

CRITIQUE AND COMMENT

CASUALTIES OF THE DOMESTIC ‘WAR ON TERROR’: A REVIEW OF RECENT COUNTER-TERRORISM LAWS

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[This article reviews three recent counter-terrorism laws, namely, the Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003 (Cth), the ASIO Legislation Amendment Act 2003 (Cth) and the Criminal Code Amendment (Terrorist Organisations) Act 2004 (Cth). It contends that these laws demonstrate that the domestic ‘War on Terror’ has inflicted casualties in two ways. First, these laws have undermined the democratic process of law-making. This has occurred because the Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003 (Cth) and the ASIO Legislation Amendment Act 2003 (Cth) have each been passed with indecent haste. Moreover, the justifications for all three pieces of legislation have been riddled with serious misrepresentations. Second, the adverse impact of these laws travels beyond the democratic process of law-making. Separately and collectively, these laws stifle public discussion, implicitly sanction lawlessness by ASIO and confer arbitrary power upon the executive. More than this, they also undermine efforts to prevent extreme acts of ideological or religious violence.]

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I INTRODUCTION

In the wake of the September 11 attacks, the Howard government introduced a raft of legislation ostensibly aimed at preventing terrorism.¹ This legislation

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¹ For ease of reference, this raft of legislation will be referred to as the ‘post-September 11 legislative package’. For an account of such legislation, see Michael Head, ‘“Counter-Terrorism”

proposed broad-ranging 'terrorism' offences and an executive power to proscribe 'terrorist' organisations.² It also sought to arm the Australian Security Intelligence Organisation ('ASIO') with the power to compulsorily question and detain persons suspected of having information relating to a 'terrorism' offence.³ These proposals and their eventual enactment, in one form or another, prompted significant community opposition.⁴

There were various strands of opposition to the recent legislation. Foremost, opponents of these laws highlighted the threat such legislation posed to Australia's democracy.⁵ The breadth of the 'terrorism' offences, for example, was condemned for its impact on the rights of political association.⁶ Opposition was also based on the corrosive effect such legislation would have on the rule of law. The proposal to grant ASIO the powers to compulsorily question and detain people without trial was argued to be an unnecessary incursion into the rule of law,⁷ as was the 'unprecedented increase in executive power' to be conferred by the legislation.⁸ In particular, the executive power to proscribe organisations was singled out as being 'subversive of the rule of law'.⁹

Opposition to these anti-terrorism laws also arose because the *raison d'être* of these laws — the prevention of terrorism — was arguably not met by these measures. Indeed, far from preventing or detecting terrorism, it has been claimed that these laws might, in fact, be counterproductive.¹⁰

The latest tranche of anti-terrorism laws has, in fact, heightened the danger that such measures will undermine democratic principles and the rule of law, and prove to be ineffectual or, worse, counterproductive. In the second half of 2003, two anti-terrorism enactments were passed: the *Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003* (Cth) ('*Hamas and LET Act*') and the *ASIO Legislation Amendment Act 2003* (Cth) ('*ASIO Amendment Act*'). The

Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666; Greg Carne, 'Terror and the Ambit Claim: *Security Legislation Amendment (Terrorism) Act 2002* (Cth)' (2003) 14 *Public Law Review* 13; Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2004) ch 11.

² Security Legislation Amendment (Terrorism) Bill 2002 (Cth).

³ Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth).

⁴ For example, most submissions to the Senate Legal and Constitutional Legislation Committee's inquiry into the post-September 11 legislative package opposed key elements of the package: Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills* (2002) 19; Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 and Related Matters* (2002) xix.

⁵ See Hocking, above n 1, ch 13.

⁶ Aidan Ricketts, 'Freedom of Association or Guilt by Association: Australia's New Anti-Terrorism Laws and the Retreat of Political Liberty' (2002) 6 *Southern Cross University Law Review* 133, 140–4. See also Head, "'Counter-Terrorism' Laws', above n 1, 687–8.

⁷ George Williams, 'National Security, Terrorism and Bills of Rights' (2003) 9 *Australian Journal of Human Rights* 263, 269. See also George Williams, 'One Year On: Australia's Legal Response to September 11' (2002) 27 *Alternative Law Journal* 212, 214–15.

⁸ Carne, above n 1, 19.

⁹ Hocking, above n 1, 211.

¹⁰ Jude McCulloch, "'Counter-Terrorism", Human Security and Globalisation — From Welfare to Warfare State?' (2003) 14 *Current Issues in Criminal Justice* 283, 289–91.

latest instalment is the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth) ('*Terrorist Organisations Act*'). These enactments, individually and collectively, realise the fears expressed by opponents of the post-September 11 legislative package.

These laws have fundamentally weakened Australia's democracy. Both the *Hamas and LET Act* and the *ASIO Amendment Act* were passed with indecent haste based on false claims of urgency. This meant that there was insufficient time for proper public deliberation. Moreover, public assessment of these two Acts and the *Terrorist Organisations Act* has been severely hindered by misrepresentations made by both the government and the Australian Labor Party ('ALP') opposition. Both misrepresented the existing measures to deal with the threat of terrorism as well as the nature of the proposed laws. Most importantly, the secrecy offences enacted by the *ASIO Amendment Act* will have a dramatic effect on Australia's democracy by stifling and controlling public discussion of the domestic 'War on Terror'.

The rule of law too has been a casualty of these laws. The *ASIO Amendment Act*'s secrecy offences implicitly sanction lawlessness by ASIO. They also mean that ASIO can exercise increasingly arbitrary power. In a similar vein, the *Terrorist Organisations Act* confers upon the Attorney-General an arbitrary power to ban 'terrorist' organisations.

Perversely, these laws will undermine efforts to prevent extreme acts of ideological or religious violence. The accompanying misrepresentations, secrecy and breaches of the rule of law will reduce the ability of the public to judge the effectiveness of anti-terrorism measures. Inadequate public scrutiny invites ineffectual measures, since in the absence of public scrutiny, governments cannot be held accountable for the effectiveness of their actions. Thus, ineffective measures continue unchallenged, and potentially efficacious alternatives are not implemented.

This article will examine these laws and the dangers they pose. Part II outlines the legislation. Part III examines the casualties that have been inflicted by these laws.

II OUTLINE OF THE LEGISLATION

A *ASIO Amendment Act*

The *ASIO Amendment Act* alters the regime governing ASIO's powers of detention and compulsory questioning.¹¹ In essence, this regime sets up a

¹¹ For an account of the detention and questioning regime, see Hocking, above n 1, 212–30; Brian Walters, 'The War on Terror: Labor's Capitulation to the ASIO Legislation' (2003) 12 *Dissent* 48. For an analysis of the government's initial proposal, see George Williams, 'Australian Values and the War against Terrorism' (2003) 26 *University of New South Wales Law Journal* 191. For reasons of space and relevance, various aspects of this regime are not canvassed in this article. For example, the accountability measures that govern this regime are not discussed in any detail. For a discussion of some of these accountability measures, see Gustav Lanyi, 'Bringing Spies to Account — The Advisory Report of the Parliamentary Joint Committee on ASIO, ASIS and DSD on the ASIO Legislation Amendment (Terrorism) Bill 2002' (2002) 10 *Australian Journal of Administrative Law* 68, 68–72.

process which enables ASIO to request a warrant to compulsorily question and/or detain persons aged 16 years and above¹² who are suspected of having information related to 'terrorism offences'.¹³ Such a request must first receive the assent of the Attorney-General.¹⁴ It is then put to an 'issuing authority', who is responsible for issuing the warrant.¹⁵ The execution of a warrant is then supervised by a 'prescribed authority'.¹⁶

Before they can issue a warrant, the Attorney-General and the 'issuing authority' need to be satisfied that the requested warrant will 'substantially assist the collection of intelligence that is important in relation to a terrorism offence'.¹⁷ Additional requirements apply to the Attorney-General in relation to detention warrants.¹⁸

A warrant issued under the regime can authorise either the compulsory questioning or detention of a person. In the latter case, a single warrant cannot authorise detention for a continuous period of more than 168 hours or seven days.¹⁹ There is, however, no maximum period of detention for any one person, since a separate warrant can be issued if there is new material that justifies it.²⁰ Potentially, a person could be detained indefinitely for rolling periods of seven days.

Prior to the passage of the *ASIO Amendment Act*, a person could be questioned in maximum blocks of eight hours with a total maximum of 24 hours.²¹ Such

¹² A warrant that authorises detention or compulsory questioning cannot apply to a person under 16 years of age: *Australian Security Intelligence Organisation Act 1979* (Cth) s 34NA(1) (*ASIO Act*).

¹³ These 'terrorism offences' are found in pt 5.3 of the *Criminal Code*. The *Criminal Code* is contained in the Schedule to the *Criminal Code Act 1995* (Cth).

¹⁴ *ASIO Act* s 34C.

¹⁵ *ASIO Act* s 34D. The 'issuing authority' must be appointed from the ranks of federal judges or members of groups declared by regulations to be issuing authorities: *ASIO Act* s 34AB.

¹⁶ The Act establishes a cascading system for the appointment of 'prescribed authorities'. In the first instance, the Attorney-General is to make an appointment from the ranks of retired judges of superior federal and state courts who have served on these courts for at least five years. In the event that the Attorney-General is of the view that there is an insufficient number of such persons to act as prescribed authorities, the Attorney-General may then appoint state judges of certain courts who have served for at least five years. If, in the view of the Attorney-General, this pool of appointees fails to yield an adequate number of prescribed authorities, the Attorney-General may then appoint persons who are either the President or Deputy President of the Administrative Appeals Tribunal and who have been enrolled as a legal practitioner for at least five years: *ASIO Act* s 34B.

¹⁷ *ASIO Act* ss 34C(3)(a) (Attorney-General), 34D(1)(b) (issuing authority). The Attorney-General also needs to be satisfied that other methods of gathering intelligence will be ineffective (s 34C(3)(b)). Moreover, additional requirements apply to warrants for persons aged 16–18 years. With such warrants, the Attorney-General must be satisfied that such a person is likely to commit, is committing or has committed a 'terrorism offence' (s 34NA(4)(a)) and the requested warrant provides for the parent or guardian of the person detained or questioned to be contacted as well as being present during any questioning by ASIO (s 34NA(4)–(6)).

¹⁸ If such a warrant is sought, the Attorney-General must be further satisfied that if the person who is the subject of the requested warrant is not immediately detained, she or he may: (i) alert a person involved in a 'terrorism offence' that such an offence is being investigated; (ii) fail to appear before a prescribed authority; or (iii) destroy or otherwise change a record or thing the person may be required to produce under the warrant: *ASIO Act* s 34C(3)(c).

¹⁹ *ASIO Act* s 34HC.

²⁰ *ASIO Act* ss 34C(3D), 34D(1A).

²¹ *ASIO Act* s 34HB.

persons are under compulsion to provide any information or document requested by ASIO with the failure to do so punishable by five years' imprisonment.²²

A person being detained or compulsorily questioned has a right to an interpreter. The Act provides that if a person requests an interpreter, the prescribed authority must arrange for such an interpreter unless she or he forms the view that the person being detained or questioned has an adequate knowledge of English and an effective ability to communicate in that language.²³ Questioning must be deferred until such an interpreter is present.²⁴

A severely circumscribed right to legal representation exists through the obligation of the Attorney-General to ensure that a requested detention warrant permits the person to contact a single lawyer of their choice.²⁵ To some degree, that 'choice' exists in name only, since the 'prescribed authority' can prevent such contact in certain circumstances.²⁶ Moreover, the ability of the lawyer to represent his or her client has been curbed. For example, questioning may occur in the absence of a lawyer of the person's choice.²⁷ Furthermore, such a lawyer may only intervene in the questioning of his or her client to request that an ambiguous question be clarified.²⁸

Prior to the passage of the *ASIO Amendment Act*, various secrecy provisions applied to the exercise of ASIO's powers. For example, detention and compulsory questioning were carried out incommunicado with individuals subject to a warrant generally being prohibited from contacting anyone while being detained or compulsorily questioned.²⁹ Moreover, the legal advisers,³⁰ representatives, parents, guardians and siblings³¹ of persons being detained or questioned were prohibited from communicating certain information.

Scarcely half a year after the regime was enacted, the newly-appointed Attorney-General, Philip Ruddock, branded it as being of a 'fourth best' standard.³² Using the pretext of the Willie Brigitte episode,³³ the government proposed far-

²² *ASIO Act* s 34G(3)–(7). It should be noted that such an erosion of the right to silence is not confined to 'terrorism' offences: see Simon Bronitt, 'Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism' (2003) 14 *Public Law Review* 76, 78–9.

²³ *ASIO Act* s 34HAA(2).

²⁴ *ASIO Act* s 34HAA(3)–(4).

²⁵ *ASIO Act* s 34C(3B).

²⁶ The 'prescribed authority' may prevent such contact only if the authority is satisfied, on the basis of circumstances relating to the lawyer chosen by the person, that if the person were to contact the lawyer: a person involved in a terrorism offence may be alerted that an offence is being investigated; or a record or thing that the person may be requested to produce in accordance with the warrant may be destroyed, damaged or altered: *ASIO Act* s 34TA.

²⁷ *ASIO Act* s 34TB.

²⁸ *ASIO Act* s 34U(4).

²⁹ *ASIO Act* s 34F(8). Exceptions include contacting the Inspector-General of Intelligence and Security and the Ombudsman: *ASIO Act* s 34F(9).

³⁰ *ASIO Act* s 34U(7) (now repealed).

³¹ *ASIO Act* s 34V(5)–(6) (now repealed).

³² David Wroe, 'Ruddock Restarts Push for Tougher Law', *The Age* (Melbourne), 4 November 2003, 1.

³³ Willie Brigitte is a French national who is suspected to be an al-Qa'eda member. It is also alleged that he planned attacks against certain Australian military and nuclear reactor sites after arriving in Australia in May 2003. Brigitte was deported to France in October 2003 after ASIO was warned by a French intelligence agency that he might pose a threat: see Martin Chulov,

reaching changes: changes which were enacted in 2003 with the support of the ALP opposition as the *ASIO Amendment Act*.

This Act made several more minor alterations to the regime, including provisions allowing the maximum questioning time to be extended by a prescribed authority from 24 to 48 hours when an interpreter is present.³⁴ Other provisions are aimed at preventing the flight of persons subject to a warrant. For example, the Act prevents persons subject to a detention or questioning warrant from leaving Australia without the permission of the Director-General of ASIO³⁵ and requires them to surrender their passports.³⁶

Most significantly, the Act introduced broad-ranging secrecy offences punishable by a maximum of five years' imprisonment.³⁷ It is now an offence for any person to disclose information that reveals that a detention or questioning warrant has been issued, the content of that warrant, or the facts relating to its execution while the warrant is in force.³⁸ Given that a warrant can be in force for a maximum of 28 days,³⁹ this ban on disclosure can operate for a 28-day period for each warrant. As there is no limit on the number of warrants that can be issued for each person, this ban can operate indefinitely as a result of a series of warrants.⁴⁰

This Act also prohibits any person from disclosing 'operational information' if such information directly or indirectly resulted from the issuing of a warrant or from conduct pursuant to such a warrant where the disclosure takes place while the warrant is in force, or within two years after the expiry of the warrant.⁴¹

The breadth of this offence stems from two sources. First, there is an expansive definition of 'operational information', namely any information relating to information or a source of information that ASIO has or had or information relating to an operational capability, method or plan of ASIO.⁴² In effect,

'Brigitte's N-Reactor Bomb Plot', *The Australian* (Sydney), 10 November 2003, 1; Ellen Connelly and Darren Goodsir, 'Brigitte: Link to Senior al-Qaeda Members', *The Age* (Melbourne), 18 November 2003, 1; Brendan Nicholson, 'Brigitte in "Australian Attack Plan"', *The Sunday Age* (Melbourne), 23 November 2003, 6. The Democrats and the Greens argued that there was no evidence arising from the Brigitte investigation to justify the ASIO Legislation Amendment Bill 2003 (Cth) because ASIO's powers were not used in that instance: Commonwealth, *Parliamentary Debates*, Senate, 3 December 2003, 18 790 (Bob Brown), 18 807 (Brian Greig). See generally Mark Forbes and Brendan Nicholson, 'What Lies behind Ruddock's Tough Talk?', *The Age* (Melbourne), 15 November 2003, Insight 8.

³⁴ *ASIO Amendment Act* sch 1, pt 1, inserting s 34HB(8)–(12) into the *ASIO Act*. This provision has been criticised for breaching the *International Covenant on Civil and Political Rights*: see Cynthia Banham, 'ASIO Grillings Will Breach Civil Rights, Warns Expert', *Sydney Morning Herald* (Sydney), 27 November 2003, 7.

³⁵ *ASIO Amendment Act* sch 1, pt 2, inserting s 34JD into the *ASIO Act*.

³⁶ *ASIO Amendment Act* sch 1, pt 2, inserting s 34JC into the *ASIO Act*. For criticisms of these changes, see Michael Head, *New Laws Cloak ASIO Detentions in Secrecy* (2003) World Socialist Web Site <<http://www.wsws.org/articles/2003/dec2003/asio-d10.shtml>>.

³⁷ *ASIO Amendment Act* sch 1, pt 4, inserting s 34VAA(1)–(2) into the *ASIO Act*.

³⁸ *ASIO Amendment Act* sch 1, pt 4, inserting s 34VAA(1)(a)–(c), (e)–(f) into the *ASIO Act*.

³⁹ *ASIO Act* s 34D(6)(b).

⁴⁰ Although it should be noted that a new warrant can only be issued on the basis of information 'additional to or materially different from that known' at the time of the original warrant: *ASIO Act* s 34D(1A).

⁴¹ *ASIO Amendment Act* sch 1, pt 4, inserting s 34VAA(1)–(2) into the *ASIO Act*.

⁴² *ASIO Amendment Act* sch 1, pt 4, inserting s 34VAA(5) into the *ASIO Act*.

'operational information' encompasses information relating to ASIO's knowledge and most of its activities. Second, to be convicted of this offence, the accused does not need to know that the information is 'operational information', as recklessness will suffice.⁴³ The Act goes even further by applying strict liability in this regard to the following groups: persons being detained or questioned; lawyers present during these persons' detention or questioning; and lawyers contacted by such persons for the purpose of seeking legal advice.⁴⁴

Finally, it should be noted that the secrecy offences are not committed if a disclosure is a 'permitted disclosure'.⁴⁵ A 'permitted disclosure' is narrowly defined to include disclosures made by a person exercising powers under the *Australian Security Intelligence Organisation Act 1979* (Cth) and those made for the purpose of conducting legal proceedings or obtaining legal advice and representation in relation to a warrant or its execution. A disclosure is also a 'permitted disclosure' if it has been authorised by a prescribed authority, the Director-General of ASIO or the Attorney-General.⁴⁶

B *Hamas and LET Act and Terrorist Organisations Act*

As noted in the introduction, a central element of the government's post-September 11 legislative package was a proposal to grant the Attorney-General a power to proscribe 'terrorist organisations'. Despite significant community opposition,⁴⁷ legislation was passed conferring upon the Attorney-General the power to proscribe 'terrorist organisations' under the *Criminal Code*, albeit on more stringent criteria than the government had initially proposed.⁴⁸ As both the *Hamas and LET Act* and the *Terrorist Organisations Act* concern this proscription regime, it is useful to outline its main features.

Prior to the passage of the *Terrorist Organisations Act*, the *Criminal Code* empowered the Governor-General to make a regulation identifying an organisation as a 'terrorist organisation' if two criteria were met. First, the organisation must have been identified in a United Nations Security Council decision as an organisation that is directly or indirectly involved in the commission of a 'terrorist act' ('UNSC requirement').⁴⁹ Second, the Attorney-General must have

⁴³ *ASIO Amendment Act* sch 1, pt 4, inserting s 34VAA(3) into the *ASIO Act*.

⁴⁴ *ASIO Amendment Act* sch 1, pt 4, inserting s 34VAA(3) into the *ASIO Act*.

⁴⁵ *ASIO Amendment Act* sch 1, pt 4, inserting s 34VAA(1)(f), (2)(f) into the *ASIO Act*.

⁴⁶ *ASIO Amendment Act* sch 1, pt 4, inserting s 34VAA(5) into the *ASIO Act*.

⁴⁷ The Senate Legal and Constitutional Legislation Committee commented that '[t]he provisions of the [Security Legislation Amendment (Terrorism)] Bill dealing with the Attorney-General's proposed proscription powers raised the most concern': Senate Legal and Constitutional Legislation Committee, above n 4, 45.

⁴⁸ The scope of the present power is narrower than that proposed by the government: see generally *Bills Digest No 174 2002-03: Criminal Code Amendment (Terrorist Organisations) Bill 2003* (2003). *Crimes Act 1914* (Cth) pt IIA would also allow the proscription of 'terrorist organisations'. See generally Roger Douglas, 'Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth *Crimes Act*' (2001) 22 *Adelaide Law Review* 259.

⁴⁹ *Criminal Code* s 102.1(3), amended by *Security Legislation Amendment (Terrorism) Act 2002* (Cth). This section has now been repealed and substituted: see below nn 54-63 and accompanying text for a discussion of the current provision. 'Terrorist act' is defined by *Criminal Code* s 100.1.

been satisfied, on reasonable grounds, that the organisation was 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)'.⁵⁰

Once an organisation was identified as a 'terrorist organisation', association with such an organisation was punishable by severe penalties. For example, membership of such an organisation by a person who knows it to be a 'terrorist organisation' was punishable by a maximum of 10 years' imprisonment.⁵¹ Similarly, providing support to such an organisation by a person who knows it to be a 'terrorist organisation' was punishable by a maximum of 25 years' imprisonment.⁵²

The present government has been dissatisfied with this proscription regime for some time, arguing that it inhibited Australia's ability to act independently in banning terrorist organisations.⁵³ Its efforts to broaden the regime have prompted legislation proscribing specific organisations. The most recent instance of this is the *Hamas and LET Act*.⁵⁴ This Act removed the UNSC requirement with respect to Hamas and Lashkar-e-Tayyiba organisations. As a result, 'listing regulations' can be made specifying such organisations as 'terrorist organisations' if the Attorney-General is satisfied that the organisation is directly or indirectly involved in the planning, preparation or commission of a 'terrorist act'.⁵⁵

The government has also been agitating for the broader executive proscription power contained in the Criminal Code (Terrorist Organisations) Bill 2003 (Cth).⁵⁶ Initially, such a proposal had little prospect of passing the Senate because of vehement opposition from the ALP.⁵⁷ As an alternative to the Bill, the

⁵⁰ *Criminal Code* s 102.1(3)(c) (now repealed).

⁵¹ *Criminal Code* s 102.3. This provision is still in force.

⁵² *Criminal Code* s 102.7. This provision is still in force.

⁵³ See below n 85 and accompanying text.

⁵⁴ See also Joo-Cheong Tham, *New Terror Laws for the Hell of It: The Lies Ruddock's Telling Us* (6 November 2003) Sydney Morning Herald Web Diary <<http://www.smh.com.au/articles/2003/11/06/1068013325146.html>>. An earlier example is the *Criminal Code Amendment (Hizballah) Act 2003* (Cth).

⁵⁵ *Hamas and LET Act* s 102.1(7)(b)–(c). 'Hamas organisations' and 'Lashkar-e-Tayyiba organisations' are defined by the *Criminal Code* s 102.1(1).

⁵⁶ For an excellent account of the various proscription proposals that preceded the Bill, see *Bills Digest No 174 2002–03*, above n 48. See also Joo-Cheong Tham, *How Not to Fight the 'War on Terrorism': The Criminal Code Amendment (Terrorist Organisations) Bill 2003* (15 September 2003) Sydney Morning Herald Web Diary <<http://www.smh.com.au/articles/2003/09/15/1063478118687.html>>.

⁵⁷ For example, Senator John Faulkner, the ALP's then spokesperson for Home Affairs, argued that: The government's proposals to erode our freedoms and our rights will ultimately erode our security as well. For this reason, we do not accept and will not accept the government's executive proscription bill. We will not accept a regime of secret proscriptions, of decisions in closed rooms, of such significant and potentially destructive power in the hands of one person and one person alone. To have that kind of power exercised by one person in secret, particularly a member of a government executive ... is not acceptable in a democratic society and it should never be allowed on the statute books.

Commonwealth, *Parliamentary Debates*, Senate, 16 June 2003, 11 432–3.

ALP proposed a judicial model of proscription with organisations declared to be 'terrorist organisations' through a court process.⁵⁸

However, by the end of 2003, the ALP's opposition to the Bill had diminished. Its judicial model of proscription became sidelined with acceptance of the Bill's executive proscription power on the condition that merits review was available.⁵⁹ Yet, even this condition turned out to be dispensable, since the ALP opposition eventually supported the enactment of the *Terrorist Organisations Act* in March 2004.⁶⁰

This Act removes the UNSC requirement in its entirety and accordingly allows the proscription of 'terrorist organisations' under the *Criminal Code* simply by virtue of the Attorney-General being satisfied that the organisation is directly or indirectly involved in the commission of a 'terrorist act'.⁶¹ To a significant extent, this Act reinstates the government's earlier proposal for an executive proscription power.⁶² The ALP did, however, secure some minor amendments. These include the possibility of the Parliamentary Joint Committee on ASIO, ASIS and DSD reviewing a listing regulation with its reports into such regulations extending the disallowance period by another eight days.⁶³

III CASUALTIES OF RECENT COUNTER-TERRORISM LAWS

A Passing Laws with Indecent Haste

Both the *ASIO Amendment Act* and the *Hamas and LET Act* were passed in a remarkably brief period of time. The ASIO Legislation Amendment Bill 2003 (Cth) was introduced into Parliament on 27 November 2003 and was passed eight days later on 5 December 2003. The Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Bill 2003 (Cth) secured even quicker passage. It was introduced into the House of Representatives on 5 November 2003 and was

⁵⁸ Ibid 11 433 (John Faulkner, Shadow Minister for Home Affairs). This model was based on the existing *Crimes Act 1914* (Cth) pt IIA: Commonwealth, *Parliamentary Debates*, Senate, 3 March 2004, 20 671 (John Faulkner, Shadow Minister for Home Affairs).

⁵⁹ See Michelle Grattan, 'Ruddock in Security Boost', *The Sunday Age* (Melbourne), 12 October 2003, 2; Brendan Nicholson, 'Labor Gives Ground on Terror', *The Age* (Melbourne), 6 November 2003, 4.

⁶⁰ See Ross Solly, 'Policy Shift as Labor Reconsiders Attorney-General Powers', *The World Today*, 17 December 2003 <<http://www.abc.net.au/worldtoday/content/2003/s1011897.htm>>; Marcus Priest, 'Labor Agrees to Legislation on Terrorists', *The Australian Financial Review* (Sydney), 10 February 2004, 3.

⁶¹ *Criminal Code* s 102.1(2).

⁶² See, eg, *Bills Digest No 174 2002-03*, above n 48.

⁶³ Section 48 of the *Acts Interpretation Act 1901* (Cth) provides that after a regulation is laid before Parliament, each House has a period of 15 sitting days to disallow the regulation with the effect that the disallowed regulation ceases to have effect. This period is referred to as the disallowance period.

There were two other amendments: a requirement that the Attorney-General brief the Opposition Leader prior to listing an organisation and a formalisation of the de-listing procedure: Commonwealth, *Parliamentary Debates*, Senate, 3 March 2004, 20 667-8 (Chris Ellison, Minister for Justice and Customs). ASIS is the Australian Secret Intelligence Service; DSD is the Defence Signals Directorate.

enacted two days later with the Senate recalled specifically for the purpose of passing this Bill.⁶⁴

In calling for the quick passage of both Bills, the government argued that it was urgent to have these laws in order to effectively prevent terrorism. In the case of the Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Bill 2003 (Cth), the claim of urgency was based on 'advice from the competent agencies that each of these organisations has mounted and continue to mount terrorist operations abroad, and in one case, the organisation [Lashkar-e-Tayyiba] has linkages with Australia.'⁶⁵

Similarly, the government argued strongly that it was 'imperative' that the ASIO Legislation Amendment Bill 2003 (Cth) 'be passed in this sitting period to give full effect to ASIO's existing powers.'⁶⁶ Failure to pass the Bill in this sitting would, it warned, 'leave a gap for a period of time which would be just untenable.'⁶⁷ Matters were considered so urgent that an attempt by the Greens and Democrats Senators to refer the Bill to the Senate Legal and Constitutional Legislation Committee was defeated,⁶⁸ despite the referral being supported by Amnesty International and Liberty Victoria.⁶⁹ A call by the main media organisations for a deferral of the Bill to the next parliamentary sitting was similarly ignored.⁷⁰

These claims of urgency, however, rested on very tenuous grounds. In the case of the *Hamas and LET Act*, there might have been a genuine basis for urgency if the law prior to the passage of this Act had not criminalised association with Hamas and Lashkar-e-Tayyiba ('LET'). But such association was already illegal: both Hamas and LET had already been listed under the *Charter of the United Nations Act 1945* (Cth) ('*Charter of the United Nations Act*'). Hamas was listed under this Act in December 2001,⁷¹ whereas LET was listed three months later.⁷²

⁶⁴ Brendan Nicholson and Mark Forbes, 'Rush to Ban Terror Groups', *The Age* (Melbourne), 5 November 2003, 4.

⁶⁵ Press Interview with Philip Ruddock, Attorney-General (Canberra, 6 November 2003). See *ibid* 4.

⁶⁶ Commonwealth, *Parliamentary Debates*, Senate, 3 December 2003, 18 797 (Chris Ellison, Minister for Justice and Customs).

⁶⁷ *Ibid* 18 798. In a similar vein, the Attorney-General, Philip Ruddock, argued that 'we [the government] regard the Bill as a very urgent Bill, we would want to see it passed during this session': Canberra Press Gallery, Interview with Philip Ruddock, Attorney-General (Canberra, 27 November 2003). See also Australian Associated Press, 'Govt Pressures ALP on ASIO Bill', *Sydney Morning Herald* (Sydney), 28 November 2003 <<http://www.smh.com.au/articles/2003/11/28/1069825949040.html>>.

⁶⁸ Commonwealth, *Parliamentary Debates*, Senate, 2 December 2003, 18 678.

⁶⁹ *Ibid* 18 669 (Bob Brown).

⁷⁰ Letter from Bruce Wolpe et al to the Senate, 3 December 2003 (copy on file with author). See also Sophie Morris, 'More Terrorists on Loose, ASIO Warns', *The Australian* (Sydney), 4 December 2003, 1.

⁷¹ *Charter of the United Nations (Anti-Terrorism — Persons and Entities) List 2001 (No 2)*, issued under the *Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001* (Cth). Available from Department of Foreign Affairs and Trade <http://www.dfat.gov.au/icat/persons_entities/2_proscribed_entities_10dec2001.html>.

⁷² *Charter of the United Nations (Anti-Terrorism — Persons and Entities) List 2002 (No 1)*, issued under the *Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001* (Cth). Available from Department of Foreign Affairs and Trade <http://www.dfat.gov.au/icat/persons_entities/List_2002.html>.

The effect of these listings is that, for more than two years, it has been illegal to provide funds to or hold any assets on behalf of these groups unless authorised by the Minister of Foreign Affairs. Persons engaged in such activity can be jailed for up to five years.⁷³

Moreover, persons supporting these organisations' extreme acts of ideological or religious violence could be prosecuted under the *Criminal Code*. Assuming that Hamas and LET are organisations involved in extreme acts of ideological or religious violence, they would fall squarely within the definition of a 'terrorist organisation' under the *Criminal Code*.⁷⁴ Persons who knowingly support such organisations' acts of ideological or religious violence face a maximum sentence of 25 years' imprisonment.⁷⁵ So, if Attorney-General Ruddock were correct to say that there are persons in Australia supporting LET's acts of ideological or religious violence, they would have been liable for 25 years' imprisonment even before the *Criminal Code* was amended.⁷⁶

The claim of urgency in the case of the ASIO Legislation Amendment Bill 2003 (Cth) is arguably false. It is exceedingly difficult to see how postponing the Bill's passage by around six months through a referral to the Senate Legal and Constitutional Legislation Committee or by deferring it to the next parliamentary session in February 2004 would have been 'untenable'. It would only have been so if the secrecy offences proposed by the Bill were critical to ASIO's ability to investigate extreme acts of ideological or religious violence.

However, this is clearly not the case. For one, the secrecy offences apply specifically to ASIO's detention and questioning powers, and these powers are intended to be of last resort. This is underlined by the statutory requirement that the Attorney-General be satisfied that other methods of gathering intelligence will be ineffective before he or she consents to a requested warrant.⁷⁷ Indeed, at the time the Bill was being debated, the powers of compulsory questioning had only been used once; namely in the Brigitte investigation.⁷⁸

Moreover, ASIO can investigate extreme acts of ideological or religious violence through its extensive powers of interception with respect to 'foreign intelligence'. These powers extend to foreign organisations like al-Qa'eda and Jemaah Islamiah.⁷⁹ Most importantly, ASIO can employ these powers against

⁷³ See below nn 86–9 and accompanying text.

⁷⁴ *Criminal Code* s 102.1(1). A 'terrorist organisation' also includes organisations identified as such in the Regulations: *Criminal Code* s 102.1(1)(b).

⁷⁵ *Criminal Code* s 102.7(1).

⁷⁶ For a more detailed discussion of the Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Bill 2003 (Cth), see Tham, *New Terror Laws for the Hell of It*, above n 54.

⁷⁷ *ASIO Act* s 34C(3)(b).

⁷⁸ Senator Chris Ellison has stated in Parliament that 'ASIO has neither sought nor executed any warrants authorising the detention of any individuals pursuant to the new powers. I am able, however, to confirm that questioning warrants have recently been executed in relation to the Brigitte investigation': Commonwealth, *Parliamentary Debates*, Senate, 3 December 2003, 18 798 (Chris Ellison, Minister for Justice and Customs). See also Martin Chulov and Trudy Harris, 'Terror Power Used on Brigitte Mate', *The Weekend Australian* (Sydney), 8–9 November 2003, 1; Chulov, above n 33, 1.

⁷⁹ This is because 'foreign intelligence' is defined to mean 'intelligence relating to the capabilities, intentions or activities of a foreign power' and 'foreign power' includes foreign political organisations: *ASIO Act* s 4.

such organisations without demonstrating or suspecting criminal activity or even an amorphous threat to national security. It merely has to satisfy the Attorney-General that the collection of foreign intelligence relating to a specified matter is important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs.⁸⁰ Consequently, 'foreign intelligence' warrants can be issued to intercept virtually all the activities of organisations like al-Qa'eda or Jemaah Islamiah regardless of whether these activities involve criminal conduct.

Another compelling reason why the secrecy offences proposed by the ASIO Legislation Amendment Bill 2003 (Cth) were not critical to ASIO's ability to investigate extreme acts of ideological or religious violence is that the disclosure of information relating to the exercise of its detention and questioning powers was already severely restricted. As discussed above, under ASIO's detention and questioning regime, detention and compulsory questioning was carried out incommunicado.⁸¹ Moreover, lawyers and other representatives of such persons were prohibited from disclosing certain information.⁸² The 'terrorism offences' under the *Criminal Code* also prohibited the disclosure of information in certain circumstances. For example, if a person disclosed information relating to a detention and questioning warrant for the purpose of facilitating a 'terrorist act', she or he would likely be committing an act in preparation of a 'terrorist act'.⁸³ Similarly, if a person leaked information relating to a detention or questioning warrant to a 'terrorist organisation' for the purpose of assisting its acts of ideological or religious violence, she or he would be guilty of providing support to such an organisation.⁸⁴

Both the *Hamas and LET Act* and the *ASIO Amendment Act* were passed in extraordinarily short periods of time with the government arguing that the measures in these Acts were urgently needed to prevent terrorism. In both cases, these claims of urgency were demonstrably false.

B *Misrepresentations*

At the core of the justifications for all three Acts was the argument that these laws were necessary in the domestic 'War on Terror'. It was in making this argument of necessity that both the government and the ALP opposition misrepresented the breadth of the post-September 11 anti-terrorism measures. For example, the rapid passage of the *Hamas and LET Act* was facilitated by two misrepresentations that have been discussed above: that Hamas and LET had not already been banned as 'terrorist organisations' under Australian law, and that association with such organisations was not already illegal.

The provisions concerning 'terrorist organisations' were also misrepresented with respect to the *Terrorist Organisations Act*. In this regard, the foremost

⁸⁰ *ASIO Act* s 27A; *Telecommunications (Interception) Act 1979* (Cth) s 11A.

⁸¹ *ASIO Act* s 34F(8).

⁸² See above nn 29–31 and accompanying text.

⁸³ *Criminal Code* s 101.6.

⁸⁴ *Criminal Code* s 102.7(1).

justification advanced by the government for the Bill's proposed repeal of the UNSC requirement was that 'Australia is currently in the unsatisfactory position that we cannot act independently of the United Nations to list a terrorist organisation posing a threat to Australia and Australian interests.'⁸⁵

This appeal to national independence is not only emotive but also false, given the proscription regime under Part 4 of the *Charter of the United Nations Act*, which has been in place since October 2001.⁸⁶ This regime requires the Minister for Foreign Affairs to list a person or entity if satisfied, among other things, that such a person or entity is involved in a 'terrorist act'.⁸⁷ Such a listing will mean that it becomes illegal to use or deal with the assets of the listed person or entity. It will also be an offence to directly or indirectly provide assets to a listed person or entity.⁸⁸

The power to proscribe 'terrorist' organisations under this Act is extremely wide, simply because the phrase 'terrorist act' is left undefined. By implication, there is no requirement that an organisation be identified by the United Nations Security Council as a 'terrorist' organisation before the Minister for Foreign Affairs can list it under the Act. Not surprisingly, the flexibility of this power has led to scores of individuals and entities being listed and thus banned.⁸⁹

The government did not, however, have a monopoly over misrepresentations in relation to the *Terrorist Organisations Act*. In justifying the ALP's support for the Bill, Robert McClelland, the ALP's Homeland Security spokesperson, argued that 'if you're going to cut out the heart of these terrorist organisations you've got to cut out their funding base and their support base, their training base and so-forth ... this is a regime we're talking about.'⁹⁰

These statements conveniently ignored the broad proscription regime contained in the *Charter of the United Nations Act*. They also ignore the fact that the provision of funds to 'terrorist organisations'⁹¹ and training with such organisations⁹² are both presently criminalised by the *Criminal Code*.

⁸⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 2003, 15 397 (Daryl Williams, Attorney-General); 3 June 2003, 15 821 (Daryl Williams, Attorney-General). See also the present Attorney-General Philip Ruddock's statements in: Nicholson and Forbes, above n 64, 4; Philip Ruddock, 'Government Prepares to List Terrorist Groups' (Press Release, 4 November 2003).

⁸⁶ This proscription regime was initially found in the *Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001* (Cth). Subsequent amendments have placed it in the principal Act, the *Charter of the United Nations Act*. See generally Mark Tan, 'Money Laundering and the Financing of Terrorism' (2003) 14 *Journal of Banking and Finance Law and Practice* 81, 100–1; Jude McCulloch et al, 'Suppressing the Financing of Terrorism' (2004) 16 *Current Issues in Criminal Justice* (forthcoming).

⁸⁷ *Charter of the United Nations Act* s 15; *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth) reg 6(1).

⁸⁸ Such conduct is not illegal if authorised by the Minister for Foreign Affairs: *Charter of the United Nations Act* ss 20–1.

⁸⁹ At the time of writing, 405 individuals and entities had been listed, along with their aliases. See Department of Foreign Affairs and Trade <http://www.dfat.gov.au/icat/persons_entities/pe_consolidated_list.pdf>.

⁹⁰ Solly, above n 60.

⁹¹ *Criminal Code* s 102.6. See Tan, above n 86, 88–9.

⁹² *Criminal Code* s 102.5.

The ALP's misrepresentations were not confined to the *Terrorist Organisations Act* but also extended to the secrecy offences proposed by the ASIO Legislation Amendment Bill. It misrepresented the scope of these offences by implying that they only applied to the persons being detained or questioned. Senator Faulkner, then ALP spokesperson for national security, in explaining the effect of the offences, stated that '[w]hat will be curtailed is the capacity of a person to blab to anyone or everyone about what they are being questioned about.'⁹³

Moreover, the changes made by the Bill were characterised as merely technical. Senator Faulkner, for instance, argued that the Bill fixes 'technical flaws; they are not matters of substance.'⁹⁴ This was one of the main reasons for refusing to refer the Bill to the Senate Legal and Constitutional References Committee.⁹⁵

The characterisation of the Bill as 'technical' is extraordinary given the dramatic consequences of the secrecy offences. The prohibition on disclosing information relating to the issuing of the warrant, the details of the warrant, and detention and questioning under the warrant mean that journalists reporting on the fact that a person is presently subject to detention or compulsory questioning face up to five years in jail.⁹⁶ The same also applies to a parliamentarian highlighting the conditions under which persons are presently detained under the *ASIO Act* outside of Parliament.⁹⁷ The 'operational knowledge' offence will have an even more profound effect. It will prohibit journalists reporting on the detention of a person for two years after the expiry of the detention warrant. More than this, it will render illegal coverage of ASIO's subsequent investigation into the detainee for two years after the expiry of the warrant, whether or not such investigation involves conduct pursuant to a warrant.⁹⁸

This characterisation of the secrecy offences is all the more remarkable given that the ALP was well aware of their potential effects, not least because the main

⁹³ Commonwealth, *Parliamentary Debates*, Senate, 3 December 2003, 18 792 (John Faulkner). See also Commonwealth, *Parliamentary Debates*, Senate, 2 December 2003, 18 670 (Joseph Ludwig); 3 December 2003, 18 801 (John Faulkner). Cf Explanatory Memorandum, ASIO Legislation Amendment Bill 2003 (Cth) 5.

⁹⁴ Commonwealth, *Parliamentary Debates*, Senate, 3 December 2003, 18 793 (John Faulkner). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2003, 23 463–4 (Robert McClelland).

⁹⁵ See, eg, Senator Joseph Ludwig, who stated that the 'amendments are [not] of such significance as to warrant a full Senate committee inquiry': Commonwealth, *Parliamentary Debates*, Senate, 2 December 2003, 18 268. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2003, 23 466 (Robert McClelland).

⁹⁶ For example, recent reporting by *The Australian* and *The Weekend Australian* journalists that acquaintances of Willie Brigitte had been subject to compulsory questioning by ASIO would be illegal under this Act: Chulov, above n 33; Chulov and Harris, above n 78.

⁹⁷ Joo-Cheong Tham, 'The Danger to Our Freedoms Posed by the ASIO Bill', *The Age* (Melbourne), 1 December 2003, 15, quoted in Parliament by Bob Brown and Michael Organ: see Commonwealth, *Parliamentary Debates*, Senate, 2 December 2003, 18 668–9 (Bob Brown); Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2003, 23 473 (Michael Organ). For a discussion of the effect on parliamentary privilege and submissions to parliamentary committees, see Commonwealth, *Parliamentary Debates*, Senate, 4 December 2003, 19 442–5 (Bob Brown).

⁹⁸ For a more detailed discussion of the effects of these offences, see Tham, 'The Danger to Our Freedoms Posed by the ASIO Bill', above n 97, 15.

media organisations wrote to the ALP Senators arguing that the ‘operational information’ offence

poses a grave threat to Australian democracy, by gagging the media and its ability to report on national security issues involving ASIO and totally remov[ing] from public scrutiny, all discussion of ASIO’s activities in relation to terrorism.⁹⁹

Against this backdrop, the ALP’s characterisation of the secrecy offences as ‘technical’ is, at best, a trivialisation of the offences’ impact and, at worst, a cynical obfuscation.

C Stifling and Controlling Public Discussion of the Domestic ‘War on Terror’

As a result of these laws, public discussion of the domestic ‘War on Terror’ has been and will continue to be stifled. The hasty passage of the *Hamas and LET Act* and the *ASIO Amendment Act* means that there has been inadequate time for public deliberation. Most significantly, the secrecy offences enacted by the *ASIO Amendment Act* mean that much of ASIO’s activities cannot be subject to open discussion. Given that ASIO is invariably involved in domestic anti-terrorism measures, these offences will result in the insulation of the domestic ‘War on Terror’ from the public gaze. As a consequence, one of the most significant policy issues in Australia has been removed from public debate.

These secrecy offences also point to another disturbing development: the increasing control by the government of information relating to national security. Some measure of control has always existed, since the government of the day has confidential information regarding ASIO’s covert operations — information that it can selectively disclose. With the enactment of these offences, however, practical control has now been entrenched by formal control. This is so because the Act exempts communications that the Attorney-General has authorised as ‘permitted disclosures’.¹⁰⁰ Thus, the Attorney-General can determine what information should be publicly disclosed in relation to ASIO’s investigatory activities, while others are generally prohibited from openly discussing these activities.¹⁰¹

Such control risks distorting Australian political life because issues of national security are hotly-contested political questions. For instance, veteran political journalist, Michelle Grattan, has characterised security issues as ‘a new Tampa’.¹⁰² This reference alludes to two potential effects of security issues: they tap into the fears of the general populace and, further, they do so in a manner that is politically disadvantageous to the ALP.¹⁰³ In short, the increased control

⁹⁹ Wolpe et al, above n 70.

¹⁰⁰ See above nn 45–6 and accompanying text.

¹⁰¹ But note that the Attorney-General may only act in this regard with the advice of the Director-General of ASIO: *ASIO Act* s 34VAA(8).

¹⁰² Michelle Grattan, ‘Labor Smells a New Tampa’, *The Age* (Melbourne), 5 November 2003, 13.

¹⁰³ The latter has been acknowledged by Senator John Faulkner who pointed out that ‘[i]t is a fact well known to political parties that the wages of fear are electoral success’: Commonwealth, *Parliamentary Debates*, Senate, 16 June 2003, 11 432.

of national security information now vested in the Howard government has handed it a distinct political advantage over the ALP opposition.

D *Implicitly Sanctioning Lawlessness by ASIO*

The covert nature of ASIO's operations has always meant that legal challenges to its activities are fraught with difficulty.¹⁰⁴ The secrecy surrounding such activities has been thickened by the *ASIO Amendment Act*. Such secrecy, which further shelters ASIO's activities from legal checks, implicitly sanctions lawless behaviour by ASIO.

First, such behaviour is implicitly sanctioned because the secrecy offences severely diminish a primary antidote against illegality: the sunshine of public discussion and scrutiny. For example, political campaigns against arbitrary and illegal detention by ASIO will not be able to get off the ground because they will be starved of relevant information.¹⁰⁵

Second, these offences directly impede legal challenges to some of ASIO's investigatory activities. While it is true that the *ASIO Amendment Act* allows disclosure for the purpose of initiating legal proceedings in relation to a detention or questioning warrant,¹⁰⁶ this exception is quite limited. In particular, the 'permitted disclosure' exceptions do not extend to disclosure of information for the purpose of legal proceedings relating to ASIO's investigatory activities which are connected to the warrant. As a result, disclosure of such information would be an 'operational information' offence, with the effect that individuals cannot challenge the legality of such investigatory activities. For example, if ASIO, after compulsorily questioning one of Willie Brigitte's acquaintances, taps the phone of this person in breach of the *ASIO Act*, it seems that this illegality cannot be tested in the courts as it is an 'operational knowledge' offence to disclose the fact that the phone has been illegally tapped.

The dilution of these checks against illegality does not, of course, necessarily mean that ASIO will engage in such behaviour. At the same time, it clearly increases the risk of such conduct. Moreover, this is not a fanciful risk. Justice Robert Hope in his first report on ASIO, for instance, found that ASIO's warrantless practices with respect to listening devices, mail interception and entering and searching premises were of doubtful legality, and recommended the present warrant-based system.¹⁰⁷

The secrecy offences also harbour ASIO from constitutional challenges to its detention powers.¹⁰⁸ This assumes significance in light of the fact that these

¹⁰⁴ For a more detailed development of this argument, see Joo-Cheong Tham, 'ASIO and the Rule of Law' (2002) 27 *Alternative Law Journal* 216.

¹⁰⁵ Head, *New Laws Cloak ASIO Detentions in Secrecy*, above n 36.

¹⁰⁶ See above nn 45–6 and accompanying text.

¹⁰⁷ Commonwealth, Royal Commission on Intelligence and Security, *Fourth Report* (1978) vol 1, 82–6, 92–3.

¹⁰⁸ The 'operational knowledge' offence also runs the risk of constitutional invalidity on the basis that it infringes the implied freedom of political communication: see generally Joo-Cheong Tham, *Ruddock's New ASIO Secrets: An Analysis* (28 November 2003) Sydney Morning Herald Web Diary <<http://www.smh.com.au/articles/2003/11/28/1069825997067.html>>.

detention powers have been described as ‘constitutionally suspect’.¹⁰⁹ For example, they might infringe the constitutional immunity against non-judicial punitive detention.¹¹⁰ While a detailed discussion of the relevant constitutional issues is outside the scope of this article,¹¹¹ the important point is that the secrecy offences will render it exceedingly difficult to test these live constitutional questions. Most notably, the task of identifying persons being detained or questioned will be very difficult. These hurdles mean that powers that are arguably unconstitutional can be exercised immune from challenge.

E *Conferring Arbitrary Executive Power*

By further insulating ASIO from legal checks, the secrecy offences confer an increasingly arbitrary power upon ASIO. Its detention and questioning powers can now be exercised largely hidden from the public eye. Moreover, the use of its interception powers in investigations related to a detention or questioning warrant is now effectively immune from legal challenge as it will be an ‘operational knowledge’ offence to disclose information relating to the exercise of such powers.

The *Terrorist Organisations Act* also arms the executive with another source of arbitrary power. First, the decision to proscribe an organisation as a ‘terrorist organisation’ is based on vague criteria. As noted above, such a decision can be made if the Attorney-General is satisfied that the organisation is ‘directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur).’¹¹²

This statutory formula leaves crucial judgements to the discretion of the Attorney-General. Groups that engage in extreme acts of ideological or religious violence are not necessarily legal entities, so a difficult question arises as to when a body of persons is to be treated as an ‘organisation’. Even once an ‘organisation’ is found to exist, when should acts of an individual be attributed to such an organisation? Further, what sort of acts will suffice? For example, does an organisation foster a ‘terrorist act’ merely by calling for the overthrow of a government but without actually engaging in any acts of violence?

Moreover, this executive proscription power can be exercised on the basis of secret and untested evidence. Apart from requiring the Attorney-General to have reasonable grounds for his or her judgement, the *ASIO Act* makes no provision for the quality of evidence relied upon by the Attorney-General.¹¹³ There is not even a requirement that a decision to proscribe an organisation be accompanied

¹⁰⁹ Williams, ‘One Year On’, above n 7, 215.

¹¹⁰ This immunity has been succinctly described by Gummow J: ‘A power of detention which is punitive in character and not consequent upon adjudgment of criminal guilt by a court cannot be conferred upon the Executive by a law of the Commonwealth’: *Kruger v Commonwealth* (1997) 190 CLR 1, 161–2. This statement paraphrases the ratio of *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27–9 (Brennan, Deane and Dawson JJ).

¹¹¹ For a more detailed discussion of this constitutional issue, see, eg, Senate Legal and Constitutional References Committee, above n 4, 74–85; Head, ‘“Counter-Terrorism” Laws’, above n 1, 682–8.

¹¹² *Criminal Code* s 102.1.

¹¹³ *ASIO Act* s 34C(3).

by a statement of relevant facts.¹¹⁴ This lacuna stands in stark contrast to the requirements that are imposed on the far less serious decision to issue a listening device warrant to the Australian Federal Police.¹¹⁵

Finally, this power is arbitrary because the available review mechanisms are no guarantee against abuse. The main mechanisms are parliamentary review through the potential disallowance of a regulation proscribing an organisation¹¹⁶ and judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Whether review by the Parliamentary Joint Committee on ASIO, ASIS and DSD will safeguard against abuse is very much an open question. The robustness of this review mechanism will depend on how vigilant the Committee is in evaluating each listing regulation. If it thoroughly investigates each case, the committee will, in effect, provide a merits review process for each proscription. On the other hand, if the committee is slow to exercise its power of review, it will then become another fig leaf for broad executive power.

Judicial review also has definite shortcomings and is likely to be ineffectual. As Roger Douglas correctly recognises, '[j]udicial review is restricted to the supervision of the legality of action ... but does not normally involve an outcome based on the *merits* of the case.'¹¹⁷ Further, the courts have demonstrated a traditional reluctance to examine questions of national security after an executive decision has been made. It was on these grounds that the Senate Legal and Constitutional Legislation Committee concluded that 'decisions on proscription are effectively unreviewable [by the courts]'.¹¹⁸

The dangers of granting ASIO and the Attorney-General such arbitrary power are all the more acute given the interests that are affected. ASIO's power to detain is, by definition, a power to deprive a person of his or her personal liberty. The exercise of its interception powers, on the other hand, involves serious intrusions into the privacy of individuals. So does the *Terrorist Organisation Act's* proscription power: its exercise criminalises association with 'terrorist organisations' and hence directly affects freedom of association.

F Undermining Efforts to Prevent Extreme Acts of Ideological or Religious Violence

The success of the domestic 'War on Terror' depends upon constant review of the effectiveness or otherwise of anti-terrorism measures by the public. The recent counter-terrorism laws will, ironically, undermine the domestic 'War on Terror' because they impair the ability of the public to properly judge the

¹¹⁴ An affected person may, however, apply for a statement of reasons under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13.

¹¹⁵ *Australian Federal Police Act 1979* (Cth) s 12H(b).

¹¹⁶ See above n 63 and accompanying text.

¹¹⁷ Roger Douglas, *Douglas and Jones's Administrative Law* (4th ed, 2002) 53 (emphasis in original).

¹¹⁸ Senate Legal and Constitutional Legislation Committee, above n 4, 58.

effectiveness of anti-terrorism measures. Such inadequate scrutiny sets the scene not only for abuse and mistakes but also for ineffectual measures.¹¹⁹

A prerequisite for proper judgement is the availability of accurate information. The misrepresentations which accompanied the passage of these laws, however, meant that this prerequisite was not met with respect to important anti-terrorism measures. More importantly, the cloak of secrecy cast by the *ASIO Amendment Act* will mean that the public will not possess adequate information relating to the domestic 'War on Terror'. In addition, increased governmental control over the flow of security information risks distorting the public's understanding through the selective disclosure of information.

Proper judgement by the public about the effectiveness or otherwise of anti-terrorism measures also requires that there be transparency in terms of the measures adopted. An integral element of such transparency is adherence to the rule of law. Such adherence provides the assurance that only measures conforming to the law have been taken. However, by implicitly sanctioning lawless behaviour, the *ASIO Amendment Act* gives rise to the risk that the assumption that the rule of law will be complied with no longer holds with extra-legal means forming a part of the domestic 'War on Terror'.

IV CONCLUSION

In a speech made soon after the September 11 attacks, High Court Justice Michael Kirby cautioned:

Keeping proportion. 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. These are the ways to maintain the support and confidence of the people over the long haul ... Every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause before acting precipitately. ... Always it is wise to keep our sense of reality and to remember our civic traditions.¹²⁰

It is hard to escape the conclusion that recent counter-terrorism legislation has infringed almost every one of Justice Kirby's tenets. The *Hamas and LET Act* and the *ASIO Amendment Act* have been passed with indecent haste on the basis of false claims of urgency. Instead of being properly justified, the passage and advocacy of these laws have been marked by misrepresentations. Far from adhering to the ways of democracy, these laws have weakened Australia's democracy in significant ways, especially by stifling and controlling public discussion of the domestic 'War on Terror'. The rule of law has also been a casualty, since lawlessness by ASIO has been implicitly sanctioned, and arbitrary power has been conferred upon the executive. And, to cap things off, these laws undermine efforts to prevent extreme acts of ideological or religious violence.

¹¹⁹ For similar reasoning with respect to ASIO, see Paul Gray, 'Preying on Our Fears', *Herald Sun* (Melbourne), 15 December 2003, 18.

¹²⁰ Justice Michael Kirby, 'Australian Law — After 11 September 2001' (2001) 21 *Australian Bar Review* 253, 263.

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All in all, they raise the bitter prospect that the domestic 'War on Terror' will make Australians no more secure but far less free.