

PROTECTING DEMOCRACY BY PRESERVING JUSTICE: 'EVEN FOR THE FEARED AND THE HATED'

JENNY HOCKING*

'Adhering to the ways of democracy. Upholding constitutionalism and the rule of law. Defending, even under assault, and even for the feared and the hated, the legal rights of suspects.'¹

I INTRODUCTION

In the years since the tragic events of 11 September 2001, the 'war on terror' has come to be considered as 'one of the defining conflicts of the early 21st century'.² Yet, unlike other wars, this is an indefinable, infinite and indeterminate war – a war against no clear object but against an abstract noun, 'terror'.³ The effects of the 'war on terror', however, *are* clear and have been keenly felt both internationally and in Australia. In the post-September 11 security environment in which the interests of security have been deemed to be paramount, many western nations have enacted dramatic and unprecedented domestic counter-terrorism measures as part of what now appears to be an ongoing 'war on terror'. This rapid expansion in the state's security powers highlights the need to protect our basic legal and political rights in the face of revised security priorities.

By early 2002, the abrogation of rights and legal protections in the name of countering terrorism had already become so pronounced that the United Nations Commission on Human Rights expressed deep concern over what it called a 'reckless approach towards human life and liberty', which would ultimately undermine any counter-terrorism measures that were implemented.⁴ More recently, the International Committee of the Red Cross ('ICRC') reiterated these concerns, stressing that 'no person captured in the fight against terrorism can be

* Australian Research Council QEII Research Fellow, National Centre for Australian Studies, Monash University. I would like to gratefully acknowledge the exceptional research assistance and comments of Sara Cousins. An earlier version of this paper was delivered at the UNSW Gilbert + Tobin Centre of Public Law National Forum on Terrorism and the Rule of Law, Sydney, 10 November 2003.

1 Justice Michael Kirby, 'Australian Law – After 11 September 2001' (2001) 21 *Australian Bar Review* 253, 263.

2 Christopher Michaelsen, 'International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11' (2003) 25 *Sydney Law Review* 275, 276.

3 See generally Rodney Allen, 'Terrorism and Truth' (2002) 27 *Alternative Law Journal* 157.

4 *Report of the United Nations High Commissioner for Human Rights to the World Conference on Human Rights*, 4, UN Doc E/CN.4/2002/18 (2002).

considered outside the law. There is no such thing as a “black hole” in terms of legal protection’.⁵ The President of the ICRC, Jakob Kellenberger, pointed to the breaches of international humanitarian law and the Geneva Conventions revealed by the appalling abuse, torture and death of Iraqi prisoners held in Abu Ghraib prison under American occupation, citing them as ‘but one example of the violation of these laws and the values they embody’.⁶

These concerns are not limited to abrogations of human rights in the international arena of security law. The implications of the contraction of established domestic legal and political protections are no less severe. The United Nations Commission on Human Rights report on the state of human rights after September 11 reaffirmed the absolute prohibition against the use of torture in any circumstances, and noted those measures which contribute to its practice:

the wide scope of arrest and detention powers granted to the police; overlapping of jurisdiction of various police and security agencies; secret detention; lack of or inadequate legal infrastructure to deal with allegations of torture; the existence of extensive pre-trial detention powers; the use of administrative or preventive detention for prolonged periods of time; ... and the denial of access to lawyers, family and medical personnel.⁷

Recent developments in domestic counter-terrorism frameworks and practices have established just such conditions.

II POST-SEPTEMBER 11 SECURITY POWERS

Shortly after September 11, the Australian Government announced that tough new measures against terrorism would be introduced. These measures would ‘set up mechanisms that will allow terrorist organisations to be stopped and potential terrorist activity to be stopped before that terrorist activity has actually taken place’.⁸ The resultant package of seven major legislative initiatives, introduced in March 2002, was the most significant recasting of the relationship between the executive, judicial and legislative arms of government since Liberal Prime Minister Robert Menzies’ *Communist Party Dissolution Act 1950* (Cth) (‘CPDA’), which was declared unconstitutional by the High Court.⁹

Central to the early legislative counter-terrorism momentum was the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) (Cth), an unwieldy multi-faceted Bill of such pervasive innovation that the Australian Democrats Senator Greig described it as ‘an ambit claim for arbitrary executive power at the expense

5 *International Humanitarian Law and Terrorism: Questions and Answers* (2004) International Committee of the Red Cross <<http://www.icrc.org/Web/eng/siteeng0.nsf/html/5YNLEV>> at 15 November 2004.

6 Jakob Kellenberger, *Protecting Life with Dignity: ‘No War is Above International Law’* (2004) International Committee of the Red Cross <<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5Z5DKQ?OpenDocument>> at 15 November 2004.

7 *Report of the United Nations High Commissioner for Human Rights to the World Conference on Human Rights*, above n 4, 6.

8 Evidence to Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, Canberra, 1 May 2002, 1–2 (Karl Alderson, Principal Legal Officer, Criminal Law Branch, Attorney-General’s Department).

9 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

of civil rights and fundamental principles of law'.¹⁰ The Security Legislation Amendment (Terrorism) Bill 2002 (No 2) (Cth) defined 'terrorist act', created categories of 'terrorism offences', introduced a means for executive proscription of 'terrorist organisations', and created derivative organisational crimes in relation to membership and other specified connections with 'terrorist organisations'.

In mid-2002, the Australian Parliament passed this legislation in a greatly amended form, following extensive community consideration and parliamentary debate. Widespread public concerns, reflected in the submissions to and hearings of the Senate Legal and Constitutional Legislation Committee, resulted in significant amelioration of the harshest aspects of the original Bill. The *Security Legislation Amendment (Terrorism) Act 2002* (Cth) created important new substantive offences and overturned established legal protections and principles. Individual and organisational crimes classed as 'terrorism offences' were introduced for the first time in Australian law. A proposal to allow the Attorney-General the power to proscribe terrorist organisations by his own determination was debated and ultimately rejected. Instead, an attenuated form of the power was introduced which allowed provision for the proscription of organisations listed by the United Nations as 'terrorist organisations'.¹¹

In June 2003, the second pillar of the early counter-terrorism package was passed – the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) ('ASIO Act 2003'). This Act allows the Australian Security and Intelligence Organisation ('ASIO'), under warrant, to detain for up to seven days and to interrogate for up to 24 hours within that period, Australians not suspected of any involvement in a criminal offence but who 'may have information relating to a terrorism offence'. Detention and interrogation can be conducted without appropriate access to independent legal advice and, in some cases, incommunicado. Australia remains the only liberal-democratic nation to have proposed the detention and interrogation of non-suspects in this way. The Parliamentary Joint Committee that examined the Bill went so far as to describe it, in its original unamended form, as 'one of the most controversial pieces of legislation considered by the Parliament in recent times' and one which 'would undermine key legal rights and erode the civil liberties that make Australia a leading democracy'.¹²

The initial counter-terrorism legislative package was just the beginning of the development of counter-terrorism measures on an unsurpassed scale. Since then there have been a total of 17 security-related Acts passed.¹³ The trajectory of the early counter-terrorism legislation set a clearly defined pattern marked by several

10 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Bills* (2002) 82.

11 The ministerial proscription power was subsequently enabled through the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

12 Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *Advisory Report on the Australian Security Intelligence Organization Legislation Amendment (Terrorism) Bill 2002* (2002) Foreword.

13 Richard Ackland, 'Belt Up; That's the Message for Libertarians', *Sydney Morning Herald* (Sydney), 26 March 2004, 15.

elements: the use of sprawling, omnibus legislation by which multiple Acts are amended in a complex web of interlocking changes within a single amendment Bill, which makes extensive debate and parliamentary supervision difficult; an absence of appropriately argued justification for such significant changes; minimal time for consideration of the legislation by parliamentary committees;¹⁴ and, finally, a determination on the part of the Government to implement its original proposals in the face of parliamentary and community concerns.

Substantively, the early Bills also established some elements common to subsequent security legislation: the expansion of executive power and discretion at the expense of judicial determination and supervision; the primacy of 'national security' imperatives; the truncation of the provision of independent legal advice; the departure from and diminution of long-standing legal and civil rights (presumption of innocence, trial by jury, freedom of association); the removal of certainty through the potential for arbitrary and discretionary application of the laws; the use of ambiguous and broadly defined key terms central to the construction of the particular criminal offence (primarily 'terrorism'); and the formalisation of a notion of guilt by association through derivative offences such as providing support to, recruitment, providing training to and membership (including 'informal membership', which is nowhere defined) of terrorist organisations.¹⁵

III LANGUAGE MATTERS

In relation to much of this legislative and procedural overhaul, the ambiguity of key terms has been the result not of poor legislative drafting but of a studied and deliberate attempt to allow for 'flexibility' in the application of the Act. Indeed, as Carne notes, a 'deliberate looseness of statutory language, as employed in the imprecise definition of terrorism, was considered beneficial because of its flexibility'.¹⁶ It is this linguistic imprecision that leaves open the possibility of an abuse of executive power through the discretionary interpretation and application of these laws, and the possibility of a form of racial or religious profiling in their implementation. The legislation leaves citizens unprotected from such excesses and reliant on their trust and confidence in the 'non-abuse of power' and the responsible application of the laws by those implementing them.¹⁷ The Canadian experience has already shown that racial profiling is exacerbated by this linguistic imprecision and its attendant discretionary capability; 'racial profiling ... is the product of discretionary

14 In both the 2002 and 2004 major legislative changes, the Bills were referred to the Committee at the same time of year – over the Easter holiday period. See Jenny Hocking, *ASIO, Counter-Terrorism and the Threat to Democracy* (2004).

15 *Security Legislation Amendment (Terrorism) Act 2002* (Cth).

16 Greg Carne, 'Terror and the Ambit Claim: *Security Legislation Amendment (Terrorism) Act 2002* (Cth)' (2003) 14 *Public Law Review* 13, 18.

17 *Ibid.*

decision-making' through which criteria of race substitute for genuine knowledge of individual risk.¹⁸

The central term on which the legislative regime turns is the 'terrorist act'. It is important to note that 'terrorist offence' is a broad and ambiguous category and is certainly not limited to the carrying out of 'terrorist acts'. The individual terrorist offences include a range of offences, some little more than tenuously connected with a terrorist act. For instance: possessing things connected with terrorist acts; collecting or making documents likely to facilitate terrorist acts; and other acts done in preparation for, or planning, terrorist acts – whether or not such terrorist acts occur.¹⁹ It is this breadth in terminology that allows this and other associated legislative measures 'to affect a far wider range of people than those who would ordinarily be thought of as terrorists'.²⁰ The organisational terrorism offences are similarly broad and certainly derivative of the 'naming' and proscription of an organisation by whatever means: directing the activities of a terrorist organisation; membership (including informal membership) of; getting funds to or from; providing support to; training or receiving training from a terrorist organisation. Not only are these offences in themselves broad, their activation, and hence the question of criminality itself, is dependent on the discretionary exercise of executive power. This extraordinary range of discretionary executive capabilities, occasioned by the studied legislative ambiguity of key terms, is further compounded by the fact that an individual may be deemed to have committed an offence, even though they have not been convicted, and indeed may have been acquitted, of it.²¹

IV ECHOES OF THE *COMMUNIST PARTY DISSOLUTION ACT 1950 (CTH)*

The imprecision over the language of 'terrorism' and the resulting potential for discretionary application, leads to concern that counter-terrorism security measures will be used in ways that are neither appropriate nor efficient, ways that may impact disproportionately upon identifiable racial and religious groups and may impinge upon legitimate political agitation and dissent. Historically, such concerns are not misplaced. It is in some ways fitting that these latest security measures were passed almost exactly 50 years since the final defeat of Menzies' attempts to pass the *CPDA*. That Act would have outlawed political organisations by executive decree, allowed for an executive finding of guilt not found since the days of the Star Chamber, reversed the onus of proof and removed even trial by jury at a time of presumed international and national crisis against the then scourge of communism.

18 Reem Bahdi, 'No Exit: Racial Profiling and Canada's War against Terrorism' (2003) 41 *Osgoode Hall Law Journal* 293, 297.

19 *Security Legislation Amendment (Terrorism) Act 2002* (Cth) div 101.

20 Evidence to Legal and Constitutional Legislation Committee, Parliament of Australia, Canberra, 30 April 2004, 17 (Patrick Emerton).

21 Hocking, above n 14, 205.

Arguments surrounding this issue reveal much about what remains an ongoing security concern – limiting acceptable political behaviour and democratic power by winding back legal and political rights in the name of protecting security. As Labor leader Ben Chifley argued in Parliament, the Communist Party Dissolution Bill 1950 (Cth)

strikes at the very heart of justice. It opens the door for the liar, the perjurer and the pimp to make charges and damn men's reputations and to do so in secret without having either to substantiate or prove any charges they might make.²²

The CPDA did away with established protections before the law, the 'great principles of justice'²³ as the former High Court Justice Lionel Murphy called them, which had been developed over generations, not as obstacles to conviction, but as a means of achieving justice. Such fundamental denials of freedom of political association and natural justice were unprecedented anywhere in the western world during peacetime with the exception, as Justice Michael Kirby has pointed out, of the apartheid regime in South Africa, whose *Suppression of Communism Act 1950* was drawn upon by the Australian Act. It is pertinent at this time, as we face contemporary challenges to democratic rights and associated legal principles, to reassess this era and this extraordinary Bill.

In the debate surrounding the CPDA's provisions, then and since, what has been highlighted is not so much the potential for an executive abuse of a power to outlaw political organisations, but that such a power is itself an abuse, through its disavowal of judicial review of these executive decisions, one which endangered the fragile relations between the arms of government.²⁴ Menzies' view, expressed after the High Court struck down the Act,²⁵ was that 'the judgment of the relationship between [this] law and national defence and security ... is to be that of this Parliament and of no outside body'.²⁶ Justice Williams perhaps had this sentiment in mind when he queried during argument: 'Does this mean that Parliament could say that the existence of John Smith, an ordinary citizen, is a menace to the security of Australia and require that he be shot at dawn?'²⁷

These concerns to maintain protections of judicial review and the trial process in the face of assertions of executive pre-eminence are particularly clear in the historic judgments of the six majority High Court justices in this case in 1951. It is a decision which asserted the finality of the axiom of judicial review which permeates our Constitution and protects all of us from the arbitrary abuse of executive power. It was, as Professor George Winterton has described it, 'truly an "epochal" decision, probably the most important ever rendered by the Court'.²⁸ The central issues raised throughout that intriguing struggle over the

22 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2268 (Ben Chifley).

23 Jenny Hocking, *Lionel Murphy: A Political Biography* (2000) 250.

24 See Jenny Hocking, 'Robert Menzies' "Fundamental Authoritarianism": The 1951 Referendum' in Peter Love and Paul Strangio (eds), *Arguing the Cold War* (2001) 47, 54–5.

25 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

26 Commonwealth, *Parliamentary Debates*, House of Representative, 5 July 1951, 1080 (Robert Menzies).

27 George Winterton, 'The Significance of the Communist Party Case' (1992) 18 *Melbourne University Law Review* 630, 656–7.

28 *Ibid* 653.

CPDA, 'about the limits of legislative and executive power and supremacy of the judiciary in deciding such [a] question',²⁹ also remain at the heart of the current concerns about national security needs and democratic practice.

Despite the obvious political parallels between arguments for enhanced and exceptional security powers during the Cold War and those of the current day, the widespread community concern over expanded executive power, evidenced during the parliamentary committee hearings into the initial counter-terrorism legislation, has not been matched by ongoing public debate, nor by any review of the nature and extent of terrorism in Australia and appropriate response mechanisms. 'It was as if the threat of terrorism demanded a suspension of democratic critique from proposals constituting an unprecedented increase in executive power.'³⁰ Indeed, with the more recent amendments to the *Australian Security Intelligence Organisation Act 1979* (Cth) ('ASIO Act'), which criminalise public discussion of aspects of the detention process,³¹ some elements of this debate may well be illegal. Although Bronnitt suggests that it is the 'war on drugs', rather than the anti-communism of the 1950s, that 'provides the template' for these counter-terrorism developments, seeing parallels particularly in the focus on a collective threat and the normalisation of exceptional criminal justice measures. It is, nevertheless, the primacy of executive-driven national security needs over established democratic and legal institutional forms that is common to each of the legal regimes.³²

Several key features of the debate remain unaddressed and ought now to be dealt with. What has been the Australian experience of terrorism? What is the level of terrorist threat in Australia? What are Australia's existing powers and structures to counter terrorism and are they adequate to meet this level of threat? These questions mirror the legal concerns regarding the introduction of exceptional security measures and the derogation from established criminal justice procedures, as well as concerns that such measures be proportional, appropriate and proximate. These requirements need to be considered politically as much as legally before we determine on a path which takes us into the uncharted terrain of introducing exceptional powers to deal with terrorism in Australia. Yet it was not until March 2004, some two and a half years after the events of 11 September 2001, and long after the passage of the new counter-terrorism legislation, that the Federal Government commissioned a White Paper on Terrorism to be undertaken by Les Luck, 'Counter-Terrorism Ambassador', with the Department of Foreign Affairs and Trade.³³ There now exists the means for detailed debate and consideration to take place, particularly in relation to the provisions of the *ASIO Act* which have been significantly amended since the events of 11 September 2001. Thanks to substantial Senate amendment of the

29 Brian Galligan, *Politics of the High Court* (1987) 203.

30 Carne, above n 16, 19.

31 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34BAA.

32 Simon Bronnitt, 'Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?' (2003) 14 *Public Law Review* 76, 76.

33 Patrick Walters and Sophie Morris, 'Downer Orders Analysis on Terror', *The Australian* (Sydney), 30 March 2004, 2.

original Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth) during its parliamentary consideration in 2002–03, there is now a three year sunset clause³⁴ which is preceded by a process of review of the Act's provisions and enforcement.³⁵

V COUNTER-TERRORISM: THE FIRST WAVE

Despite the repeated perception that the events of 11 September 2001 have marked the coming of a 'new world', a 'new kind of violence', necessitating a 'new type of response', we are in fact witnessing what might be called a 'second wave' of counter-terrorism law in Australia, one that further develops a network and structure of counter-terrorism first set in place in the mid-1970s and cemented following the Hilton Hotel bombing of 1978. Two distinct models of domestic counter-terrorism in liberal democratic states can be identified in this 'first wave': a militarised strategy that draws on counter-insurgency theory and practice, and treats terrorism as a war-like domestic insurgency; and a counter-terrorism structure developed within the existing criminal justice system, which essentially treats terrorism as a peacetime, criminal matter.³⁶

In the earlier development of counter-terrorism, Australia drew heavily on the British model, despite clear differences in the nature and extent of political violence. The British model has essentially been a militarised one, reflecting its focus on Northern Ireland. It draws on five main aspects of counter-insurgency theory and practice: the use of exceptional legislative measures; the maintenance of vast intelligence collections; the development of pre-emptive controls on political activity; military involvement in civil disturbances; and the development of a strategy of media management in times of crisis.³⁷

The exception to the wholesale adaptation of this model in Australia's earlier counter-terrorism strategy had been, until recently, the continued use of the existing criminal law against terrorist offences. Unlike Britain, Australia's broad counter-insurgency based approach had retained important elements of the 'criminal justice model' and, until the events of 11 September 2001, had not adopted the particularly problematic use of 'exceptional powers'.³⁸ The more recent 'second wave' developments in domestic counter-terrorism differ from the first wave of the 1970s in this critical respect. For the first time in Australia's counter-terrorism procedures, 'exceptional' legislative provisions have been introduced which would not ordinarily be proposed nor accepted within the

34 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34Y.

35 Explanatory Memorandum, *Australian Security Intelligence Organisation Legislation Amendment Bill 2003* (Cth).

36 Jenny Hocking, *Beyond Terrorism: The Development of the Australian Security State* (1993). Ronald Crelinsten similarly terms these a criminal justice model and a war model: 'The Discourse and Practice of Counter-Terrorism in Liberal Democracies' (1998) 44 *Australian Journal of Politics and History* 389.

37 Hocking, above n 36, 21.

38 Crelinsten, above n 36, 390.

existing criminal justice system.³⁹ In particular, contemporary developments in counter-terrorism have fundamentally recast the balance between the branches of government in a way seldom contemplated and never achieved by the first wave.

VI POLITICAL PROCESS SUBVERTED

The enactment of legislation granting ASIO's expanded powers in 2003 was the result of a protracted 18 month period of negotiation, debate and compromise. Its eventual form reflected some degree of compromise over the major concerns expressed by several parliamentary inquiries into its provisions, widespread community debate and the hard-won political compromises fought out on the floor of the Parliament. Not everyone was happy with the Act's final form. Some aspects of the original Bill remained as oppressive as they had been when the Parliamentary Joint Committee on ASIO, ASIS and DSD described it as undermining 'key legal rights and erod[ing] the civil liberties that make Australia a leading democracy'.⁴⁰ Other aspects, such as the Bill's original proposal that detention be incommunicado, that no legal representation be permitted during detention and that detention and interrogation include children as young as 10, were improved. The process of parliamentary scrutiny and public consultation was significant and extensive and the final Bill was one that the Opposition, whose support was crucial to the Bill's passage, felt it could endorse. Stressing the idea of 'balance', the Prime Minister proclaimed: 'We have, of necessity, tightened our security laws. I believe through the great parliamentary process ... that we have got the balance right'.⁴¹ Yet just months after the passage of this extensively amended Act, the Attorney-General renewed his claims that ASIO needed stronger powers.⁴²

Despite the extensive debate and parliamentary compromise over the original counter-terrorism package, the committee process, and the widespread public concern over the proposed executive proscription power, within 18 months of its passage the Government succeeded in reintroducing and passing through other means, much of the legislation's previously rejected elements. In particular, the original provisions for executive proscription and constraints on independent legal representation have been largely achieved and, subsequently, even further powers have been demanded. Such continued claims for yet further powers disregard the parliamentary process and reflect an impatience with the workings of democracy itself. It suggests a determination on the part of the Government not only to expand the power of the executive through the powers already given

39 This shift is noted also in the discussion in the report by the International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2003) 232 <[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5ZBHH7/\\$File/IRRC_853_FD_IHL_Challenge.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5ZBHH7/$File/IRRC_853_FD_IHL_Challenge.pdf)> at 15 November 2004.

40 Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 12.

41 John Howard, Speech delivered at the National Press Club, Canberra, 11 September 2002 <<http://www.pm.gov.au/news/speeches/2002/speech1848.htm>> at 15 November 2004.

42 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2003, 21727, 21729, 21734 (Phillip Ruddock, Attorney-General).

to ASIO, but also to supersede carefully constructed parliamentary compromises in order to achieve this goal. In a sense the substance of the ASIO legislation has been matched by executive form.

This is a particularly disconcerting aspect of the lengthy and continuing debate around the security legislation. It is indicative of a mode of government which sees parliamentary compromise as an obstacle to governmental dominance rather than essential to democratic practice. In the final hours of the parliamentary session following the Senate's initial rejection of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill in late 2002, Greens Senator Bob Brown strongly criticised this mode of government:

If the point of view of the government and the Prime Minister is that they will not brook improvement through the workings of the Senate and the parliament, it is democracy itself that is being questioned.⁴³

VII MORE POWERS: DETENTION AND SECRECY

The Attorney-General's suggestion, just months after the passage of the *ASIO Act 2003*, that ASIO needed yet further powers, was made in the context of his stated view that ASIO had not been able to act against the French al Qaeda suspect Willie Brigitte under its existing powers. The suggestion that ASIO lacked sufficient basis upon which to successfully request a warrant allowing for Brigitte's detention and interrogation within Australia was simply untrue. That the newly amended *ASIO Act* would have allowed for the detention and questioning of Willie Brigitte is clear. What is not so clear is why ASIO and the Attorney-General chose not to do so. The Attorney-General had indicated that ASIO had not even moved to use its new powers, despite having been advised previously that Brigitte was 'of interest' to the French authorities.⁴⁴

In late 2003, the Government introduced further amendments to the newly empowered *ASIO Act*, seeking stringent secrecy provisions in relation to public disclosure of the implementation of its detention regime and still further expanded interrogation powers. Specifically, these changes enabled the interrogation period to be doubled to 48 hours if an interpreter had been 'present at any time' during the questioning period,⁴⁵ and created the new and little-reported criminal offences for public disclosure of the specific use of these detention powers.⁴⁶ Disclosing any information including 'operational information' about ASIO's existing warrants is now illegal whilst the warrant is in effect, including even the name or fact of an individual being detained under warrant.⁴⁷ Such disclosure carries a penalty of five years imprisonment and may apply even if the warrant was itself illegal or improperly applied, for example if

43 Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 81578 (Bob Brown).

44 Jenny Hocking, 'Flawed View of Security Power Hits Democracy', *Canberra Times* (Canberra), 5 November 2003, 18.

45 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34HB8.

46 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VAA.

47 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VAA(1).

it was used against an individual under the age of 16 or continued beyond the specified seven day detention period. Further crimes relating to the general disclosure of 'operational information' relating to ASIO's activities, including the warranting and detention process, were also introduced, with a penalty of five years imprisonment for the release of such information within two years of the warrant period.⁴⁸ 'Operational information' is defined as 'information that [ASIO] has or had'.⁴⁹ The breadth of this term makes it unclear what reporting, if any, will now be permitted about any of ASIO's activities, the impact of which is to effectively remove the capacity for informed public debate and policy consideration about the implementation of this controversial detention regime.

One example of the danger to public debate that has been created by this new secrecy provision was cited by a Department of the Parliamentary Library Bills Digest. In relation to Willie Brigitte's activities in Australia, it was reported that

[a]t least one of the seven men raided by armed police and ASIO ... was detained and questioned this week ... the man was taken to the Australian Crime Commission offices in Sydney's CBD for questioning in two eight-hour sessions about his connections to [Willie] Brigitte. ... [T]he man was later released and no charges have been laid.⁵⁰

The Parliamentary Library, citing this report, asked 'whether this sort of reporting would and should be caught by the new disclosure offences'.⁵¹ Senior management figures from a range of media organisations, including the Australian Broadcasting Corporation, the Australian Press Council, John Fairfax and News Limited, wrote to the Senate to express their concerns about the potential impact of these amendments on media coverage, saying that '[s]uch a measure ... is capable of being used by the Government against Australian citizens while providing little tangible benefit save for a complete media black-out of those matters that are so important in this political climate'.⁵²

The Greens unsuccessfully sought to have a 'public interest' test inserted into the legislation to protect journalists from prosecution regarding any public disclosure of such information that did not threaten national security. Following the passage of the Act, the Attorney-General indicated that the national interest sometimes overrode journalists' right to publish information about terrorism.⁵³

VIII 'SECURITY POLICING': A NEW ORTHODOXY

Taken overall, the current revised security powers have established a new orthodoxy in ASIO's activities by moving it into the arena of 'security policing'

48 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VAA(2).

49 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VAA(5).

50 Martin Chulov and Trudy Harris, 'ASIO Flexes Fresh Muscle', *The Australian* (Sydney), 8 November 2002, 1.

51 Department of the Parliamentary Library, 'ASIO Legislation Amendment Bill 2003' (Bills Digest No 68/2003-04) 14.

52 Selina Mitchell, 'Journalists Face Jail under New ASIO Laws', *The Australian* (Sydney), 11 December 2003, 1.

53 *Ibid.*

– merging its activities with those of domestic policing.⁵⁴ It also marks the endpoint in ASIO's gradual shift towards a universalised strategy of pre-emptive surveillance of an ever-present internal 'enemy'; an end to the political struggle – waged since ASIO's establishment by Labor Prime Minister Ben Chifley in 1949 – to maintain a more focused, democratic and accountable notion of national security.

These concerns were reflected in the appointment by Chifley of a civilian judge, Justice Reed, as the first Director-General of ASIO. However, Chifley's determination to make the protection of civil and political liberties paramount lasted barely a year when, with the elevation of Robert Menzies as Prime Minister, Reed was replaced by the former head of military intelligence – Brigadier Charles Spry. This appointment marked the beginning of ASIO's broader, more politicised approach to surveillance, which lasted until a series of revelations of its excesses in the 1970s led to tighter controls. Since that time ASIO's operations have become more clearly accountable (in particular through the establishment of the office of Inspector-General of Security) and its activities more tightly focussed around questions of genuine national security concern. More specifically, there had, until recently, been a clearer demarcation between ASIO's pre-emptive security surveillance and the traditionally reactive intelligence activities of police and law enforcement bodies.

Contemporary counter-terrorism developments have altered these earlier relationships to such an extent that they have established a new orthodoxy in ASIO's activities. For the first time in its history, ASIO will be able to move directly into law enforcement. Its agents are now able to detain individuals – even those not suspected of any involvement in a criminal offence – for a week without charge.⁵⁵ ASIO's security operations are increasingly merged with those of domestic policing. This gradual move towards a generic notion of 'security policing' can also be seen in the agreement between the States and the federal authorities in October 2002 to establish the new Australian Crime Commission with the Director-General of ASIO on its Board.

The immensely expanded security powers of ASIO, and the associated criminalisation of public debate about their operation, is an example of contemporary challenge to the rule of law, arising from the actions of the State itself. Heinrich described the situation as displaying 'what can be dubbed the "fight fire with fire" phenomenon. That is, the State responding to lawlessness by acting also with characteristics of lawlessness'.⁵⁶ It can be seen also in the process of the proscription legislation. In a similar trajectory the Government, never happy with Parliament's removal of the Minister's power to proscribe and its replacement with a United Nations listing process, proposed an amendment to the proscription power. The proposal simply reintroduced the ministerial

54 Jenny Hocking, 'Charting Political Space: Surveillance and the Rule of Law' (1994) 21(4) *Social Justice* 66.

55 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34C–F.

56 Ron Heinrich, 'The Least Dangerous Profession? Lawyers and the Rule of Law in the Commonwealth Today' (Speech delivered at the 13th Commonwealth Law Conference, Melbourne, 17 April 2003) 2, <<http://www.lawcouncil.asn.au/read/2003/2377372291>> at 15 November 2004.

discretionary power to proscribe organisations with suspected terrorist links, 'in short the original proposal is reinstated and the connection with the UNSC [United Nations Security Council] is severed'.⁵⁷ It overturned, in other words, the negotiated parliamentary compromise on the matter of proscription and simply reinstated the original proposal for 'largely unfettered' ministerial discretion and executive proscription.⁵⁸ The Bill was passed with Opposition support early in 2004.⁵⁹

Philip Ruddock's appointment as Attorney-General in October 2003 marked the beginning of this new round of demands for ever greater security powers. The new Attorney-General's persistence was greatly facilitated by the ascension of a new Leader of the Opposition whose electoral strategy determined that the only response to this endless array of incursions upon legal rights and democratic principles would be personal indifference and parliamentary impotence. Perhaps, as one commentator suggested, the Opposition had simply 'tired of the fight'.⁶⁰ Certainly the Labor Senator, John Faulkner, had moved quickly from an apparently unassailable view that, 'that kind of power exercised by one person ... is not acceptable in a democratic society',⁶¹ to describing the new proscription power as 'a great achievement'.⁶²

This lack of rigorous opposition and debate has seriously compromised the possibility of parliamentary supervision through the scrutiny that a strong Opposition party provides – a crucial element of parliamentary democratic practice. This has inevitably led to further and greater security amendments. No sooner have measures been implemented in the face of Opposition capitulation, than the Attorney-General is back with more. Senator Bob Brown has recognised the dangers to democratic practice in this procedural and party weakness:

We are on a terrible slippery slope where we know that the Attorney-General has more laws to come which are worse than this one. ... He said this week that his canvas is not yet complete, and he did so with a great deal of cockiness, saying that the Labor Party had caved in to the election on this piece of legislation so he will take it further. This has been a political mistake by the Labor Party.⁶³

IX STILL MORE POWERS: ANTI-TERRORISM BILL 2004 (CTH)

Nowhere is this 'slippery slope' – along which our rights and liberties have already travelled – clearer than in the provisions of the Anti-terrorism Bill 2004

57 Department of the Parliamentary Library, 'Criminal Code Amendment (Terrorist Organisations) Bill 2003' (Bills Digest No 174/2002–03) 9.

58 See Law Council of Australia, 'New Proscription Powers Prompt Grave Concern' (Press Release, 4 March 2004) Law Council of Australia <<http://www.lawcouncil.asn.au/read/2004/2392368082>> at 15 November 2004.

59 *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

60 'Labor's Backflip on Terrorist Bans', *Sydney Morning Herald* (Sydney), 5 March 2004, 10.

61 *Ibid.*

62 Commonwealth, *Parliamentary Debates*, Senate, 3 March 2004, 20663 (Senator John Faulkner).

63 Commonwealth, *Parliamentary Debates*, Senate, 4 March 2004, 20794 (Senator Bob Brown).

(Cth), currently before the Parliament. Once again, this is an ambitious legislative proposal, an omnibus Bill that would significantly amend the *Crimes Act 1914* (Cth), the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) and the *Proceeds of Crime Act 2002* (Cth). The provisions of this Bill would enable the diminution of customary legal rights through the potentially indefinite extension ('suspended and delayed') detention periods for those held by police without charge in relation to terrorism offences; a further expansion of executive power through a power to declare and proscribe by regulation organisations operating as a part of the armed forces of a state; and the criminalisation of the commercial publication of material by those accused of foreign indictable offences, including those held but never charged and those held, charged and acquitted.⁶⁴

Like the security legislation before it, this Bill has been accompanied by scant serious attempt at reasoned justification of the need for these amendments in terms of recognisable shortcomings in the existing counter-terrorism framework, but rather has been attended by a series of unsubstantiated and banal assertions that these further powers are now essential:

In the current environment, complacency is not an option. ... This government has worked hard to ensure that the reach of Australia's criminal justice system extends to cover terrorists by eliminating loopholes and gaps. ... It is now appropriate to improve the capability of Australia's law enforcement agencies to properly investigate these new terrorism offences.⁶⁵

The proposed power to proscribe by regulation organisations pursuant to the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) carried with it no specifications of any criteria on which such a listing would be based. Its ambiguity and breadth, therefore, was such that the Attorney-General's Department glibly acknowledged that an organisation did not have to be a terrorist organisation to be proscribed, with the startling comment that '[y]ou could list the Boy Scouts'.⁶⁶ The Committee recommended that the Bill identify the criteria by which organisations may be proscribed.⁶⁷ The Castan Centre for Human Rights Law, Monash University, argued that this proscription power was part of the earlier pattern of counter-terrorism legislative developments and

would further entrench an already disturbing feature of Australian anti-terrorism legislation, namely, criminal liability that results from the unfavourable exercise of discretion directed at particular organisations, rather than from the legislative prohibition of conduct.⁶⁸

64 These proposals have been extensively examined by the Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-terrorism Bill 2004* (2004) and by the submissions to it: see <http://www.aph.gov.au/senate/committee/legcon_ctte/anti_terrorism04> at 15 November 2004.

65 Second Reading Speech, Anti-terrorism Bill 2004 (Cth), House of Representatives, 31 March 2004 (Philip Ruddock, Attorney-General).

66 Senate Legal and Constitutional Legislation Committee, above n 64, 28.

67 Recommendation 2: *ibid* ix.

68 Submission No 18 to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-terrorism Bill 2004* (2004) 10 (Castan Centre for Human Rights Law, Monash University).

The Bill's proposed amendment to the *Crimes Act 1914* (Cth) would extend the total period of detention prior to charges being laid for those suspected of a 'terrorism offence' in two ways: by allowing a general extension of time to a total of 24 hours instead of the current eight hours maximum; and, more significantly in terms of its potential for repeat and therefore indefinite extensions, by allowing for a period of 'dead time' for the purpose of obtaining information from countries in different time zones. The Bill, however, places no upper limit on the total period of 'dead time', nor does it specifically prevent multiple requests for such extensions based on time zone differentials. Nor are any protocols proposed to cover such extended detention periods, such as ensuring adequate sleep time, the regular provision of food and necessary breaks between questioning periods.

Finally, the proposed amendments to the *Proceeds of Crime Act 2002* (Cth) through the Anti-terrorism Bill 2004 (Cth) would amend the definition of 'literary proceeds' currently in the Act to include those derived outside Australia and then transferred to Australia. This definition would also include the words 'directly or indirectly' in relation to these proceeds to now read: 'any benefit that a person derives from the commercial exploitation of ... the person's notoriety resulting directly or indirectly from the person committing an indictable offence or a foreign indictable offence'.⁶⁹ The significance of the inclusion of the words 'directly or indirectly' has been quite explicitly described by the Attorney-General as being 'intended to vitiate a claim that a person's notoriety stems from circumstances related to their commission of an offence, such as their place of incarceration, and not from the actual commission of the offence'.⁷⁰

Given that the *Proceeds of Crime Act 2002* (Cth) allows for the court merely to be satisfied that an indictable offence has been committed, there is no requirement here for conviction. 'Indeed, an acquittal does not affect the court's power to make a "literary proceeds" order'.⁷¹ The Bill also proposes a new meaning of 'foreign indictable offence' to include an 'offence against a law of a foreign country', which is defined to include

an offence triable by a military commission of the United States of America established under a Military Order of 13 November 2001 made by the President of the United States of America and entitled 'Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism'.⁷²

The new definitions of 'literary proceeds' and 'foreign indictable offence' taken together make the immediate impact of this Bill absolutely clear. Neither David Hicks, nor Mamdouh Habib, nor indeed any other Australians who are, in the future, held in Guantánamo Bay by American authorities, would be able to publish commercially any details of their detention or their treatment, whether

69 Anti-terrorism Bill 2004 (Cth) Item 24.

70 Explanatory Memorandum, Anti-terrorism Bill 2004 (Cth) 22.

71 See the excellent discussion of this aspect in Submission No 9 to Senate Legal and Constitutional Committee, Parliament of Australia, *Provisions of the Anti-terrorism Bill 2004* (2004) 13 (Joo-Cheong Tham) and the Committee's consideration in their final report: Senate Legal and Constitutional Legislation Committee, above n 64, 47–8.

72 Anti-terrorism Bill 2004 (Cth) s 337A(3).

they are eventually charged, convicted, acquitted or even released without charge. At a time when the revelations of human rights abuses, torture and death in other American-run facilities have come to light precisely through their commercial publication, the implications of these strictures are not only clearly censorial, their precision raises the not unreasonable question of whether they have been inserted at the behest of American interests. It is difficult to reconcile in any other way this highly targeted aspect of the Bill with its otherwise predictable ambiguity and generalised application. The vagueness of language and the resultant arbitrary and discretionary applicability, which we have come to expect from counter-terrorism security legislation and is present in other aspects of this Bill, stand in stark contrast to these provisions, which are precise even down to the date and title of the Military Order. Indeed these are of such specificity that they appear to be aimed at identifiable individuals. Professor George Williams has asked whether, in this regard, the Bill has some features of a bill of attainder in its implications, and may therefore be unconstitutional.⁷³ Certainly the Bill, if passed, will recognise in Australian law the repugnant and contentious notion of executive trial by military commission, a noxious imposition of might over right that should have no place in Australian law or politics.

The Anti-terrorism Bill 2004 (Cth) highlights the fact that the impact of the 'war on terror' can be found not only on individual rights, judicial norms and democratic parliamentary accountability, but also on sovereignty. In incremental ways such as the specifications of the amendments to the *Proceeds of Crime Act 2002* (Cth) and to the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), the imperatives of American security interests can be seen in Australian legislative developments. The proximity of Canada to America and the latter's demands regarding access to personal data and argued common security needs in the 'war on terror' have led to similar concerns, with a report marking the first anniversary of their *Anti-terrorism Act, C 2001*, c 41 noting 'a very disturbing trend in this emerging discourse that "security" will only be achieved at the expense of sovereignty and civil liberties that Canadians have always regarded as fundamental'.⁷⁴

X 'HIS CANVAS IS NOT YET COMPLETE': LIMITING LEGAL ACCESS, CREATING 'NON-CITIZENS'

Attorney-General Ruddock has expressed his intention to put forward even further measures essential to the 'war against terror'. The most recent suggestions are that a new offence of 'consorting with terrorists' may be needed, and that the Parliament ought to consider significantly compromising access to independent

⁷³ Submission No 7 to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-terrorism Bill 2004*, (2004) 2.

⁷⁴ International Civil Liberties Monitoring Group, *In the Shadow of the Law – A Report by the International Civil Liberties Monitoring Group in Response to Justice Canada's 1st Annual Report on the Application of the Anti-Terrorism Act (Bill C-36)* (2003) 12.

legal advice, and the access of those legal advisors, to evidence in 'terrorism' cases. From the outset of its counter-terrorism legislation, the Government, through both Attorneys-General Williams and Ruddock, made its frustration with the provision of independent, unvetted, legal advice in such cases very clear. It is again revisiting an aspect of the original security legislation which had been of great concern to both the Parliamentary Joint Committee and the Parliament.⁷⁵

XI THE SECURITY STATE

The accompanying discourse of the 'war on terror' highlights two particular aspects that currently hold sway: that we now face a new level of terrorist threat and that civil and political liberties must 'bend' to allow for a similarly 'new' response. The Prime Minister has reiterated the apparently unproblematic view that 'the events of the 11th of September ... changed forever the world in which we live. And it changed the way in which we must ... respond'.⁷⁶ This latter point, the asserted need for a new, changed response to terrorism, leads inevitably to the notion of 'balance' between national security and legal protections, a view which too readily suggests that civil and political rights are to be wound back to accommodate the overarching needs of national security. This argued need for balancing apparently competing interests has become a dominant theme in recent developments in counter-terrorism.

Similar concerns regarding this shifting notion of 'balance' in the popular discourse surrounding counter-terrorism developments have been expressed in other jurisdictions. The International Committee of the Red Cross has also considered the implications of the fact that 'the fight against terrorism has led to a re-examination of the balance between state security and individual protections'.⁷⁷ Historically, however, there is nothing new in this view, nor in its invocation during times of perceived crisis. The interests of 'national security' have long been seen as generating critical tensions for values that are fundamental to the political and legal systems of contemporary liberal democracies. Every expansion in security has been accompanied by the claim that certain needs – the need for secrecy, for protection of sources, the urgency of conviction, for instance – require a less than strict observance of what would otherwise be seen as untouchable, indeed elemental democratic, political and civil rights.

Attorney-General Ruddock reiterated this view soon after his appointment in 2003: 'the unavoidable fact is that any tightening of security arrangements does

75 See Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism, and the Threat to Democracy* (2004) 221–4.

76 Prime Minister John Howard, 'Closing Address' (Speech delivered at the Liberal Party National Convention, Adelaide, 8 June 2003) <<http://www.pm.gov.au/news/speeches/speech106.html>> at 15 November 2004.

77 International Committee of the Red Cross, above n 39, 3.

involve some diminution of rights'.⁷⁸ It is, however, a flawed equation. And it is the dichotomy suggested in this popular view, the argued trade-off between liberty and security, that lies at the heart of what has been described as the 'startling surrender of fundamental democratic principles'⁷⁹ in the heightened security environment post-September 11. National security and individual liberties, far from being in competition with one another in a simplistic zero-sum game, are in fact mutually reinforcing. Rather than seeing national security and democracy as being in perpetual friction (as if each exists somehow independently yet in tension with the other), political and civil rights and a robust democratic process are the key elements in the maintenance of national security itself.⁸⁰

In a later commentary on this view of 'balance', Attorney-General Ruddock has argued that the 'perceived dichotomy between national security and civil rights' is false.⁸¹ Collective democratic rights, Ruddock now suggests, are at one with the security of the state, in which the interests of the state must have primacy in order to meet the security needs of the citizen. Here Ruddock appears to favour the view propounded by his Canadian counterpart, Attorney-General Irwin Cotler, that 'the Universal Declaration on Human Rights gave governments primacy in protecting the right to life'.⁸² The Director-General of ASIO Dennis Richardson is now also playing this tune: 'balanced tough laws are an essential component in the fight against terrorism. The notion that in a liberal democracy such laws constitute a victory for terrorists is a nonsense'.⁸³

Yet a democratic state, underpinned by fundamental principles of the rule of law, responsible government and freedom of political association, cannot compromise those principles without at the same time compromising the democratic nature of the state itself. These three requirements are indispensable, the *sine qua non* of democratic states, and it is because of their non-negotiability that the preservation of rights and liberties through steadfast constitutionalism can never undermine security, but will constitute the very means of sustaining it. In this view, democracy 'is not limited by the rule of law but rather is defined by it'.⁸⁴ These liberties and legal protections are precisely what define us as a democracy, their diminution is the diminution of democracy itself.

78 Philip Ruddock, 'Opening Address' (Speech delivered at the 12th Annual Conference of the Australian Institute of Professional Intelligence Officers, Canberra, 22 October 2003) <<http://www.ag.gov.au/agd/www/ministerruddockhome.nsf/Page/53A93BC94E27B42ECA256DC7001926B4?OpenDocument>> at 15 November 2004.

79 James Dempsey, 'Civil Liberties in a Time of Crisis' (2002) 29(1) *Human Rights* 8, 8.

80 See Laurence Lustgarten and Ian Lee, *In from the Cold: National Security and Parliamentary Democracy* (1994).

81 Philip Ruddock, (Press Conference, Sydney, 26 February 2004) <<http://www.ag.gov.au/agd/www/MinisterRuddockhome.nsf/Page/D52072DD8A72F90ACA256E46007E0C26?OpenDocument>> at 15 November 2004.

82 Ackland, above n 13.

83 Dennis Richardson, 'ASIO Today' (2004) 41 *Australian Institute of Administrative Law Forum* 25, 29.

84 Tony Abbott, 'The World Since September 11' (Speech delivered at the first plenary session of the Australian Academy of Forensic Sciences, 13 February 2002) 3 <<http://www.lawcouncil.asn.au/read/2002/2090901747>> at 15 November 2004.

The counter-terrorism developments since 11 September 2001, with their unhesitating emphasis on expanding executive power through discretionary and ambiguous application and diminishing judicial review, have clearly recast the 'relationship between the citizen and the state in responding to terrorism'.⁸⁵ The perception expressed throughout the current legislative developments in counter-terrorism is that issues of national security should not be dealt with by the courts, that it is for the executive and not the judicial sphere to determine what the interests of national security require. This is a critical issue in any attempt to reconcile national security needs with democratic principles. It gets to the very heart of the concept of the rule of law, itself a fundamental tenet of liberal democratic practice and a protection from the arbitrary use of the state's coercive powers. No individual and no organisation should be beyond the reach of the law and, conversely, all citizens have the right to its protections, equally, as a consequence of judicial determination through the courts.⁸⁶

The growing dominance of the interests of security over individual rights is also entirely consistent with the Government's reluctance to intervene in the detention by American military authorities of the Australian citizens Mamdouh Habib and David Hicks at Guantánamo Bay which, until recently, was without charge and without access to independent legal advice. It can be seen also in the renewed attempts to legitimise the practice of torture as part of the 'war on terror'. Professor Alan Dershowitz has argued for the permissibility of torture as a structured, accountable element in this 'war', without any heed to its absolute incompatibility with the fundamentals of a liberal democratic state.⁸⁷ The International Committee of the Red Cross has noted this same push towards the validation of torture and the reintroduction of the death penalty even without appropriate trial processes, for example, through the use of military tribunals in the absence of the most basic judicial protections.⁸⁸

These arguments for the institutionalisation of torture and indeed for any other human rights abuses, underscore the perilous fragility of contemporary liberal democratic states. They reflect a paradigm shift from democracy to security; from a notion of democracy in which rights, justice and the rule of law are fundamental, to a view which privileges the interests of national security above all else. We are witnessing the development of a new type of state – a state in which the interests of security prevail, even over democracy itself, and in which personal freedoms and liberties depend on the arbitrary will of the state. As Agamben suggests:

85 Carne, above n 16, 16.

86 See Heinrich's paraphrasing of A V Dicey's three senses of the rule of law in Heinrich, above n 56, 2.

87 Alan Dershowitz, 'Stop Winking at Torture and Codify It', *Los Angeles Times* (Los Angeles), 13 June 2004, M5.

88 International Committee of the Red Cross, above n 39, 8.

In the course of a gradual neutralisation of politics and the progressive surrender of traditional tasks of the state, security imposes itself as the basic principle of state activity. ... Because they require constant reference to a state of exception, measures of security work towards a growing depoliticisation of society. In the long run, they are irreconcilable with democracy.⁸⁹

The 'war on terror' is no longer simply endangering key liberal democratic values. It is threatening to vitiate democracy itself, reducing politics to security, and democracy to mere formality.

89 Giorgio Agamben, 'Security and Terror' (2002) 5(4) *Theory & Event* 2.