) Was the evidence provided by police or security agencies?

Yes       No

☐       ☐
(ii) Was the evidence found through your own researches?

Yes   No

□     □

If ‘Yes’ to question (ii), please specify the research. For example, media reports, articles from magazines or journals, case law.

(iii) Was the evidence found by other means?

Yes   No

□     □

If ‘Yes’ please specify: for example, parliamentary committee meetings or hearings.

17. Did you consider the effectiveness of existing criminal law statutes or the common law before casting your vote?

Yes   No

□     □

18. If ‘Yes’, what laws did you consider?

(a) Federal criminal statutes

Yes   No

□     □

(b) State criminal law statutes

Yes   No

□     □
Part 2 – ASIO powers

The following is a brief summary identifying the relevant legislation and providing some details of what restrictions can be placed on people who are subjected to some of the powers given to ASIO. This summary is designed to assist in refreshing memories and to provide a path for further research, if required, before answering the questionnaire.

The *Australian Security Intelligence Legislation Amendment (Terrorism) Act 2003* gave special powers under Division 3 Part III of the *Australian Security Intelligence Organisation Act 1979* to seek warrants for the questioning of a person; and a warrant for the questioning and detention of a person. The warrants do not have to relate to a suspect but to anyone it is claimed who is able to ‘substantially assist in the collection of intelligence that is important in relation to terrorism’. As former High Court Chief Justice Sir Gerald Brennan pointed out, ‘a person may be detained in custody, virtually incommunicado, without even being accused of involvement in terrorist activity, on grounds which are kept secret and without effective opportunity to challenge the basis of his or her detention’. (The Law and Justice Address, 2007, Parliament House, Sydney)

The *National Security Legislation Amendment Act (No.1) 2014* further amends the *Australian Security Intelligence Organisation Act 1979*. It, amongst other things, has provisions for Special Intelligence Operations which provide a broad immunity from civil or criminal liability for those involved in such operations, and penalties of 5 and 10 years imprisonment for disclosure of such operations.
Current and Past Parliamentarians

Please place a cross in the relevant box

20. Do you support the legislation that allows the detention by ASIO of people who have not been charged with a criminal offence?
   
   Yes □
   No □

21. Do you support the legislation that allows ASIO to hold people in virtual secrecy?
   
   Yes □
   No □

22. If you do support ASIO being able to hold people in virtual secrecy, would you give the same powers to police investigating serious crimes?
   
   Yes □
   No □

23. Do you support the legislation that allows ASIO to question people with a penalty of 5 years imprisonment if information is not provided?
   
   Yes □
   No □

24. If you do support ASIO being able to question people as described in question 23, would you give the same powers to police investigating serious crimes?
   
   Yes □
   No □
25. Do you believe the right to silence should be available to people who are subject to questioning and detention by ASIO?

Yes  No

□   □

26. If your answer to question 25 is ‘No’ please specify the reasons you rely upon for saying this otherwise existing legal right should be removed.

27. If you believe the right to silence should not exist under ASIO questioning, would you remove the right to silence for suspects being questioned about serious crimes by the police?

Yes  No

□   □

28. Is ASIO a suitable body to be given such extensive powers?

Yes  No

□   □

29. Have you seen any evidence that providing ASIO with coercive questioning and detention powers has stopped a terrorist attack?

Yes  No

□   □

30. Do you believe that ASIO employees or ASIO affiliates should be able to commit various criminal offences during Special Intelligence Operations with impunity?

Yes  No

□   □
31. Do you believe that the public should be told if any person including a suspected terrorist is killed or injured during a Special Intelligence Operation?

Yes          No

☐          ☐

32. Do you believe you should be told if a relative or friend was killed or injured during a Special Intelligence Operation?

Yes          No

☐          ☐

33. Do you believe the public should be told if a person who is not a suspected terrorist was killed or injured during a Special Intelligence Operation?

Yes          No

☐          ☐

34. Do you believe people (including journalists) should be gaolled if they reveal a Special Intelligence Operation that resulted in the killing of or serious injury of innocent people?

Yes          No

☐          ☐

35. Do you believe that the normal coronial investigative and hearing process should occur where a person is killed during a Special Intelligence Operation?

Yes          No

☐          ☐

36. Do you believe that the parents should be told if their child was killed during a Special Intelligence Operation?

Yes          No

☐          ☐

37. If the answer to question 36 is ‘Yes’ should the parents be stopped from telling others how the death occurred?

Yes          No

☐          ☐
38. Are you aware that the ASIO powers go further than similar legislation in other countries?

Yes □  No □

39. If you **do not** believe that the death of an innocent person during a Special Intelligence Operation should be revealed, please provide your main reasons.

... ... ... ... ... ... ... ... ... ... ... ... ... ... ... ... ... ... 
... ... ... ... ... ... ... ... ... ... ... ... ... ... ... ... ... ... 

(If the space proved is insufficient please add an attachment.)

40. Would you support ASIO being given additional powers of arrest and detention?

Yes □  No □

41. If the answer to question 40 is ‘Yes’ would you support ASIO being given the power to impose detention until such time as the information being sought from an individual is provided?

Yes □  No □

42. Is it appropriate that ASIO has been given greater powers than the police who investigate serious crimes?

Yes □  No □
Part 3 – Non-disclosure of evidence

The following is a brief summary identifying the relevant legislation and providing some details of what restrictions can be placed on people where the National Security Information (Criminal and Civil Proceedings) Act 2004 (NSIA) is invoked. This summary is designed to assist in refreshing memories and to provide a path for further research, if required, before answering the questionnaire.

The NSIA allows the Attorney-General to issue a certificate restricting what information can be provided to the defence if the evidence would prejudice national security; or if the mere presence of a person whom a party intends to call as a witness will disclose information that would prejudice national security. A certificate must be considered by the court in closed hearing. Former High Court Justice Michael McHugh commented: ‘How can a court make an order in favour of a fair trial when in exercising its discretion, it must give the issue of fair trial less weight than the Attorney-General’s certificate?’ (‘Terrorism Legislation and the Constitution’ (2006) Australian Bar Review 117)

Current and Past Parliamentarians

Please place a cross in the relevant box

43. Is it appropriate for a criminal trial to be unfairly prejudiced because evidence is restricted by an Attorney-General’s certificate?

Yes        No

☐        ☐

44. Assume you are facing a criminal charge where an Attorney-General’s certificate is restricting evidence that may prove your innocence, would you be satisfied if that evidence was excluded?

Yes        No

☐        ☐

45. Is it appropriate that a judge should decide in closed court whether to admit evidence the subject of a certificate?

Yes        No

☐        ☐
Further feedback

46. I would like an appointment arranged for an interview so I can better detail my reasons for supporting or not supporting the anti-terrorism legislation that has passed the federal parliament. Just indicate in the box if you wish to be contacted for an interview.

Yes

☐

Name
Appendix D

The Growth of Secrecy Provisions and Increasing Penalties in Commonwealth Statutes

Up until the 1970s it seems to have been accepted that the functioning of government was largely shielded from public view. A change was brought about by cases such as Sankey v Whitlam\(^{648}\) where the High Court held that it was for courts, not the executive, to decide what could be produced in court proceedings. There were some legislative changes in the 1970s and 1980s that provided further openness.\(^{649}\)

The *Crimes Act 1914* was for most of the 20\(^{th}\) Century the main statute governing the secrecy of government workings. Section 70 of the *Act* when originally introduced stated:

Any person who, being a Commonwealth officer, publishes or communicates any fact which comes to his knowledge by virtue of his office, and which it is his duty to keep secret, or any document which comes to his possession by virtue of his office, and which it is his duty to keep secret, except to some person to whom he is authorized to publish or communicate it, shall be guilty of an offence.

Penalty: Imprisonment for two years.

It can be reasonably assumed that, before the growth of legislated secrecy provisions, the main reason ASIO and other secret state organisations maintained their cloaks was simply because people outside the organisations did not know what they were doing, and those inside the organisations stayed loyal through fear of punishment, or their perceived duty.

The overarching secrecy around activities of the security organisations and the activities of the police so far as anti-terrorism activities are concerned provides for only very limited oversight, by the Inspector General of Intelligence and Security, the Minister and the Prime Minister. Monitoring by parliamentary committees, and the involvement of the Leader of the Opposition, are not significant. Nevertheless, Commonwealth


parliamentarians have regularly legislated to institutionalise the practice of secrecy during the 21st Century, even though they do not know any detail about what is being kept from them.

The functional provisions contained in security and anti-terrorism legislation that allow for the secret gathering of information and policing activities are supplemented by punitive secrecy provisions that ensure that the public are excluded from knowledge of the activities. In summary the secrecy provisions can allow:

- Penalties involving imprisonment if covert information gathering is disclosed
- Penalties involving imprisonment if those employed by security agencies are identified
- Penalties involving imprisonment if an interrogation is disclosed
- Penalties involving imprisonment if detention of an individual is disclosed
- Severe restrictions on prosecution disclosure to the defence
- Severe restrictions on the admissibility of evidence if national security is invoked

The secrecy provisions reduce the possibility of appropriate legal representation, and effectively remove disclosure and therefore the chance of a fair trial. Apart from the potential impact on individuals through the secrecy provisions, they also affect truth gathering inquiries with the consequent removal of any benefits the society as a whole might derive from their findings: thus Royal Commissions, coronial hearings, corruption commission hearings or parliamentary inquiries, because of the restrictive nature of the legislation, can all be rendered of less value. Of particular concern for truth seeking inquiries is the effect secrecy provisions may have on Royal Commissions. In the past Royal Commissions into ASIO have been held in secret with the documents produced by them suppressed for decades, making any documents valueless for democratic decision making at the time. They have historical value and are of contemporary assistance in that they reveal some of the operations of the time, which although not predictive of the future should cause parliamentarians who allow virtually untrammeled surveillance activity some pause for thought. There are, however, significant obstacles to ensuring that any
Royal Commission into security activities gets access to all relevant information. This difficulty is acknowledged and seemingly accepted in section 34A of the Inspector-General of Intelligence and Security Act 1986, when the Inspector-General of Intelligence and Security is given the discretion to provide information to a Royal Commission. Although with political will any existing problems with a Royal Commission looking into the functions of security services could be overcome, such political will may not exist, for example, where the Royal Commission is established by a state government to inquire into a death where security agencies have played a role.

Both the immunity from criminal prosecution provisions contained in the ASIO and Intelligence Services legislation, and the secrecy provisions, have particularly sinister connotations. Not only can the agents of the state commit criminal offences but these are removed from public, parliamentary, police and judicial scrutiny.

Commonwealth legislation that most affects a fair trial and the gathering and analysis of evidence for judicial or parliamentary hearings includes: the Australian Security Intelligence Organisation Act 1979; Intelligence Services Act 2001; Inspector-General of Intelligence and Security Act 1986, National Security Information (Criminal and Civil Proceedings) Act 2004; Criminal Code 1995; and the Crimes Act 1914. In the event that there might be any doubt, the Public Interest Disclosure Act 2013 does not assist a person who wants to reveal information in a bona fide way to assist in ensuring a fair trial or truth gathering.

Australia, along with other common law countries, has become infected by widespread secrecy provisions contained in legislation that is designed for security agencies and policing activities. A report by the Australian Law Reform Commission in 2009 identified 506 secrecy provisions in 176 pieces of primary and subordinate Commonwealth legislation with 70% imposing criminal penalties. Each piece of Commonwealth legislation would need to be examined to determine if legitimate reasons exist for the

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secrecy. In this work reference is only made to provisions that relate to the activities of security agencies and police where those provisions are not designed to protect an individual from an invasion of privacy, but rather to protect those acting in the name of the state from scrutiny.

**Australian Security Intelligence Organisation Legislation Secrecy Provisions**

The *Australian Security Intelligence Organisation Act 1979*, No 113 which included amendments up to Act No 116 of 2014, contains a number of secrecy provisions that provide penalties if there is a breach. Section 3 of the 1979 Act, which commenced on 1 June 1980, repealed the *Australian Security Intelligence Organisation Act 1956* and the *Australian Intelligence Organisation Act 1976*. The 1976 Act allowed for a judge to be appointed as Director-General and for this to not affect the person’s tenure or status as a judge; it also contained some reference to salary and contained no secrecy provisions. The 1956 Act contained no secrecy provisions. The 1979 Act which commenced on 1 June 1980 had secrecy provisions: section 18(1) provided, ‘The communication of intelligence on behalf of the Organisation shall be made only by the Director-General or by an officer of the Organization acting within the limits of authority conferred on him by the Director-General’. The maximum penalty for a breach of the section upon summary conviction was $1,000 or a term of imprisonment not exceeding 1 year, on a conviction on indictment the penalty was not to exceed 2 years imprisonment.

The most recent *Australian Security Intelligence Organisation Act 1979* contains significantly more secrecy provisions and much harsher penalties. Presumably the widening of the secrecy provisions and the increasing of penalties are the result of the parliament deciding that Australia is under significantly greater threat than during the Cold War. Some support for this proposition can be found in Attorney-General, Brandis’ second reading speech for the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* when he stated:

*The rapid resurgence in violent extremism and the participation in overseas conflicts by some Australians present new and complex security challenges for our nation. The ongoing conflicts in Syria and Iraq are adding to this challenge and the*
number of Australians who have sought to take part, either by directly participating in these conflicts or providing support for extremists fighting there, is unprecedented.

Australia is well served by its law enforcement, intelligence and border security agencies. However, we must not become complacent. The recent increase in the terrorism threat level from Medium to High by the Director-General of ASIO, the first time the threat level has ever been increased to this level, only serves to remind us that the threat of a domestic terrorist attack remains real.  

The Attorney-General in his 2014 comments is saying little more than was said shortly after 11 September 2001. The actors have changed but the on-going threat remains. Assuming there will continue to be people who wish to overthrow governments and gain power then, unless a utopian state is achieved, draconian secret state legislation that takes away rights will need to remain and probably grow, if the position adopted by the Commonwealth parliaments since 2001 is any guide.

Subject to some limited exceptions contained in section 18(2A)(2B)(3)(4)(4A) and (4B), section 18(2) of the Act makes it an offence for an ASIO employee or affiliate to communicate information if the information was acquired or prepared in connection with its functions or it relates to the performance of its functions and approval was not given by the Director-General. If an attempt is made to use one of the exceptions as a defence, the evidential burden is shifted to the accused. The penalty is 10 years imprisonment for a breach.

Section 18A makes it an offence for an ‘entrusted person’ who obtains a record to: copy, transcribe, retain, remove the record, or otherwise deal with the record in a way that is not approved. The penalty and offence under this section is 3 years imprisonment. Section 18A(2) provides an exception if the record is already available to the public (the burden of proof being with the accused to show this), and section 18A(2A) allows the record to be used where the Inspector-General of Intelligence is exercising power under

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651 George Brandis, Second Reading, Senate, Official Hansard, Wednesday, 24 September 2014, 6999. Section 18A(5) states: ‘entrusted person means: (a) an ASIO employee; or (b) an ASIO affiliate; or (c) a person who has entered into a contract, agreement or arrangement with ASIO (otherwise than as an ASIO affiliate).’
the Inspector-General of Intelligence and Security Act 1986 (the burden of proof being with the accused to show this).

Section 18B makes is an offence punishable by 3 years imprisonment for an entrusted person to make a record of ‘information or matter’ without approval. The same exceptions as contained in section 18A apply.

Section 34ZS(1) makes it an offence to disclose simply if a warrant has been issued, or a fact relating to its content, or that it relates to questioning or detention, or operational information. The penalty is 5 years imprisonment. Section 34ZS(2) allows for 5 years imprisonment if the disclosure occurs in a period of 2 years after the expiry of the warrant. Section 34ZS(3) removes any defence, other than the obvious ‘I didn’t do it’ one, by making it a strict liability offence for both the person subject to the warrant and the person’s legal representative. Lawyers representing ASIO or other state authorities are not caught by this section. Presumably the parliament has decided that only defence lawyers are likely to reveal such information or inform the public if abuses are occurring in the process.

Section 81 of the Act places secrecy requirements on members and officers of the Administrative Appeals Tribunal who have a very limited role, and provides for 2 years imprisonment in the event of a breach.

One of the more striking secrecy provisions is contained in section 92, which relates to the publication of the identity of an ASIO employee or an ASIO affiliate. Section 92(1) and 92(1A) provide for 10 years imprisonment for anyone, including parliamentarians on the Committee of Intelligence and Security, who reveals a present or former ASIO employee or affiliate, or their address. Section 92(1)(1A) requires the Minister or Director-General to give permission for the publication of the name of an ASIO employee or affiliate, subject to 10 years imprisonment if not obtained. The Act when it was first introduced was much more constrained when dealing with potential exposure of ASIO agents, having penalties of $1,000 or imprisonment for 1 year. Presumably foreign powers would not
have great difficulty identifying ASIO agents by use of basic surveillance techniques. Therefore the current much broader section with harsher penalties must be designed to keep agents and affiliates safe from members of the public who don’t appreciate their activities. The inclusion of former ASIO agents and affiliates seems more to protect their reputations from being disparaged by those they spied on.

**Intelligence Services Secrecy Provisions**

The current *Intelligence Services Act 2001* contains a number of secrecy sections that apply to that part of the Defence Department known as the Australian Geospatial-Intelligence Organisation (AGO), that part of the Defence Department known as the Australian Signals Directorate (ASD), the Australian Secret Intelligence Service (ASIS), the Office of National Assessments (ONA), and the Defence Intelligence Organisation (DIO). Where there is an exception to those sections creating an offence, in each instance the evidential burden is shifted to the accused person. Penalties for disclosure of information range from 3 years to 10 years.

**Inspector-General of Intelligence and Security**

The transparency and accountability of the Inspector-General of Intelligence and Security activities is non-existent, as no scrutiny is provided for beyond that given to the Prime Minister and the Minister. However, the *Inspector-General of Intelligence and Security Act 1986* does have a secrecy section. Section 35(1) of the Act makes it an offence for the Inspector-General or any member of staff to ‘make a record of, or divulge or communicate to any person or to a court, any information acquired’ or ‘make use of any such information’. The penalty for a breach is $5,000 or imprisonment for 2 years or both. There are a number of very limited qualifications contained in the section.

**Criminal Code Espionage Secrecy Provisions**

The *Criminal Code 1995* has secrecy provisions for espionage type offences. Section 91 of the Code concerns offences relating to espionage and similar activities. Section 91.1(2) makes it an offence for a person to communicate, or makes available information concerning the Commonwealth's security or defence; or information concerning the
security or defence of another country, to another country or a foreign organisation, or to a person acting on behalf of such a country or organisation. The section requires that the person intended to prejudice the Commonwealth’s security or defence. Section 91.1(2) is similar that it concerns providing information without lawful authority intending to give an advantage to another country's security or defence. Pursuant to section 91.1(3) a person commits an offence for obtaining or copying a record (in any form) of information concerning the Commonwealth's security or defence; or information concerning the security or defence of another country, being information that the person acquired (whether directly or indirectly) from the Commonwealth, with the intention and that the record will, or may, be delivered to another country or a foreign organisation, or to a person acting on behalf of such a country or organisation. Section 91.1(4) is similar to (3) except that it includes the intention that the record will, or may, be delivered to another country or a foreign organisation, or to a person acting on behalf of such a country or organisation. The penalty provided for offences under section 91.1 is 25 years imprisonment.

**Crimes Act 1914 Secrecy Provisions and Penalties**

Where the other legislation fails to capture those who might disclose secret information, the *Crimes Act 1914* provides the traditional coverage of Commonwealth officers. It was amended in 1960 to include former officers and has remained largely unchanged since then. Part VI section 70 provides for 2 years imprisonment for publishing or communicating information that should not be disclosed. Part VII of the *Act* is titled, ‘Official Secrets and Unlawful Soundings’ and it contains seven sections dealing with: Interpretation s77; Official secrets s79; Prohibited places s80; Institution of prosecution s85; Hearing in camera s85B; and Forfeiture of articles s85D.

In order to ensure that secrecy can maintained, section 85B places significant limits on the usual openness required for a trial to be seen to be fair. The section provides a penalty of 5 years for disclosure and it allows the court to be closed.
Public Interest Disclosure

The Public Interest Disclosure Act 2013 provides no protection for an individual who breaches secrecy provisions despite the objects listed in the Act.

6 Objects

The objects of this Act are:
(a) to promote the integrity and accountability of the Commonwealth public sector; and
(b) to encourage and facilitate the making of public interest disclosures by public officials; and
(c) to ensure that public officials who make public interest disclosures are supported and are protected from adverse consequences relating to the disclosures; and
(d) to ensure that disclosures by public officials are properly investigated and dealt with.

The noble objects simply do not apply to an intelligence agency. This is made clear in various sections of the Act. Section 33 is particularly relevant and interesting in that it would be a very courageous discloser who attempted to seek protection under the Act on the basis that the disclosure revealed conduct not connected with intelligence agency functions. Section 33 states:

Conduct connected with intelligence agencies

Despite section 29, conduct is not disclosable conduct if it is:
(a) conduct that an intelligence agency engages in in the proper performance of its functions or the proper exercise of its powers; or
(b) conduct that a public official who belongs to an intelligence agency engages in for the purposes of the proper performance of its functions or the proper exercise of its powers.
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