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Abstract

This thesis seeks to understand the factors that drive the Australian Parliament's response to exceptional national security laws proposed in times of 'crisis'. It employs case studies, doctrinal analysis, legal history, and literature relating to emergency laws. It selects two periods of 'crisis' for study — the Cold War and the 'War on Terror' — and examines the passage of the *Communist Party Dissolution Act 1950* (Cth), the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth).

Parliamentarians viewed the related Bills as extraordinary legislative proposals designed for extraordinary or emergency times or situations. These characterisations suggested that the work of legal scholar Oren Gross could, potentially, throw light on Parliament's legislative processes. Gross has written extensively on law in times of crisis. He hypothesises that a number of factors work towards our acceptance of exceptional laws. The first is the assumption of constitutionality — our belief that such laws fall within the bounds of constitutional and legal norms. The second is the assumption of separation. This assumption includes our belief that emergency laws will be temporary, that they will apply to 'others' not to 'us', and that national security is a separate sphere about which we defer to the views of the Executive Government.

The thesis explores whether Parliament's response to proposals for exceptional national security laws can be explained in terms of Gross's assumptions of constitutionality and separation. It uses *Hansard* to examine whether and, if so, how Parliament engaged with constitutional and legal norms and whether the transcripts of debate reveal evidence of Gross's assumption of separation.

My analysis suggests that Gross's assumptions provide a partial explanation of the factors that drove the Australian Parliament when it was presented with Bills for exceptional national security laws. It also reveals the influence of other factors — for example, the impact that 'ordinary' legal rules have in justifying and normalising proposals for exceptional laws and the importance of the Opposition's position as the 'once-and-future government'.

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All errors and omissions are my own.

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Originality statement

I hereby declare that this submission is my own work and to the best of my knowledge it contains no materials previously published or written by another person, or substantial proportions of material which have been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis. I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation and linguistic expression is acknowledged.

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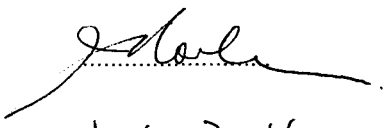
Signed 

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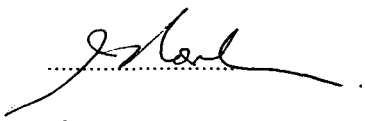
Signed 

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CHAPTER ONE

INTRODUCTION

This thesis focuses on the Australian Parliament and its role in making exceptional national security laws in times of crisis. Emergency legislation was an important part of Australia's response to two world wars. In those total wars, Parliament delegated extraordinarily wide powers to the executive.[1] Parliament's importance as legislator; as facilitator, legitimiser and partner in emergency governance has also been evident during other times of national security 'crisis'. This thesis contains case studies of Parliament's role in two such periods — the Cold War and the 'War on Terror'.

In April 1950, during the Cold War, the conservative Liberal-Country Party Coalition Government of Robert Menzies introduced the Communist Party Dissolution Bill 1950 ('Dissolution Bill [No 1]') into the House of Representatives. Under the Bill, the Australian Communist Party ('Communist Party') would be dissolved by legislative fiat and its surplus property would be forfeit to the Commonwealth. The Bill also empowered the Executive Government to ban other organisations it deemed unlawful. It contained proposals for derivative offences, such as membership of an unlawful association. It sought to enable the public declaration of individuals and their exclusion from certain trade union office. It also banned declared individuals from obtaining or retaining Commonwealth employment. Such was the controversy that surrounded the proposal that, in June 1950, the Bill was laid aside after the House of Representatives and the Senate failed to agree on amendments. The Bill was reintroduced in September 1950 as the Communist Party Dissolution Bill 1950 [No 2] ('Dissolution Bill [No 2]') and finally passed in October that year.

Just over 50 years later, the conservative Liberal-National Party Coalition Government of John Howard introduced into Parliament a raft of counter-terrorism bills in response to the September 2001 attacks on New York and Washington ('the 9/11 attacks'). The most important of these were the Security

[1] See, for example, *War Precautions Act 1914* (Cth), *Trading with the Enemy Act 1914* (Cth); *National Security Act 1939* (Cth); *Trading with the Enemy Act 1939* (Cth).

Legislation Amendment (Terrorism) Bill 2002 [No 2] ('SLAT Bill') and the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 ('ASIO (Terrorism) Bill [No 1]'). After substantial amendments, the SLAT Bill passed the Parliament in June 2002. The ASIO (Terrorism) Bill [No 1], on the other hand, was laid aside in December 2002 after the Government and the Senate failed to agree on amendments. It was reintroduced in March 2003 and finally passed the Parliament in June of that year after further changes were made.

It is debatable that Australia faced a national security crisis in either of these eras — the Cold War and the post-9/11 world. Nevertheless, the idea that Australia was endangered was an essential part of government rhetoric. In 1950, Prime Minister Menzies described the Dissolution Bill [No 1] as an 'extraordinary'[2] measure relating to the 'safety and defence of Australia … designed to deal with the King's enemies in this country'.[3] In 2001, Prime Minister John Howard said '[t]he threat of terrorism will be with us in the way the threat of a nuclear war was around for so long before the end of the Cold War. I think it is as bad as that and I don't think any of us should pretend otherwise'.[4] Introducing the SLAT Bill, Attorney-General Daryl Williams declared that '[w]e are actively involved in the war against terrorism. We cannot assume that we are not at risk of a terrorist attack … we should never forget the devastation of September 11'.[5] He described the ASIO (Terrorism) Bill [No 1] as 'extraordinary' and said it was directed at the extraordinary evil of terrorism.[6]

Each of the Bills I have selected for study incorporated extraordinary features. The SLAT Bill contained a broad, unclear and complex definition of 'terrorist act' that encompassed unlawful protest and that was central to a number of 'terrorist act' offences, all of which attracted penalties of life imprisonment. It proposed to criminalise preparatory conduct and place legal burdens on defendants in terrorism cases. It proposed that the Attorney-General would be empowered to

[2] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2748.
[3] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1995.
[4] Quoted in Michelle Grattan, 'The US has only to Ask for our Help: PM', *The Sydney Morning Herald,* 14 September 2001.
[5] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 March 2002, 1043.
[6] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1932.

proscribe organisations on a variety of imprecisely defined grounds and that proscribed organisation offences, attracting severe penalties, would be created.

Even more controversially, the ASIO (Terrorism) Bill [No 1] would have enabled Australia's secretive domestic security organisation to obtain two types of renewable warrant, in addition to those already in its armoury. The first was a warrant for questioning ('questioning warrant'). The second was a warrant for questioning and (potentially) incommunicado detention ('detention warrant'). The latter enabled adults and children to be held for up to a week for coercive questioning. Warrants would apply to people not suspected of any wrongdoing but who were thought to have information relating to a terrorism offence. They would also apply to terrorism suspects. This scheme was unprecedented in comparable Western nations.[7]

I am interested in attempting to identify the factors that drove Parliament's response to each of these Bills through the lens of exceptionality — scholarship concerned with law and government in times of crisis. This is a diverse body of research — legal, sociological, political and economic — which examines the forces that produce extraordinary laws and their effects. This thesis centres on the work of legal scholar, Oren Gross. In part, Gross is concerned with the factors that ease our acceptance of exceptional laws in times of 'violent' crisis.[8] He hypothesises that certain assumptions lead us to tolerate 'expansive governmental emergency powers and counterterrorism measures'.[9] The first assumption is that of constitutionality. This is the assumption that emergency laws conform to constitutional and legal rules. The second is the assumption of separation. This is an umbrella term that includes the following. The assumption of temporality envisages emergency laws as temporary, lapsing or being repealed once a crisis ends and normalcy returns. The assumption of spatiality is the assumption that exceptional laws will be geographically contained in what

[7] It continues to be the case — see Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Terrorism Laws and Trials* (NewSouth Publishing, 2015) 2.
[8] Oren Gross, 'Chaos and Rules. Should Responses to Violent Crises Always be Constitutional?' (2003) 112(5) *Yale Law Journal* 1011; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis. Emergency Powers in Theory and Practice* (Cambridge University Press, 2006).
[9] Gross, above n 8, 1022.

Gerald Neuman once called 'anomalous zones'.[10] The assumption of communal divisions is the assumption that emergency laws will apply to 'others' and not to 'us'. Gross also suggests we make assumptions about national security and foreign affairs. We assume, he argues, that these are special realms of public affairs that demand and justify a high degree of deference to the opinion of the Executive Government.

My thesis involves a close textual analysis of the Australian Parliament's edited transcript of debate — *Hansard* — in order to determine whether Gross's assumptions acted as drivers for Parliament when it considered the Dissolution Bills, the SLAT Bill and the ASIO (Terrorism) Bills. It does so by using a combination of legal history and doctrinal research.

Chapter Two focuses on the work of Oren Gross and explains how I propose to apply it to my study of lawmaking in the Australian Parliament. For instance, the assumption of constitutionality is important in Gross's scheme but he spends relatively little time developing it, instead concentrating on the assumption of separation. Chapter Two, therefore, explains my approach to this assumption. It explains why studying the work of Parliament is an important subject for legal scholars. It justifies my use of Gross's theoretical framework and it describes my methodology.

Chapters Three and Four are case studies. Chapter Three deals with the Dissolution Bills. It begins by locating the Dissolution Bill [No 1] in its wider political context and establishing its credentials as extraordinary legislation designed for extraordinary times. This involves a brief description of the global and domestic political scene in which the legislation was introduced together with parliamentary atmospherics and parliamentary process before highlighting the proposed legislation's contentious provisions.

Chapter Three then engages in doctrinal analysis. This analysis contextualises my examination of *Hansard* against Gross's assumption of constitutionality. It describes the constitutional landscape in which the Dissolution Bill [No 1] was introduced so that I can consider the extent to which parliamentarians adverted to the issue of constitutionality. I also note legal norms and rules potentially

[10] Gerald L Neuman, 'Anomalous Zones' (1996) 48 *Stanford Law Review* 1197.

relevant to Parliament's debates. Chapter Three then tests Gross's assumptions of constitutionality and relevant assumptions of separation against the record of parliamentary debate. It concludes by assessing the usefulness of Gross's assumptions in explaining the passage of the Dissolution Bill [No 2] and by identifying other important drivers.

Chapter Four is divided into two parts. The first part relates to the SLAT Bill and replicates the general structure and analysis of Chapter Three. The second part of Chapter Four deals with the ASIO (Terrorism) Bills. Its structure and content are similar to Chapter Three. However, unlike the Dissolution Bill [No 2], the ASIO (Terrorism) Bill [No 2] was passed in a substantially modified form. Chapter Four therefore contains additional material describing the Bill as introduced and passed. Like Chapter Three, it concludes by assessing the usefulness of Gross's assumptions in understanding the drivers of the legislative process. It is important to note that Chapter Four is a long chapter. Rather than create two separate chapters, one dealing with the SLAT Bill and the other dealing with the ASIO (Terrorism) Bills, I have combined them in one chapter in order to avoid repeating background material.

Chapter Five is the conclusion. It draws together the material from Chapters Three and Four to consider the usefulness of Gross's assumptions in understanding the passage of extraordinary Australian national security laws. It also notes other important drivers of Parliament's legislative process. These include the position of the Opposition as the 'once-and-future government'[11] and the appropriation and decontextualisation of 'ordinary' legal rules in order to 'normalise' exceptional laws.

[11] Stanley Bach, *Platypus and Parliament. The Australian Senate in Theory and Practice* (Department of the Senate, 2003) 202.

CHAPTER TWO

MAKING EXCEPTIONAL LAWS

I INTRODUCTION

The *Communist Party Dissolution Act 1950* (Cth) ('*Dissolution Act*') and Australia's post-9/11 terrorism laws have been closely scrutinised by legal scholars. The former has been studied from a constitutional perspective. Post-9/11 laws have been analysed for compliance with fundamental rights and the rule of law and in terms of constitutional validity. The legislative processes to which they were subjected have been assessed. Definitional questions have been debated and comparative perspectives have been explored. This thesis takes a different approach. It uses exceptionality literature to provide insights into the making of Australian national security laws. Two themes of the academic literature devoted to exceptional laws are the problems of normalisation and seepage. Scholars, including Australian academics,[1] have shown that exceptional laws become permanent, are normalised and migrate into other areas of law. My thesis, instead, takes a step back in the lawmaking process to examine how exceptional laws are made in Parliament.

II LAW AND CRISIS

The question of how societies should best respond to crisis has long occupied governments and scholars. In times of dire emergency, the early Roman Republic allowed for the appointment of a dictator who wielded supreme power. However, the dangers posed to the Republic by such a person were well-recognised and the office came with a number of restrictions. Tenure was time-

[1] Gabrielle Appleby and John Williams, 'The Anti-Terror Creep: Law and Order, the States and the High Court of Australia' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond. The Culture of Law and Justice after 9/11* (Routledge, 2010) 150; Nicola McGarrity and George Williams, 'When Extraordinary Measures Become Normal. Pre-emption in Counter-Terrorism and other Laws' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond. The Culture of Law and Justice after 9/11* (Routledge, 2010) 131; Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38(2) *Melbourne University Law Review* 362.

limited and not renewable. The purpose of the appointment was a restoration of the status quo.[2]

In the modern world, there have been and are a range of perspectives about emergency or crisis powers, their origins and ramifications. On one view, the German jurist, Carl Schmitt, considered that liberalism was particularly unsuited to dealing with crisis. He regarded its pluralism as dangerous.[3] He considered that its discursive processes and constitutional structures, which diffused and eroded power through constitutional division and separation, compromised its decision-making capacities.[4] He argued that positive law was unable to meet the challenge of the 'exception' — an unforeseen 'case of extreme peril'.[5] His solution to this problem was an authoritarian sovereign who decided on the exception and how to overcome it.[6]

In 1948, the American political scientist, Clinton Rossiter, published *Constitutional Dictatorship*.[7] In this work, he examined the responses of four democracies — Britain, the United States, France and Germany — to great political and economic upheavals.[8] Like Schmitt, Rossiter concluded that the structures and processes of liberal democracy are unsuited to dealing with existential crises.[9] Nevertheless, he considered parliamentary democracy to be adaptable to crisis government because it lacks complete institutional separation between the executive and parliament, has been dominated over time by cabinet

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[2] Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis. Emergency Powers in Theory and Practice* (Cambridge University Press, 2006) 17–26.
[3] As Schmitt's translator, George Schwab, points out Schmitt believed Weimar Germany was endangered because it tolerated its enemies. George Schwab, 'Introduction' in *The Concept of the Political* (University of Chicago Press, 2007) 3, 13–14.
[4] Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (George Schwab trans, University of Chicago Press, first published 1922, 2005) 6-7, 11; Mark Neocleous, '"Perpetual War" or "War and War Again". Schmitt, Foucault, Fascism' (1996) 22(2) *Philosophy and Social Criticism* 47, 48; Jef Huysmans, 'The Jargon of the Exception — On Schmitt, Agamben and the Absence of Political Society' (2008) 2 *International Political Sociology* 165, 171.
[5] Schmitt, above n 4, 6. For a different reading of Schmitt see, for example, Andrew W Neal, *Exceptionalism and the Politics of Counter-Terrorism. Liberty, Security and the War on Terror* (Edinburgh University Press, 2009). Neal argues that Schmitt also regarded liberalism's claims of pluralism and depoliticised institutions and rules as disingenuous and hypocritical (61–3).
[6] Schmitt, above n 4, 5.
[7] Clinton Rossiter, *Constitutional Dictatorship. Crisis Government in the Modern Democracies* (Transaction Publishers, 2009).
[8] They included the Great War, the Great Depression and World War II.
[9] Rossiter, above n 7. Rossiter argued that existential threats to the nation could justify 'dictatorial institutions and powers' (6).

government and is advantaged by the enforcement of rigid party discipline.[10] Yet, despite his belief in the efficacy of what he called 'constitutional dictatorship', Rossiter was aware of its dangers: its capacity to fabricate crisis, become permanent, concentrate power in the hands of the Executive Government and erode civil liberties. He also acknowledged that while even in normal times, modern government works towards increasing executive power, these trends are accelerated by war and economic depression.[11]

The idea that liberal democracy is weak and ill-equipped to deal with crisis has been the subject of investigation and dispute more recently — much, though not all of it, generated in response to the 'War on Terror'. In *State of Exception*, Giorgio Agamben describes emergency government as the 'dominant paradigm'.[12] He concludes that contemporary states of emergency are fictitious and have been transformed from temporary and exceptional measures into a 'technique of government'.[13] Unlike Schmitt or Rossiter, Agamben sees states of exception as divorced from necessity and also from law, although they stand in relation to it.[14] They are 'space[s] without law'.[15] Thus, Agamben regards President George W Bush's Military Order of November 2001 as demonstrating the 'immediately biopolitical significance of the state of exception as the original structure in which law encompasses living beings by means of its own suspension'.[16]

In a somewhat different vein, the philosopher and political economist Mark Neocleous suggests that liberalism's priority is security — a project concerned with the protection of capitalism.[17] Liberalism, he says, is 'a strategy of governance in which security is deployed as liberty'.[18] Like other scholars, whose work I sketch below, Neocleous surveys the use, entrenchment and seepage of emergency powers over time in Britain, Ireland and the USA. Unlike them,

[10] Ibid 154–5, 289.
[11] Ibid 296.
[12] Giorgio Agamben, *State of Exception* (Kevin Attell trans, Chicago University Press, first published 2003, 2005) 2.
[13] Ibid 2.
[14] Ibid 50–51.
[15] Ibid 51.
[16] Ibid 3.
[17] Mark Neocleous, *Critique of Security* (Edinburgh University Press, 2008) 29.
[18] Ibid 31.

however, he concludes that emergency measures lie deep in the heart of liberalism and liberal democracy.[19]

Of course, not all scholars assume that crisis powers pose a threat to liberal democracy. Legal scholars Eric Posner and Adrian Vermeule reject concerns about overweening executive power and its effects during times of crisis. They argue that it is rational to give security a heavier weight than liberty during times of crisis and that the Executive Government has the requisite institutional advantages of speed, flexibility, information and capacity to act when emergencies occur.[20] In addition, they contend that times of crisis can witness the promotion of progressive agendas and normal times can see repression of minority groups.[21] They dispute ratchet theory, which is discussed below, as making no allowance for the normal expansion and contraction of government powers over time. And they contest the idea of contamination, maintaining that this takes no account of the complexity of the modern administrative state.[22]

Nevertheless, Rossiter is not alone in his anxieties about crisis government. A considerable body of work has drawn attention to, and documented the effects of, crisis and emergency on law. Laura Donahue, among others, has traced the development, retention and wider effects of emergency powers in Northern Ireland.[23] She begins with the passage of the *Civil Authorities (Special Powers) Act 1922*, passed by the Unionist Parliament of Northern Ireland, which contained powers to proscribe organisations, confine individuals to prescribed areas and detain without trial. She notes the renewals of temporary emergency legislation in Northern Ireland, its eventual entrenchment and its migration to the British

[19] Mark Neocleous, 'The Problem with Normality: Taking Exception to "Permanent Emergency"' (2006) 31(2) *Alternatives: Global, Local, Political* 191, 207. Neocleous prefers to use the term 'emergency' rather than 'exception' because 'emergence' means 'the process of coming forth' from the law not something outside it.
[20] Eric A Posner and Adrian Vermeule, *Terror in the Balance. Security, Liberty and the Courts* (Oxford University Press, 2007).
[21] Ibid.
[22] Eric A Posner and Adrian Vermeule, *The Executive Unbound. After the Madisonian Republic* (Oxford University Press, 2010).
[23] Laura K Donohue, *Counter-Terrorism Law and Emergency Powers in the United Kingdom 1922–2000* (Irish Academic Press, 2001).

mainland. As David Bonner notes, these laws continue to be replicated and expanded in contemporary British terrorism laws.[24]

Donahue's work also seeks to account for the acceptance, longevity and influence of emergency powers in Northern Ireland and Britain. For example, she notes that despite their extraordinary nature, terrorism laws also contained signs of normality and legitimacy — being subject to normal, if truncated, parliamentary procedures and meeting (undoubtedly thin) rule of law standards of generality, public promulgation and, mostly, of clarity.[25] Reflecting in 2008 on her examination of counter-terrorism laws in the United Kingdom and United States, Donohue argues that 'a spiral — not a pendulum — best characterises counterterrorist law'.[26] Counterterrorism powers, she says, become normalised and migrate into ordinary criminal law.[27]

Other scholars also point to the complexity and changing times of emergency law and governance. Nasser Hussain, for instance, argues that today's emergency laws no longer fit the criteria of emergency or exceptional measures. They do not involve a suspension of law. They are not usually temporally bounded. They are not necessarily a response to an exceptional event. They do not involve prerogative power but are a joint venture between the executive and legislature. Further, they are marked by hyperlegality — the application of a complex web of laws — exceptional and ordinary, old and new, domestic and international — as well as new classifications of legal subject and new and specialised tribunals established to deal with them.[28]

Yet others see connections between emergency governance and the influence of ideas about risk, prevention and pre-emption. Richard Ericson argues that, in the post-9/11 world, these concerns have been magnified because the threat of

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[24] David Bonner, *Executive Measures, Terrorism and National Security. Have the Rules of the Game Changed?* (Ashgate Publishing Limited, 2007).
[25] Donohue, above n 23.
[26] Laura K Donohue, *The Cost of Counter-Terrorism. Power, Politics, and Liberty* (Cambridge University Press, 2008) 15.
[27] Ibid 15–16. See also Donohue, above n 23, 316.
[28] Nasser Hussain, 'Beyond Norm and Exception: Guantánamo' (2007) 33(4) *Critical Inquiry* 734; Nasser Hussain, 'Hyperlegality' (2007) 10(4) *New Criminal Law Review* 514. See also Kanishka Jayasuriya, 'Struggle over Legality in the Midnight Hour: Governing the International State of Emergency' in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008) 360.

terrorism is itself a 'politics of uncertainty' that feeds into Western fears.[29] Similarly, Jude McCulloch and Sharon Pickering maintain that since 9/11 the trend away from a post-crime orientation of criminal justice has accelerated towards the idea of pre-crime and even (pre)pre-crime.[30] Lucia Zedner has similar views. She contends that the catastrophic nature of imagined harms after 9/11 has contributed further to the abandonment of criminal justice protections in favour of preventive measures.[31]

Further concerns about crisis laws have been expressed by one of the foremost contemporary legal scholars of law in times of violent crisis. For David Dyzenhaus, post-9/11 terrorism laws are deeply problematic. Their context is an [unwarranted][32] claim of emergency that is permanent,[33] which carries the risk of normalisation. The laws themselves, he argues, are inevitably rushed through parliament and threaten civil liberties. Existing criminal laws make them largely unnecessary, they are little used in practice, and they largely affect the marginalised in the community.[34] There is also the problem of seepage. This occurs both from exceptional laws into ordinary laws and is a problem for law in ordinary times. Dyzenhaus argues that 'the executive is prone to carve out exceptions for itself … the barbarian is already within the gates'.[35]

[29] Richard V Ericson, 'The State of Preemption: Managing Terrorism through Counter Law' in Louise Amoore and Marieke de Goede (eds), *Risk and the War on Terror* (Routledge, 2007) 57, 58.
[30] Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism' (2009) 49(5) *British Journal of Criminology* 628.
[31] Lucia Zedner, 'Terrorizing Criminal Law' (2014) 8(1) *Criminal Law and Philosophy* 99, 106.
[32] David Dyzenhaus and Rayner Thwaites, 'Legality and Emergency — The Judiciary in a Time of Terror' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 9, 9.
[33] David Dyzenhaus, *The Constitution of Law. Legality in a Time of Emergency* (Cambridge University Press, 2006).
[34] David Dyzenhaus, 'Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security' (2003) 28 *Australian Journal of Legal Philosophy* 1.
[35] David Dyzenhaus, 'The Compulsion of Legality' in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008) 33, 55.

III THE WORK OF OREN GROSS

Another important contemporary legal scholar, whose work forms the basis of this thesis, is the American legal academic Oren Gross.[36] Gross's interest in this topic predates 9/11.[37] However, like many theorists, he was profoundly influenced by the events of 9/11 and, in particular, by what he refers to as the 'alternative system of justice' established by the Bush Administration.[38]

Gross's view is that violent crises pose the greatest of all threats to democratic freedoms.[39] By violent crises he means 'wars and international armed conflicts, rebellions, and terrorist attacks as distinguished from economic crises and natural disasters.' [40] While he accepts that enhancements of executive power and diminutions of rights and freedoms occur independently of emergencies, he argues that crises legitimise and accelerate these processes. His work poses a number of questions. How do democratic legal systems respond to crisis? What drives their responses? What are the effects of those responses? How can the democratic state best protect itself in a time of emergency but also prevent a descent into authoritarianism? In two major works, Gross attempts to provide answers to these questions and to explore the historical record.

In *Law in Times of Crisis*, he argues that because democratic states are aware of the dangers of authoritarian rule, responses to crisis are typically conceived of as bounded by constitutional norms and legal rules. With this in mind, he suggests that two types of response occur in practice. One is 'Business as Usual'. Here the ordinary legal system is deemed sufficient to deal with crisis without permanent or ad hoc changes. While Gross notes that 'Business as Usual' may be aspirational rather than real, he argues that it is useful as an 'ideal type' and measuring

[36] As a general rule, I refer to Gross alone rather than also citing his co-author of *Law in Times of Crisis*, Fionnuala Ní Aoláin. The portion of Gross's work that is particularly relevant to my thesis first appeared in his 2003 article 'Chaos and Rules' and is largely replicated in *Law in Times of Crisis*, above n 2.
[37] See Oren Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy' (2000) 21 *Cardozo Law Review* 1825.
[38] Oren Gross, 'Chaos and Rules. Should Responses to Violent Crises Always be Constitutional?' (2003) 112(5) *Yale Law Journal* 1011, 1017.
[39] Gross and Ní Aoláin, above n 2, 7.
[40] Ibid 4.

stick.[41] However, more usually, he contends, a model of 'Accommodation' operates. This is envisaged as a flexible, effective and largely principled approach in which the law — as manifested in the constitution, interpreted by the judiciary or enacted by the legislature — bends to some degree but does not break in response to crisis.[42]

Of the versions of 'Accommodation' described by Gross, my interest is in legislative accommodation, of which Gross says there are two types. The first he labels the 'Emergency/Ordinary' model. In this model, 'emergency-driven' rules are incorporated into ordinary legislation.[43] Gross calls the second category 'Special Emergency Legislation'. Here, new emergency legal norms directed at particular exigency are created.[44] In the case of terrorism, Gross and Ní Aoláin argue that states have traditionally responded by using an Accommodation model. However, they note that United Nations Security Council Resolution 1373 ('UNSC 1373') has possibly placed terrorism in a 'heightened' category of accommodation — that is, 'beyond the usual emergency responses'.[45] I do not address this suggestion in my thesis.

Gross is sceptical of both 'Business as Usual' and 'Accommodation' approaches because he regards them as having significant flaws. He suggests that the former can be criticised as being naïve, hypocritical, and weak because it is rigid in the face of crisis.[46] He criticises the latter because it opens the door to abuse by government and the erosion of constitutional and legal norms.[47] He also suggests

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[41] Ibid 86–103. It is difficult to see where such a model has operated. One of the few examples provided in Gross and Ní Aoláin is the opinion of Justice David Davis in *Ex parte Milligan* 71 US (4 Wall) 2 (1866).
[42] Gross, above n 38, 1058–9.
[43] Gross and Ní Aoláin, above n 2, 66–7. An example of what Gross would call 'Emergency/Ordinary' laws in the Australian context are amendments made in 2004 to Part IC of the *Crimes Act 1914* (Cth), which provides a framework governing the investigation of Commonwealth crimes. The 2004 amendments created special rules extending the length of time that police can question a person who has been arrested on suspicion of committing a terrorism offence. See *Anti-terrorism Act 2004* (Cth) ss 23CA, 23DA. Now numbered s 23DB and 23DF as a result of the enactment of the *National Security Legislation Amendment Act 2010* (Cth).
[44] Ibid 67–68. Gross would regard the *Dissolution Act* and the *ASIO (Terrorism) Act* as 'Special Emergency Legislation'.
[45] Ibid 401. I refer to Gross and Ní Aoláin on this occasion because these issues were not considered in Gross's earlier work 'Chaos and Rules'.
[46] Gross, above n 38, 1044, 1069.
[47] Gross and Ní Aoláin, above n 2, 81.

how this damage occurs. For the sake of completeness, before addressing these suggestions, it is worth mentioning briefly Gross's remedy.

Post-9/11, Gross was not alone in proposing a controversial solution to the problem of how law and the institutions of government should deal with crisis and avoid the undermining of constitutional and legal values.[48] Gross's solution is 'Extra-Legal Measures'. The purpose of this model is to quarantine and thereby better protect the legal system by allowing officials to step outside the law in the 'extreme case' — for example, in the face of a ticking time bomb. Gross considers that, under Extra-Legal Measures, the legal system is more likely to be protected than undermined by the erosive effects of accommodation. In coming to this conclusion, he considers that officials will not unnecessarily engage in unlawful conduct because they will be required to seek ex post ratification with its attendant uncertainties — the possibility of public or judicial ratification on one hand or punishment on the other.[49]

Despite the real problems of Gross's 'solution' — normative, practical and political — it is possible to set Extra-Legal Measures aside and focus on Gross's other important insights. The first are his views on the ways that the normalisation of emergency powers occurs. These are both original in nature and also synthesise the work of other theorists. For example, in the period since 9/11, Lucia Zedner agrees that emergency laws are typified by de facto permanency, infiltration into ordinary criminal law and procedure, as well as by incrementalism and normalisation.[50] Mark Neocleous writes of the normalisation

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[48] See, for example, Dyzenhaus, above n 35. Victor Ramraj argues that it is naïve to assume that public officials will exercise restraint and disclose extra-legal activities or that the public will effectively check 'official disobedience' — 'Between Idealism and Pragmatism: Legal and Political Constraints on State Power in Times of Crisis' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007) 185, 191. David Cole regards Extra-Legal Measures as no less susceptible to rights intrusions and the creation of dangerous precedents than other approaches and doubts the wisdom of relying on political processes to judge emergency measures. See 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2004) 101(8) *Michigan Law Review* 2565.

[49] Gross, above n 38; Gross and Ní Aoláin, above n 2; Oren Gross, 'Extra-Legality and the Ethic of Political Responsibility' in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008) 60.

[50] Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32(4) *Journal of Law and Society* 507; Lucia Zedner, *Security* (Routledge, 2009); Lucia Zedner, 'Security, the State, and the Citizen: The Changing Architecture of Crime Control' (2010) 13(2) *New Criminal Law Review* 379, 392, 394–5.

of emergency laws.[51] Kim Lane Scheppele concludes that much new law created to deal with emergencies 'has aspirations to permanence or makes changes in the baseline against which the previous state of "normal law" was measured'.[52]

Gross's survey of law and practice leads him to conclude that, once in place, emergency powers have the following effects. First, in a temporal sense, they may be extended, renewed or made permanent. Second, substantively, their scope may be widened and their limitations removed. Third, they work as a ratchet — providing a precedent and establishing a threshold when the next crisis occurs. Fourth, they are used for purposes other than those originally intended. Fifth, they seep into ordinary law.[53] Sixth, the public and public institutions become desensitised to emergency regimes. Seventh, institutional changes designed to respond to crisis are retained. Eighth, there is an exponential increase in executive power.[54]

Law in Times of Crisis also identifies multiple factors at work when law responds to crisis. These include a 'rush to legislate'[55] — to be seen to be doing something — and the national consensus that emerges during emergencies. In addition, Gross identifies a number of assumptions that operate. The first is the assumption of constitutionality — the idea that governmental responses to crisis must be found within rather than outside the confines of constitutional norms and legal rules.[56] Gross says that this assumption underlies the traditional constitutional models of emergency powers — 'Business as Usual' and 'Accommodation'.[57] He challenges the assumption of constitutionality on normative grounds and also as a descriptor.[58] And he says that the assumption

[51] Neocleous, above n 17, 67.
[52] Kim Lane Scheppele, 'The International State of Emergency : Challenges to Constitutionalism after September 11' (2006) <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1048&context=schmooze_papers>.
[53] Dyzenhaus, above n 35. Dyzenhaus compliments Gross for identifying 'perspicuously the problem of seepage of the exceptional into the ordinary which affects all attempts to adapt the rule of law' (55).
[54] Gross and Ní Aoláin, above n 2, 228–43.
[55] Ibid 72.
[56] Ibid 86.
[57] Gross, above n 38, 1022–3.
[58] Ibid 1023.

may have more rhetorical significance than any effect as a 'real … check on governmental powers'.[59]

The second category of assumption is the assumption of separation. Gross argues that we consider normalcy and emergency to be separate states and that the assumption of separation 'facilitate[s] and sustain[s]' this belief.[60] It assumes that a 'firewall' can be constructed protecting rights and liberties from encroachment from emergency regimes.[61] According to Gross, the assumption of separation encompasses a number of subtypes. The first is temporality — the belief that normalcy and emergency occupy separate timeframes.[62] As examples, Gross points to the emergency regimes initially regarded as temporary and later made permanent in Northern Ireland, Britain and Israel.[63]

Another class of separation is that of spatiality. Gross argues we believe that impermeable barriers can be drawn between emergency laws that apply in dependent territories such as colonies and the legal regime of the 'controlling' power. In 1996, Gerald Neuman's study of 'anomalous zones', including Guantánamo Bay, led him to conclude that 'disrespect for one fundamental norm' may produce disrespect for other norms both within and outside an anomalous zone.[64] The migration of counter-terrorism laws from Northern Ireland to the British mainland is another example.[65] Gross also notes this effect and points to the use of torture and of French laws originally intended for use in the Algerian War of 1954–1962 being applied in metropolitan France.[66]

Gross also posits that courts and legislators defer to the Executive Government in matters relating to national security and foreign affairs. In the case of national security, for example, he maintains that this is because 'when the security and safety of the state are at stake, special rules must apply'.[67]

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[59] Ibid.
[60] Ibid 1070.
[61] Gross and Ní Aoláin, above n 2, 171.
[62] Ibid 174.
[63] Ibid 175–180.
[64] Gerald L Neuman, 'Anomalous Zones' (1996) 48 *Stanford Law Review* 1197, 1234.
[65] Donohue, above n 23.
[66] Gross and Ní Aoláin, above n 2, 181–202.
[67] Ibid 214.

Finally, Gross argues that we are more likely to accept emergency powers and counter-terrorism measures when we believe they are directed at a clearly defined 'other' and not at 'us'.[68] This is the idea of 'communal divisions' or 'us v them'. While he concedes that targeting of the 'other' is not unique to emergency powers, Gross considers that 'crises lead to heightened individual and group consciousness'.[69] This heightened consciousness serves a number of purposes. In particular, it enables fear and anger to be expressed during crises. Gross also contends that a proportional relationship is involved. The greater the perceived difference between 'us' and 'them', the more we will be prepared to tolerate enhanced and intrusive government powers that supposedly protect 'our' security while eroding 'their' liberties.[70] An example Gross provides is the use and acceptance of racial profiling in the United States after 9/11.[71]

Running through these analyses is the idea that to talk about emergency is to assume that there is normalcy; that normal times are, indeed, normal and that emergency is atypical. Gross argues that this is mistaken. The limitless 'War on Terror' and his examination of long-standing emergency rule in Northern Ireland, in Israel, and in the United States leads him to a number of additional conclusions. The first is that crises are no longer the exception, rather they are the norm.[72] The second conclusion is separate and differs from the idea of 'normalisation'. It is that '[i]n various meaningful ways, the exception … has merged with the rule, and "[e]mergency government has become the norm."'[73] This is a view shared by Scheppele who rejects the idea that 'emergencies constitute exceptions to normal governance'.[74]

My interest, however, is in one particular aspect of Gross's work. This is whether his assumptions of constitutionality and separation can explain what drives legislative processes when Parliament deliberates on exceptional national security laws. The next section deals with a number of topics. In particular, it

[68] Ibid 220.
[69] Ibid 222–3.
[70] Ibid 221.
[71] Ibid 222.
[72] Ibid 175.
[73] Ibid 171 quoting Harold Relyea, *A Brief History of Emergency Powers in the United States* (Government Printing Office, 1974) v.
[74] Kim Lane Scheppele, 'Small Emergencies' (2006) 40(3) *Georgia Law Review* 835, 839.

explains how I intend to apply Gross's assumptions to the study of lawmaking by the Australian Parliament. It also deals with use of legal scholarship to study the work of legislatures, the use of *Hansard* as an analytical tool and the reasons why I have chosen particular Bills for study.

IV STUDYING THE WORK OF PARLIAMENT

A *Legisprudence*

The purpose of this thesis is to study Australian federal national security laws that were passed in times of 'crisis' via the work of federal politicians as legislators. This raises the question of why legal scholars should study the work of the legislature. In this regard, I owe a debt to legisprudential scholars. My purpose is not to frame rules for 'good' legislation — one project of legisprudence — but to take the work of Parliament seriously by looking at the practice of legislating and by asking what considerations, including understandings of constitutional and legal norms, are evident in parliamentary debates. In order to explain, I turn first to the discipline of legisprudence and then to other relevant scholarly contributions on the subject of the legislature.

Law schools and legal scholars traditionally paid little attention to the role of legislatures as lawmaking institutions.[75] Jurisprudence, says Jeremy Waldron, is fixated on the 'organic, spontaneous and implicit growth of the Common Law';[76] its venerability;[77] its 'appealing anonymity … its apparent neutrality … its distance from or independence of politics'.[78] In contrast, decision-making by politicians has commonly been regarded as merely a self-interested exercise in obtaining and maintaining power.[79] As such, the process of legislating and the content of legislation have been regarded as alien to legal theory — sometimes

[75] See, for example, Julius Cohen, 'Legisprudence: Problems and Agenda' (1983) 11(3) *Hofstra Law Review* 1163.
[76] Richard W Bauman and Tsvi Kahana, 'New Ways of Looking at Old Institutions' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006) 1, 23.
[77] Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999) 10.
[78] Ibid 24.
[79] Bauman and Kahana, 'New Ways of Looking at Old Institutions', above n 76.

seen as 'not-yet-law';[80] as irrational and inexpert as opposed to the reasoned deliberation of legally qualified judicial officials; as simply a matter of politics.

The field of 'legisprudence' — the theory and practice of legislation — re-focuses legal scholarship away from the 'least dangerous branch'.[81] For a variety of reasons, legisprudential scholars maintain that legislatures, legislators and legislation are important objects of study. The interest of some scholars appears to stem from concerns about the quantity and quality of legislation in the modern state, its unintended and negative consequences, its effectiveness and its coherence.[82] Thus, for Luc J Wintgens, an important goal of legisprudence is 'to articulate criteria for good legislation' through the application of legal theory.[83] From a slightly different perspective, Waldron argues that because 'the legislature is one of the main sources of law in any well-functioning legal system',[84] a 'philosophical theory of legislating' is essential for developing 'appropriate conceptions of legislative authority and legislative interpretation'.[85]

Yet another theme in the literature regards legislators as legal and constitutional actors who share responsibility with the judiciary 'for the continued existence of the constitutional order'.[86] In the United States, the 'countermajoritarian difficulty' has spurred debate about the role and competence of Congress as constitutional interpreter.[87] In Europe, the Spanish legal academic A Daniel

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[80] Kaarlo Tuori, 'Legislation between Politics and Law' in Luc J Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation. Proceedings of the Fourth Benelux-Scandinavian Symposium on Legal Theory* (Hart Publishing, 2002) 77, 100.
[81] Imer B Flores, 'The Quest for Legisprudence: Constitutionalism v Legalism' in Luc J Wintgens, Philippe Thion and Melanie Carly (eds), *The Theory and Practice of Legislation. Essays in Legisprudence* (Ashgate, 2005) 26, 27.
[82] Ibid 30, 40.
[83] Luc J Wintgens, 'Legislation as an Object of Study of Legal Theory: Legisprudence' in Luc J Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation. Proceedings of the Fourth Benelux-Scandinavian Symposium on Legal Theory* (Hart Publishing, 2002) 9, 10.
[84] Jeremy Waldron, 'Legislation and the Rule of Law' (2007) 1(1) *Legisprudence* 91, 99.
[85] Waldron, above n 77, 129.
[86] Ruth Gavison, 'Legislatures and the Phases and Components of Constitutionalism' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006) 198, 212.
[87] Ibid; Mark Tushnet, 'Interpretation in Legislatures and Courts: Incentives and Institutional Design' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006) 355; Mark Tushnet, 'Is Congress Capable of Conscientious, Responsible Constitutional Interpretation? Some Notes on Congressional Capacity to Interpret the Constitution' (2009) 89(2) *Boston University Law Review* 499; Sandford Levinson, 'Constitutional Engagement: "Outside the Courts" (and "Inside the Legislature"): Reflections' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined*

Oliver-Lalana has described statutes as 'legal-normative decisions whose justifications involve contributions on the application and interpretation of valid legal norms.' [88] He argues that the legal character of parliamentary argumentation is revealed in parliament's justification of statutes — often including 'interpretive standpoints' on constitutional and legal provisions — as well as weighing and balancing, which he regards as legal techniques.[89] Similarly, Imer Flores contends that the legislature's deliberative processes are 'a special mode of legal argumentation'.[90]

The views of other scholars on the appropriate role of legislators and legislatures should also be noted. David Dyzenhaus's solution to suggestions that emergency governance is not constrained by the rule of law is his 'rule of law project' in which all three arms of government are legal actors, duty-bound to participate and cooperate in the rule of law project and to commit to a 'culture of justification'.[91] Dyzenhaus conceptualises the executive as a 'reason-giving institution' and the legislature as a 'reason demanding institution'.[92] Thus, the executive must provide detailed information to the legislature so that it can meaningfully and independently make assessments of executive proposals. The role of a democratic legislature, according to Dyzenhaus, is to make laws based on the principle of non-interference with rights. Legislators, Dyzenhaus argues, 'are not merely representatives of political parties, but also legal officials who have, like all other legal officials, an obligation to the law in an expansive sense'.[93] They must ensure that 'parliament is an institution in which reasons are properly debated, in order that legislation might take forward the rule of law project'.[94]

Branch: The Role of Legislatures in the Constitutional State (Cambridge University Press, 2006) 378.

[88] A Daniel Oliver-Lalana, 'Legitimacy Through Rationality: Parliamentary Argumentation as Rational Justification of Laws' in Luc J Wintgens, Philippe Thion and Melanie Carly (eds), *The Theory and Practice of Legislation: Essays in Legisprudence* (Ashgate, 2005) 237, 245.

[89] Ibid.

[90] Flores, above n 81.

[91] David Dyzenhaus, 'Deference, Security and Human Rights' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007) 125, 137.

[92] Ibid 143.

[93] Ibid.

[94] Ibid.

The idea of Parliament as a legal actor has also been explored in Australian academic literature. Andrew Lynch has called the legislative process 'an untidy fusion of the political and legal.'[95] In addition, Lynch and Meyrick argue that, because Parliament is bound by the *Constitution*, it should 'determine its constitutional authority to act'.[96] This is particularly so, they contend, given that most statutes are not subject to constitutional challenge. More recently Appleby and Webster have argued that, while they should largely adopt a court-centred view of constitutional interpretation, parliamentarians have a duty to act in good faith by considering the constitutional issues associated with a bill. On occasions this might mean passing legislation about which there is doubt but nonetheless persuasive arguments in favour of validity.[97] Last, making an even stronger claim to legislative competence, former Attorney-General Daryl Williams maintains that the federal Parliament not only has a role in determining constitutional questions but a 'greater array of sources of direct advice on any constitutional matter arising than does the High Court.'[98]

Without wishing to over-state the matter, it is useful to note the various sources of legal advice available to federal politicians in the late 20th and early 21st century. These include lawyers in executive departments, advisers, chamber and committee staff, think tanks, and NGOs, as well as lobbyists, pro bono lawyers, legal academics, and legally qualified Parliamentary Library staff. Politicians' involvement in the work parliamentary committees — such as the Senate Legal and Constitutional Committee — together with the submissions and evidence provided is also relevant. In addition, the number of federal politicians with legal qualifications has, at least recently, been relatively high.[99]

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[95] Andrew Lynch, 'Legislating with Urgency — The Enactment of the *Anti-Terrorism Act [No 1] 2005*' (2006) 30(3) *Melbourne University Law Review* 747, 776.
[96] Andrew Lynch and Tessa Meyrick, 'The Constitution and Legislative Responsibility' (2007) 18(3) *Public Law Review* 158, 163; Gabrielle Appleby and Adam Webster, 'Parliament's Role in Constitutional Interpretation' (2013) 37(2) *Melbourne University Law Review* 255; Geoffrey Lindell, 'Introduction: The Vision in Hindsight Explained' in Geoffrey Lindell and Robert Bennett (eds), *Parliament. The Vision in Hindsight* (Federation Press, 2001) xix.
[97] Appleby and Webster, above n 96, 295.
[98] Daryl Williams, 'The Australian Parliament and the High Court: Determination of Constitutional Questions' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions. Theories, Principles and Institutions* (Federation Press, 1996) 203, 209.
[99] There are 226 federal politicians. In 2005, 66 federal politicians had legal qualifications and 29 had worked as lawyers in their previous job. In 2011, 90 parliamentarians had qualifications in law, 30 of whom recorded their previous occupation as barrister, solicitor, legal officer etc.

In earlier times — the 1950s for example — there were far fewer lawyers in Parliament,[100] especially in the Labor Party. However, the Menzies Government included four KCs — the Prime Minister, External Affairs Minister Spender, Attorney-General Spicer and Supply Minister Beale — and a number of lawyers. The latter included Immigration Minister Holt, Trade and Customs Minister O'Sullivan and backbenchers Alexander Downer, Gordon Freeth, Billy Hughes and Keith Wilson.[101] Foremost in Labor were HV Evatt, constitutional scholar, former High Court judge and former Attorney-General and Nicholas McKenna, who had acted as Attorney-General for two years during Evatt's absences[102] and who Maher describes as an 'able lawyer'.[103] Other Labor lawyers were William Bourke and William Riordan.[104]

In the 40th Parliament, lawyers on the Government benches included Prime Minister Howard, Attorney-General Williams, Defence Minister Hill, Justice and Customs Minister Ellison, Immigration Minister Ruddock, Special Minister of State Abetz, Senators Brandis, Mason and Payne, and MP Peter King. Labor lawyers included Opposition Leader Crean, Shadow Attorney-General McClelland; Shadow Justice and Customs Minister Melham; Senators Bolkus, Cooney, Forshaw, Kirk and Ludwig; and MP Duncan Kerr. There was one lawyer

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However, these figures declined in 2014 (84 politicians with legal qualifications including 24 who recorded their previous occupation as legal practitioner). See Parliamentary Handbooks published by the Parliamentary Library/Department of Parliamentary Services. See also Gavison, above n 86.

[100] Rydon calculates that in federal Parliament in 1950, 16.49% of all politicians had been lawyers in their previous occupation. She also points out the difficulties inherent in such classifications given that some parliamentarians may have had a number of different occupations and a few, like Billy Hughes, obtained legal qualifications during their parliamentary careers. Joan Rydon, *A Federal Legislature. The Australian Commonwealth Parliament 1901–1980* (Oxford University Press, 1986) 162.

[101] See Australian National University, *Australian Dictionary of Biography* (2014) <http://adb.anu.edu.au>; Parliament of Australia, *The Biographical Dictionary of the Australian Senate* <http://biography.senate.gov.au>.

[102] Commonwealth, *Parliamentary Debates*, Senate, 6 June 1950, 3690 (Nicholas McKenna, ALP).

[103] Laurence W Maher, 'The Use and Abuse of Sedition' (1992) 14(3) *Sydney Law Review* 287, 300.

[104] AN Preston, 'Riordan, William James Frederick (1908-1973)' *Australian Dictionary of Biography*, Australian National University <http://adb.anu.edu.au/biography/riordan-william-james-frederick-11530>; Scott Bennett, 'Bourke, William Meskill (Bill) (1913-1981)' *Australian Dictionary of Biography*, Australian National University <http://adb.anu.edu.au/biography/bourke-william-meskill-bill-12238/text21953>.

— Democrats Senator John Cherry — in the ranks of the minor parties and Independents.[105]

There are other reasons for studying the work of parliamentarians as legislators. The Dissolution Bills were a particularly high profile part of the Government's claim to anti-communist credentials. In relation to the post-9/11 world, legislating against terrorism was a typical response in both common and civil law jurisdictions.[106] To quote Kent Roach, the Australian response to 9/11 was an exercise in 'legislative activism' and 'hyper-legislation'.[107] This thesis is designed to add to the understanding of legislative practice. As Neal points out, while much of the contemporary debate about exceptionalism has been influenced by Schmittian concepts of sovereignty, modern exceptionalism involves 'lawmaking rather than sovereign exceptions'.[108] And although the legislature's response to national security demands is often viewed as supine, Neal usefully reminds us that parliament has a 'legitimating role that is central to lawmaking as a security practice'.[109]

B *Analysing the Work of Parliament*

There are many ways of studying the work of legislators. Potential sources include *Hansards*, personal interviews, public statements reported in the media and, when available, autobiographies, memoirs, personal papers, and declassified government records. In this study I focus on two sources. The first is chamber *Hansards* — the official transcripts of debate in the House of Representatives and the Senate. The second, in relation to post-9/11 laws, is parliamentary committee reports. These were extremely influential as a source

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[105] See the website of the Australian Parliament <http://www.aph.gov.au> for information on former parliamentarians. It is perhaps worth noting that three Labor politicians prominent in negotiations and debate — Senators Faulkner and Ray, together with former Opposition Leader Beazley — had no legal qualifications.
[106] Andrew W Neal, 'Terrorism, Lawmaking, and Democratic Politics: Legislators as Security Actors' (2012) 24(3) *Terrorism and Political Violence* 357, 357.
[107] Kent Roach, *The 9/11 Effect. Comparative Counter-Terrorism* (Cambridge University Press, 2011) 310.
[108] Andrew W Neal, 'Normalization and Legislative Exceptionalism: Counterterrorist Lawmaking and the Changing Times of Security' (2012) 6(3) *International Political Sociology* 260, 261.
[109] Neal, above n 106, 362.

of amendments proposed by politicians and a source of advice about the constitutional implications of the SLAT Bill and the ASIO (Terrorism) Bills.

It is trite to observe that *Hansard* may not record what parliamentarians truly think about the bills they consider. As Oliver-Lalana points out, there may be an 'abyss' between what politicians say and what they really think.[110] Modern party discipline generally masks internal disagreements. Some politicians — especially independents and those from minor parties — do not get an opportunity to speak.[111] Limiting material to *Hansard* cannot, of course, take account of the many factors involved when politicians make decisions about proposed legislation. It cannot be relied upon to illuminate discussions in Cabinet or, in the usual course of events, debates in government backbench committees, in caucus or in the corridors of power. It does not normally shine a light on government briefings, negotiations between parties, communications with lobbyists, advisers, NGOs, peak bodies, academics or members of the public.[112] Further, as Huysmans and Buonfino observe, studying parliament means studying a political elite and, as a means of studying policy formation, it neglects the role of 'mass media, blogs, focus groups, campaigning and opinion polling.'[113]

Nevertheless, studying *Hansard* is both important and legitimate. *Hansard* is a contemporaneous record. Further, as Oliver-Lalana maintains, parliamentary debates are important for a number of reasons. They contain the public justifications for legislative decisions. It may be difficult to access real decision-making processes.[114] It is arguable that they contain legal-normative

[110] Oliver-Lalana, above n 88, 244.
[111] In relation to the Communist Party Dissolution Bill 1950 [No 2], the Government pointed to failure to participate in debate against the Bill by a number of ALP politicians known to be anti-communist. See Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 184 (Harold Holt, Minister for Labor and National Service and Minister for Immigration, Liberal).
[112] It can, however, do so. *Hansards* from 1950 expose the influence of the ALP's National Executive on the parliamentary party and illuminate divisions within Labor. Senate debates on post-9/11 bills provide some insights into negotiations between the Government and Opposition parties, the work of the Government's backbench committee and the attitudes of some Government backbenchers who were critical of the legislation.
[113] Jef Huysmans and Alessandra Buonfino, 'Politics of Exception and Unease: Immigration, Asylum and Terrorism in Parliamentary Debates in the UK' (2008) 56 *Political Studies* 766, 766.
[114] This is especially so if it is the recent past that is under examination — given rules for the release of Cabinet documents, the absence of memoirs, and the unavailability of personal papers.

decisions.[115] In addition, *Hansard* can be a rich source of information as politicians — aware of their audiences and mindful of the historical record — variously explain, justify and contest proposed legislation.[116]

C *Choosing What to Study*

The Dissolution Bills, the SLAT Bill and the ASIO (Terrorism) Bills exhibit a number of common features. There are some contextual similarities — they were all introduced during a time of uncertainty and fear, globally and domestically. They were debated during periods when Australia was engaged in non-conventional 'wars' — the Cold War and the 'War on Terror'. They were the subject of protracted debate and significant criticism in Parliament, in the press, in academia and in the wider community.

Another important reason for studying the selected Bills relates to matters of content. Each made large inroads into democratic rights and freedoms. For example, opponents of the Dissolution Bill [No 1] argued that it employed 'totalitarian methods' and departed from 'fundamental democratic principles'.[117] The Prime Minister himself acknowledged that the Bill was 'extraordinary'.[118] In 2002, George Williams described the original ASIO (Terrorism) Bill as 'a law that would not be out of place in General Pinochet's Chile'.[119] Kent Roach regards ASIO's post-9/11 powers as 'exceptional among Western democracies'.[120] And in 2006, a UN Special Rapporteur remarked on 'a number of actual and potential

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[115] Oliver-Lalana, above n 88, 245.
[116] David Lowe, *Menzies and the 'Great World Struggle'. Australia's Cold War 1948–1954* (UNSW Press, 1999).
[117] The first quote is from a letter signed by 26 University of Sydney academics and the latter is from a statement by 14 University of Melbourne academics. Quoted in George Winterton, 'The Communist Party Case' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 108, 120–121. For a different view of the likely impact of the Dissolution Act see Roger Douglas, 'A Smallish Blow for Liberty? The Significance of the Communist Party Case' (2001) 27(2) *Monash University Law Review* 253.
[118] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2748.
[119] George Williams, Submission No 22 to Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) 7.
[120] Roach, above n 107, 311.

human rights violations within Australia's counter-terrorism regime' combined with the absence of a federal bill of rights.[121]

A second reason for study relates to the ongoing consequences of emergency laws that remain on the statute books. Australia was spared the *Dissolution Act*. The High Court invalidated the legislation in 1951[122] and Menzies' attempts to amend the Constitution at a referendum and, later, to have the states refer their power over communism, failed.[123] The SLAT Bill and ASIO (Terrorism) Bills were amended during the course of parliamentary debate but, as enacted, retained disturbing provisions. Further, they constitute important bases from which other anti-terrorism statutes have been built.

Very occasionally Commonwealth counter-terrorism powers have been wound back but generally their scope has expanded under federal governments of both political persuasions. They have been subject to a large number of parliamentary and independent reviews, the recommendations of which have largely been ignored.[124] Since 2003, new powers that have themselves expanded over time have been added to the Commonwealth's armoury. Preventative detention and control orders are two examples.[125] These orders and ASIO's questioning and detention powers have recently been extended to 2018.[126] ASIO has been endowed with further powers.[127] New terrorism offences have been created.[128] And yet more controversial counter-terrorism proposals were in the Parliament at the time of writing.[129]

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[121] UN Special Rapporteur, A*ustralia: Study on Human Rights Compliance while Countering Terrorism*, A/HRC/4/26/Add.3 (14 December 2006) 22.
[122] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
[123] Winterton, above n 117.
[124] See Jessie Blackbourn, 'Anti-Terrorism Law Reform: Now or Never?' (2014) 25(1) *Public Law Review* 3; Andrew Lynch, 'The Impact of Post-Enactment Review on Counter-Terrorism Laws: Four Jurisdictions Compared' (2012) 18(1) *Journal of Legislative Studies* 63.
[125] *Anti-Terrorism Act (No 2) 2005* (Cth).
[126] *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) ('*Foreign Fighters Act*').
[127] The *National Security Legislation Amendment Act (No 1) 2014* (Cth) enables ASIO to engage in 'special intelligence operations' and, with exceptions, immunises participants in those operations from criminal and civil liability.
[128] The *Foreign Fighters Act* includes new and expanded foreign incursions and recruitment offences that apply in relation to both foreign countries and to parts of countries declared by the Foreign Affairs Minister.
[129] The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) sets out the circumstances in which a dual citizen can cease to become an Australian citizen. These include

A third reason important for my selection of bills is quantitative. As Lynch and others have demonstrated, national security laws, are often subjected to limited parliamentary scrutiny — they are legislated 'with urgency'.[130] In contrast, each of the Bills selected — but particularly the Dissolution Bills and the ASIO (Terrorism) Bills — were the subject of comparatively lengthy debate.[131] There is, therefore, a useful amount of parliamentary material available for analysis. The Dissolution Bill [No 1] was debated over 24 sitting days and the Dissolution Bill [No 2] over seven days. Dalla-Pozza calculates that the SLAT Bill and four related bills were debated in Parliament for 29 hours and 34 minutes.[132] Most of this debate related to the SLAT Bill. The ASIO (Terrorism) Bills occupied 50 hours and 52 minutes of chamber debating time.[133]

V METHODOLOGY

This section covers a number of aspects of my methodology. First, it explains my approach in general terms — that is, I am interested in exploring whether Gross's assumptions of constitutionality and separation account for the factors that drove the legislative process when Parliament deliberated on the Dissolution Bills, the SLAT Bill and the ASIO (Terrorism) Bills. Second, it describes how I have fleshed out Gross's assumption of constitutionality. Third, it considers whether there is a reasonable 'fit' between Gross's hypothesis and the work of the Australian Parliament.

To recap briefly, Gross argues that we accept exceptional laws because of assumptions we make about them. We assume, and are reassured, says Gross,

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following conviction of certain criminal offences, by engaging in terrorist-related conduct and by acting in the service of a declared terrorist organisation.

[130] Lynch, above n 95.

[131] A lengthy debate is considered by the Senate to be a debate lasting for more than five hours. <http://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/legislation/lengthybills>.

[132] Dominique Dalla-Pozza, *The Australian Approach to Enacting Counter-Terrorism Laws* (PhD Thesis, University of New South Wales, 2010) 142. Of this total, there were 24 hours and 31 minutes of Senate debate:
<http://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/legislation/lengthybills/40thparliament>.

[133] Ibid. Of this total, 34 hours and 29 minutes of debating time occurred in the Senate — <http://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/legislation/lengthybills/40thparliament>.

that 'constitutional norms and legal rules control governmental responses to emergencies and terrorist threats'.[134] One reason we take this view is to convince ourselves that, in fighting lawless terrorists, our democratic way of life is not sacrificed.[135] 'The assumption', says Gross, 'is … that the exception is governed and controlled by legal norms'.[136] Gross also maintains that the assumption of separation plays a role in our acceptance of intrusive governmental powers because it reassures us that once a crisis has ended, those powers will be terminated.[137] As stated above there are four such assumptions — temporality, spatiality, national security, foreign affairs and communal divisions.

The aim of my thesis is to determine whether the drivers of legislative process when Parliament debated the Dissolution Bills, SLAT Bill and ASIO (Terrorism) Bills can be understood using Gross's assumptions of constitutionality and separation. Not all Gross's assumptions are relevant to this thesis — spatiality and foreign affairs are the two cases in point. In addition, using Gross's assumption of constitutionality involves elaborating an idea that Gross himself does not develop.

I have approached the assumption of constitutionality in the following ways. The first is by looking at each of the Bills in terms of contemporaneous constitutional understandings as to constitutional power and constitutional limitations. So, for example, in the case of the Dissolution Bills, this involves sketching case law as it stood in 1950 and then analysing *Hansard* for evidence about parliament's approach to and understanding of constitutional issues.

When Gross talks about the assumption of constitutionality, he refers variously to 'constitutional norms and legal rules'[138] and to 'legal norms'.[139] He does not explain what he means by these terms. I have taken these expressions to include the rule of law in its formal and procedural senses — incorporating values such as clarity in statutory language, generality, publicity, prospectivity and fair

[134] Gross and Ní Aoláin, above n 2, 86.
[135] Gross, above n 38, 1043.
[136] Ibid.
[137] Ibid 1069–70.
[138] Gross and Ní Aoláin, above n 2, 86.
[139] Gross, above n 38, 1043.

process.[140] In addition, I have included discussion of particular legal norms that are relevant to individual pieces of legislation — in the case of the ASIO (Terrorism) Bills these were the right to a lawyer, the right to silence and right of children to special protections. In Chapters Three and Four, I include these aspects of the rule of law and these particular legal norms under the assumption of constitutionality.

The application of Gross's work to the work of the Australian Parliament and to the Dissolution Bills and Australia's post-9/11 laws raises a number of issues that relate to 'fit'. The first is the 'fit' between those laws and Gross's model of legislative 'Accommodation' to which his assumptions of constitutionality and separation apply. Gross would likely regard the Dissolution Bills, the SLAT Bill and the ASIO (Terrorism) Bills as 'Special Emergency Legislation' pertaining to 'potential future exigencies'.[141] They created new emergency legal rules. They banned the Communist Party and enabled other organisations as well as individuals to be declared. They provided for proscription and widely defined terrorism and terrorist organisation offences. They provided for incommunicado detention and enabled ASIO to coercively interrogate nonsuspects, including children.

The second is the 'fit' between the Bills and Gross's concerns with violent crises and emergencies — terms defined in *Law in Times of Crisis* as including 'wars and international armed conflict, rebellions, and terrorist attacks'.[142] The threat of communism and the threat of terrorism are, arguably, separate issues. Gross and Ní Aoláin themselves ask whether terrorism is a 'fundamentally distinct phenomenon that cannot be captured by the emergency framework'.[143] However, they suggest that, traditionally, state responses 'to crisis generally and terrorism in particular' generally conform to their Accommodation model.[144]

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[140] David Clark, 'The Many Meanings of the Rule of Law' in Kanishka Jayasuriya (ed), *Law, Capitalism and Power in Asia. The Rule of Law and Legal Institutions* (Taylor & Francis e-Library, 2006) 28.
[141] Gross and Ní Aoláin, above n 2, 67. 'Special Emergency Legislation' includes both standalone legislation and legislation that retains its special emergency features while being incorporated into ordinary legislation. That said, the distinctions between 'Emergency/Ordinary' and 'Special Emergency Legislation' are not always clear.
[142] Ibid 4.
[143] Ibid 365.
[144] Ibid 372.

Moreover, they argue that United Nations Security Council Resolution 1373's requirements meant that 'states were being told implicitly that a threat existed of proportions outside the normal or even the "normal emergency"' even though this threat was non-specific.[145] In addition, Australia's involvement militarily and ideologically in a 'War on Terror', the idea of international terrorism and the generalised fear and suspicion that followed 9/11 suggest to me that Australia's post-9/11 laws can be regarded as a species of 'crisis' or 'emergency' law. Given that the Dissolution Bills were introduced as 'crisis' laws and in an atmosphere of domestic and global crisis, I consider that they can also be analysed in terms of Gross's framework.

The third issue is the 'fit' between Gross's ideas and the Australian political system. Gross's own view is that his work and his conclusions are generalisable to 'constitutional democratic regimes' both pre- and post-9/11.[146] I have proceeded on that basis.

The fourth issue concerns Gross's idea of the 'we' who accept exceptional laws. Gross does not expand on this concept though doubtlessly it includes 'we, the people'. However, he may also be contemplating the work of lawmakers when he comments that 'fashioning legal tools to respond to emergencies on the belief that the assumption of separation will serve as a firewall protecting human rights, civil liberties, and the legal system as a whole may be misguided'.[147]

I have taken an expansive view of Gross's 'we' and applied his assumptions to the work of federal politicians. Much of my analysis focuses on the response of non-government politicians to extraordinary laws — in each of the Parliaments in question, the Government lacked a majority in the Senate, so the opinions of non-government politicians were crucial. However, Australian ministers sit in Parliament so their views are included as well in my analyses.

Gross's assumptions potentially provide useful tests for analysing how Parliament has responded to a number of 'extraordinary' bills. They also have

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[145] Ibid 403. Gross and Ní Aoláin go on to suggest that UNSC 1373 mandates responses that go 'beyond the usual emergency responses' (401) but it is not necessary to address this claim for the purposes of my thesis.
[146] Gross, above n 38, 1027.
[147] Gross and Ní Aoláin, above n 2, 13.

the potential to illuminate lawmaking more generally. For example, exploring the idea that there is an assumption about the special nature of national security may also shed light on the nature of relations between the executive and legislature. As Neal asks, is it the case that the legislature is supine, simply dominated by the executive, or are relations more complex than this?[148] Further, Gross's idea that an assumption of constitutionality operates has the potential to tease out parliamentarians' roles as legal actors — how, if at all, do Australia's federal politicians understand the constitutional and legal frameworks in which they operate and how do these factors affect their work as legislators?

As indicated earlier, I have used *Hansard* and parliamentary committee reports as my primary source material to test Gross's assumptions of constitutionality and separation. To recap, my thesis proceeds in the following way. Chapter Three deals with the two Dissolution Bills. Chapter Four addresses some of the most contentious post-9/11 national security bills — the SLAT Bill and two ASIO (Terrorism) Bills. Each chapter deals first with background material — describing the wider political context in which each Bill was introduced, parliamentary atmospherics and the controversial features of the legislation. Setting the scene in these ways is intended to establish the exceptional credentials of each Bill and the surrounding circumstances of troubled times. Each chapter then sketches contemporary and relevant constitutional and legal norms for each Bill. This material is used to test Gross's assumption of constitutionality against Parliament's consideration of each Bill. In addition, three aspects of Gross's assumption of separation — temporality, national security and communal divisions — are applied to parliamentary debate. Finally, in Chapters Three and Four there is a concluding section that assesses the usefulness of Gross's assumptions in understanding the factors that drove the legislative process.

Chapter Five draws together the strands of the previous chapters, assesses the usefulness of Gross's assumptions of constitutionality and separation in understanding Parliament's responses to the selected Bills and identifies factors that were influential.

[148] Neal, above n 108, 262.

VI Concluding Comments

In briefly sketching a number of important contributions to the subject of law and crisis, this chapter has noted the concerns that many scholars have about the use of emergency powers. These include the likelihood of entrenchment, the possibility of seepage into 'ordinary laws', and the potential for a ratchet effect to operate when the next crisis threatens.

This chapter has also paid particular attention to the work of legal scholar, Oren Gross and to his assumptions of constitutionality and separation. Because Gross's assumption of constitutionality is not well-developed, I have explained how I intend to interpret and apply it to the work of the Australian Parliament. This endeavour means taking seriously the work of parliament as legal actor. The chapter has also, therefore, explained why we should do so. In particular, it has noted the evolving views of legal scholars to this issue, the legal resources available to Parliament and the presence of lawyers, some of them noted constitutional scholars, among the ranks of politicians.

In addition, Chapter Two has explained why I have chosen the Dissolution Bills, SLAT Bill and ASIO (Terrorism) Bills for study. It has demonstrated why Gross's theories of law and crisis are relevant to those Bills and the work of the Australian Parliament. And it has argued that the assumptions of constitutionality and separation can be applied to the practice of lawmaking.

Chapters Three and Four follow. They employ legal history and doctrinal analysis to determine the usefulness of Gross's assumptions of constitutionality and separation in explaining Parliament's response to the Dissolution Bills, the SLAT Bill and the ASIO (Terrorism) Bills.

CHAPTER THREE

THE COMMUNIST PARTY DISSOLUTION BILLS

I INTRODUCTION

This chapter focuses on Parliament as lawmaker and its consideration of the Communist Party Dissolution Bill 1950 ('Dissolution Bill [No 1]') and the Communist Party Dissolution Bill 1950 [No 2] (Dissolution Bill [No 2]').[1] It analyses *Hansard* in order to determine whether Gross's assumptions of constitutionality and separation are adequate descriptors of the legislative process in which Parliament was engaged when it considered the Dissolution Bills.

As noted in earlier chapters, Gross is concerned with the making of extraordinary laws in times of crisis. Chapter 3 begins, therefore, by locating the Dissolution Bills within this framework. First, it describes the wider political context in which the Bills were introduced — the Cold War and anti-communism. Understanding this background is important in understanding the Dissolution Bills and Parliament's reaction to them. Second, it deals with parliamentary atmospherics, noting in particular politicians' own descriptions of the proposed legislation. Third, it summarises the Dissolution Bills, highlights their contentious features and amendments incorporated during debate. It also briefly charts their course through Parliament. This material demonstrates that the Bills were introduced in an atmosphere of crisis, were generally regarded by politicians as extraordinary laws and were exceptional in terms of content and process.

Chapter 3 then addresses Gross's assumptions. The assumption of constitutionality is the idea that we believe government responses to emergencies are bounded by constitutional and legal norms. In examining the work of Parliament as legislator within Gross's framework, my approach is that the assumption of constitutionality cannot perform a useful function without some understanding of contemporaneous and relevant constitutional and legal norms. So, before turning to an analysis of *Hansard*, Chapter 3 sets the scene by

[1] I refer to the 'Dissolution Bills' when it is unnecessary to distinguish between them.

considering the following issues: constitutional power, underlying constitutional principles and the rule of law.

I then analyse parliamentary debates on the Dissolution Bills in order to determine whether and how they reflect the assumption of constitutionality and three subsets of the assumption of separation — temporality, national security and communal separation.[2] The Dissolution Bills are considered together in this analysis because no additional amendments were made to the Dissolution Bill [No 2] and the respective positions of the Government and Labor remained unchanged. I include discussion on amendments made to the Dissolution Bill [No 1] where it is useful for the purposes of this thesis.

My concluding section focuses on two questions. First, the usefulness of Gross's framework in explaining Parliament's engagement with the Dissolution Bills. Second, whether my analysis of *Hansard* reveals other insights into the making of exceptional laws.

II CONTEXT

In order to better understand the context in which the Dissolution Bills were introduced and debated, this section sketches some important features of the post-World War II international and domestic political climate.

First, it is important to note the international scene — the early Cold War and its attendant seismic geopolitical shifts. Following hard on the heels of World War II came the collapse of the entente that had existed between the West and the Soviet Union. On 5 March 1946, British Prime Minister Winston Churchill gave an address in which he asserted that an 'iron curtain' had descended over Central and Eastern Europe and that the situation in the Far East and in Manchuria was troubling. He added, 'Nobody knows what Soviet Russia and its Communist international organization intends to do in the immediate future, or what are the limits, if any, to their proselytizing tendencies'.[3]

[2] The assumption of spatiality and the assumption relating to foreign affairs are not relevant and are not included in this discussion.
[3] <http://www.historyguide.org/europe/churchill.html>.

By 1947, in a speech clearly directed at the Soviet Union, US President Harry S Truman had signalled that the United States would not retreat into isolationism but would instead 'support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures'.[4] Concerns such as these were fuelled by Soviet expansion into central and eastern Europe, by the Berlin Blockade and, in 1949, by the revelation that the Soviets possessed nuclear weapons.[5] In addition, post-war independence movements and armed struggles in the colonies of the Great Powers began — creating new sites of contest and anxiety — and in 1949 there was a communist revolution in China.

Second, is the domestic context. The Australian public was not immune from anxieties about communism. Opinion polling in 1948 found that 67% of respondents believed a war would occur within 10 years and by 1950, 35% of respondents predicted an outbreak of war between the US and USSR within five years.[6]

Also important was the place of anti-communism in Australian politics. The relationship between the Communist Party and the Labor Party was one of long-standing antagonism. The Communist Party had long been a rival for trade union loyalties and dominance and a disruptive political and industrial force when Labor was in power federally. In the immediate post-war period, this relationship worsened.

In 1948, at its 18th Triennial Conference, Labor had reaffirmed its historical repudiation of communist methods and principles and pledged an 'increasing campaign directed at destroying the influence of the Communist party'.[7] In 1948 and 1949, likely to demonstrate its anti-communist credentials and to respond to pressure from the United States and United Kingdom, Labor's acting Attorney-

[4] President Harry S Truman's Address Before a Joint Session of Congress, 12 March 1947 <http://avalon.law.yale.edu/20th_century/trudoc.asp>.
[5] The USSR successfully conducted a nuclear weapons test in 1949.
[6] These data are from polls conducted in 1949 and 1950. Murray Goot, 'Red, White and Brown: Australian Attitudes to the World since the Thirties' (1970) 24(2) *Australian Outlook* 188, 197.
[7] Quoted by Senator Richard Nash (ALP) in Commonwealth, *Parliamentary Debates*, Senate, 18 October 1950, 944.

General Nicholas McKenna approved the sedition prosecutions of three Communist Party officials.[8]

There were also concerns that a Soviet espionage ring was operating in Australia. Pressure from Australia's major allies had led Prime Minister Chifley to establish an Australian intelligence organisation in 1949.[9] While in government, Labor also removed suspected communists and communist sympathisers from, and blocked their appointment to, the Commonwealth public service and agencies such as the Council for Scientific and Industrial Research.[10]

Australian communists had also featured in a wave of post-war political and industrial campaigns. The later included union disputes in key industries largely designed to improve wages and conditions in the face of the Chifley Government's post-war persistence with wage restraints and centralised wage fixing.[11] The most serious of these, led by the Miners Federation and its communist leader, Idris Williams, spread from the NSW coal fields in the severe winter of 1949 and, due to a lack of coal reserves, resulted in the closure of factories and severe rationing of electricity, domestic gas supplies and transport services. Unemployment peaked at 630,000.[12]

The view of at least some in Government was that the strike was a Communist Party attack on the conciliation and arbitration system and the Labor Government.[13] Emergency legislation, designed to starve striking unions of

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[8] Laurence W Maher, 'The Use and Abuse of Sedition' (1992) 14(3) *Sydney Law Review* 287, 305. Maher demonstrates that, at least in the case of Gilbert Burns, the decision was contrary to the Government's own legal advice (300). The other officials were Lance Sharkey and Ken Healy. See also Laurence W Maher, 'Downunder McCarthyism: The Struggle against Australian Communism 1945–1960. Part 1' (1998) 27 *Anglo-American Law Review* 341.

[9] Background to ASIO's establishment is chronicled in Laurence W Maher, 'The Lapstone Experiment and the Beginnings of ASIO' (1993) 64 *Labour History* 103 and Frank Cain, *The Australian Security Intelligence Organization. An Unofficial History* (Frank Cass & Co Ltd, 1994).

[10] Maher, above n 8.

[11] David Lowe, *Menzies and the 'Great World Struggle'. Australia's Cold War 1948–1954* (UNSW Press, 1999); James Waghorne and Stuart Macintyre, *Liberty. A History of Civil Liberties in Australia* (UNSW Press, 2011). In the period 1945–47, some 5.5 million working days were lost to industrial action. See also Geoffrey Bolton, *The Oxford History of Australia. Volume 5 1942–1995. The Middle Way,* The Oxford History of Australia (Melbourne University Press, first published 1990, 2nd ed, 1996).

[12] David Lee, 'The 1949 Federal Election: A Reinterpretation' (1994) 29(3) *Australian Journal of Political Science* 501.

[13] Commonwealth, *Parliamentary Debates*, House of Representatives, 29 June 1949, 1681–2 (Tom Burke, ALP). See also Phillip Deery, 'Chifley, the Army and the 1949 Coal Strike' (1995) 68 *Labour History* 80.

funds, was enacted.[14] Marx House, the Communist Party's headquarters, was raided in July 1949 to determine whether the Party was breaching the *Coal Strike Act*.[15] The armed forces were called out to break the strike and work in the mines, union leaders were imprisoned, and union funds were frozen.[16] These actions, suggests Chifley's biographer, David Day, may have lent substance to claims that the Communist Party was a real threat to Australian democracy.[17]

In addition, anti-communism featured prominently in conservative politics. As Prime Minister, Robert Menzies had banned the Communist Party but in the post-war period had initially been against its proscription. Internal pressure within the Coalition parties combined with international developments may have changed his mind.[18] And the political advantages of such a course of action — in winning an election, in maintaining power, in dividing Labor, and perhaps in provoking a double dissolution election — cannot be discounted.

In early 1949, as federal Opposition Leader Menzies had argued that Australian communists' alignment with and subservience to Moscow made them a threat to national security.[19] This theme was carried into the 1949 federal election campaign — a 'Red-scare election' that, as Cain and Farrell point out, had typified conservative politics in Australia since the mid-1920s.[20] He spoke against '[s]ocialism in our time' — highlighting the Chifley Government's abortive attempts to nationalise the banks and introduce 'nationalised' medicine. He linked the ALP to the 'teachings of Karl Marx' and dangerously centralised

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[14] The *National Emergency (Coal Strike) Act 1949* (Cth) ('*Coal Strike Act*') had retrospective effect, contained reverse onus offences and included a sunset clause.
[15] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 September 1949, 15 (HV Evatt, Deputy Opposition Leader, ALP). The raid, by the Commonwealth Investigation Service and state police was authorised by Evatt. Reportedly, it yielded 32 bundles of books, records and documents including membership lists. 'Raid by Security Police on Communist Headquarters', *The Canberra Times,* 9 July 1948, 1.
[16] Roger Douglas, 'Cold War Justice? Judicial Responses to Communists and Communism 1945–1955' (2007) 29(1) *Sydney Law Review* 43.
[17] David Day, *Chifley* (Harper Collins Publishers, 2001) 498.
[18] Sam Ricketson, 'Liberal Laws in a Repressive Age: Communism and the Law 1920–1950' (1976) 3 *Monash University Law Review* 101; Lachlan Clohesy, 'A House Committee on Un-Australian Activities? An Alternative to the Dissolution Act' (2013) 44(1) *Australian Historical Studies* 23.
[19] Frank Cain and Frank Farrell, 'Menzies' War on the Communist Party 1949–1951' in Ann Curthoys and John Merritt (eds), *Australia's First Cold War 1945–1953* (George Allen & Unwin, 1984) vol 1, 109–110.
[20] Ibid.

government.[21] And he promised that, if he was elected, the Communist Party and successor organisations would be dissolved and their property forfeited. The Commonwealth's sedition and subversion offences would be reviewed and reformed. Additionally, Communist Party members, together with anyone convicted of sedition or subversion, would be ineligible for Commonwealth employment or for office in a registered trade union.[22]

On 10 December 1949, the Labor Government of Ben Chifley was defeated by a Liberal-Country Party coalition led by Robert Menzies. The Coalition secured a commanding majority in the House of Representatives. However, Menzies' proposed anti-communist legislation also needed to pass the Senate, in which the ALP held a majority of seats.[23]

Before concluding this section, it is important to note that despite anti-communist hysteria, the Communist Party did not pose a threat to Australia's liberal democratic institutions. The party's membership was in steep decline — from about 20,000 in 1940 to an estimated 13,000 at the time of the 1950 Lowe Royal Commission. Its vote in the 1949 federal election constituted a mere 1.8 per cent of total ballots cast for the House of Representatives.[24]

In addition, the Lowe Royal Commission into the Communist Party, set up with great fanfare in the wake of sensational allegations made by former party member Cecil Sharpley, had produced less than sensational findings in 1950.[25]

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[21] Robert Menzies, '*Joint Opposition Policy 1949, Policy Speech of the Leader of the Opposition (Rt Hon RG Menzies, Delivered at Canterbury, Victoria, on November 10, 1949, Together with Supplementary Statements*' (1949) <http://electionspeeches.moadoph.gov.au/speeches/1949-robert-menzies>.

[22] Ibid.

[23] The 1949 federal election returned a House of Representatives consisting of 55 Liberal Party members, 19 Country Party members, 48 ALP members and 1 'other'. During debates on the Dissolution Bill [No 1], the Senate's composition was 33 ALP, 2 Liberal Party 2, 1 Country Party. The composition of the Senate changed on 1 July 1950, when new Senators took their places and new electoral arrangements took effect. During debate on the Dissolution Bill [No 2], therefore, the Senate's composition was 34 ALP, 21 Liberal Party, and 5 Country Party. See Stephen Barber and Sue Johnson, 'Federal Election Results 1901–2014', (Research Paper Series 2014–15, Parliamentary Library, Parliament of Australia, 2014) 34, 137.

[24] 87,958 votes were cast for Communist Party candidates in the 1949 federal election — see Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1996 (Robert Menzies, Prime Minister, Liberal). The total number of votes cast for the House of Representatives in that election was 4,714,360 — see ibid 34.

[25] Sir Charles Lowe, *Report of the Royal Commission Inquiring into the Origins, Aims, Objects and Funds of the Communist Party in Victoria and other Related Matters* (Government Printer, 1950). Sharpley had alleged that the Communist Party had engaged in practices such as rigging union

Commissioner Lowe identified a number of communist leaders in militant unions but found that, in general, their industrial campaigns were designed to improve wages and conditions. Lowe also concluded that communists held varying views about how a revolution might be achieved and whether or not it was imminent.

In summary, in 1950 while the domestic threat from communism was negligible, there were global and domestic anxieties about the Soviet Union, Soviet expansionism, and communism in Asia. All three major political parties in Australia were antagonistic to communism and the Australian Communist Party. In addition, Menzies' proposal to ban the Communist Party arguably fanned anti-communist sentiment, public anxieties and contributed to a sense of crisis.

Having set the wider international and domestic political scene, sections III–V examine parliamentary atmospherics and then the Dissolution Bills themselves.

III PARLIAMENTARY ATMOSPHERICS

Gross's work is about exceptional law in times of crisis. This section of my thesis looks at parliamentary atmospherics. In what circumstances was the Dissolution Bill [No 1] introduced? How did Australia's politicians describe it? Answers to these questions contribute to an understanding of whether a sense of crisis existed in Parliament and whether the Dissolution Bills were understood by federal senators and MPs as extraordinary legislative proposals.

The scene in Canberra on 27 April 1950, the date the Dissolution Bill [No 1] was introduced into the House of Representatives, provides one insight. Parliament House was the scene of heightened security measures and what one Labor Party MP described as unprecedented 'ballyhoo … reminiscent of a Hollywood premiere'.[26] To underscore the menace of communism and guard against demonstrators, Parliament House was closed, except to those holding admission tickets. Extra police were on standby. Labor Senator John Armstrong reported

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elections, violence and intimidation. Lowe's report into the origins, aims and funding of communism in Victoria was presented the day after the Dissolution Bill [No 1] was introduced into Parliament and was fairly measured. It found little evidence of ballot rigging but did find evidence of violence and intimidation.

[26] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2531 (William Riordan, ALP). See also Commonwealth, *Parliamentary Debates*, 3 October 1950, 185 (Eddie Ward, ALP).

that '[e]very door and window of Parliament House, except the front door, was locked so that the Prime Minister's person would be safe. In order to get to our accustomed places, we had to enter by the front door, through a phalanx of security men and attendants.'[27]

A joint statement issued by the Speaker and the Senate President warned that anyone who defied or degraded the institution of Parliament would be dealt with by the full force of the law. This could include arrest and sentence by the Parliament without recourse to appeal. It was also reported that a Commonwealth ordinance forbidding assemblies of more than 20 persons within 100 yards of Parliament would be strictly enforced.[28]

Parliamentary descriptions of the legislation, its purpose and its geopolitical context are also noteworthy. Menzies referred to the proposed legislation in the most serious terms — as a defence measure against traitors. It was, he said, 'a law relating to the safety and defence of Australia … designed to deal with the King's enemies in this country'.[29] Also during his second reading speech, the Prime Minister, under parliamentary privilege, read a list of 53 communist trade union officials into *Hansard*. This was an illustration, he said, of the powerful positions communists held in vital industries and the damage they could do to the nation.[30]

In addition, supporters and opponents of the legislation agreed that it was an extraordinary measure. The Prime Minister linked the extraordinary nature of the Bill with the danger facing the nation. He said, 'we are considering in this extraordinary bill a very extraordinary disease — the disease of communism, of active, militant, revolutionary communism in Australia associated with a cold war now being waged against democracies by the headquarters of the

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[27] Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3333 (John Armstrong, ALP). See also Commonwealth, *Parliamentary Debates*, Senate, 19 October 1950, 1035 (Joseph Cooke, ALP).

[28] 'Anti-Red Bill To-Night. Extra Police in Canberra', *The Sydney Morning Herald*, 27 April 1950, 1; 'Canberra under Guard for Anti-Red Bill', *The Argus (Melbourne),* 27 April 1950, 1.

[29] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1995 (Robert Menzies, Prime Minister, Liberal).

[30] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1996–7. The list was widely publicised — see, for example, 'Menzies Names Red Leaders', *The Sydney Morning Herald,* 28 April 1950, 1; 'Bill is in "Self-Defence Against Fifth Column". Full Details of Mr Menzies' Speech', *The Argus (Melbourne),* 28 April 1950, 6. The list contained some errors, which were corrected by the Prime Minister — Commonwealth, *Parliamentary Debates*, 9 May 1950, 2242.

Communist movement of the world'.[31] He contended that the Government was 'dealing with an emergency'.[32] Veteran MP and former Prime Minister Billy Hughes called the Bill 'unprecedented … in its range and scope, and the circumstances in which it was introduced'.[33] Communists in Australia and in the Soviet Union, he maintained, were plotting 'the enslavement of mankind'.[34]

Similar assessments were made by Coalition Senators when the Dissolution Bill [No 1] was debated in the upper house. They referred to 'a state of emergency';[35] 'a grave national emergency';[36] and described the Bill as 'emergency legislation';[37] 'an extraordinary piece of legislation';[38] a drastic remedy for drastic times;[39] and an 'exceptional' measure 'for the security of the State against public enemies'.[40] Attorney-General Spicer said the Bill was 'special legislation to deal with a real emergency now facing the country'.[41] And Senator Ian Wood declared that communism was 'possibly the greatest peril with which [Australia] has ever been faced within its own borders'.[42]

The Bill's recitals were themselves inflammatory and contained sensational allegations — the Prime Minister referred to them as 'facts', as 'counts in this

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[31] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2749 (Robert Menzies). See also Commonwealth, *Parliamentary Debates,* House of Representatives, 9 May 1950, 2281 (Percy Spender, Minister for External Affairs, Liberal); Commonwealth, *Parliamentary Debates*, Senate, 31 May 1950, 3430 (John McCallum, Liberal).
[32] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950 (Robert Menzies); See also Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2645 (Frederick Osborne, Liberal); Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2667 (John McEwen, Minister for Commerce and Agriculture, Country Party); Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2677 (Athol Townley, Liberal); Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2761 (John Howse, Liberal); Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2875 (Alan Hulme, Liberal); Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2901, 2907 (Hugh Leslie, Country Party); Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2939 (Howard Beale, Minister for Supply, Liberal).
[33] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2534 (Billy Hughes, Liberal).
[34] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2536 (Billy Hughes, Liberal).
[35] Commonwealth, *Parliamentary Debates*, Senate, 6 June 1950, 3678 (Robert Wordsworth, Liberal).
[36] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3916 (James Guy, Liberal).
[37] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3920 (James Guy, Liberal).
[38] Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3808 (John Gorton, Liberal).
[39] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3920 (James Guy, Liberal).
[40] Commonwealth, *Parliamentary Debates*, Senate, 6 June 1950, 3699 (Ivy Wedgwood, Liberal).
[41] Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3332 (John Spicer, Attorney-General, Liberal).
[42] Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4199 (Ian Wood, Liberal).

indictment' and called as his witnesses Lenin, Stalin, the Communist Party and the ALP.[43] The Communist Party was said to engage in revolutionary activities designed to bring about the overthrow of constitutional government and its replacement by dictatorship through the use of violence, fraud, espionage, sabotage and militant action in industries vital to the security and defence of Australia.[44]

The primary targets of the legislation — the Communist Party and communists — were alleged to constitute an extraordinary threat on a number of fronts: to the defence of Australia against external enemies; to industries vital to defence preparations; through their control of the trade union movement; and as fifth columnists. It was contended that communists aimed to frustrate 'national recovery'; undermine 'economic stability'; and sabotage 'proper defence preparations'.[45] Their objectives were said to be 'to foster revolution in this country, and to slaughter those who oppose them'.[46]

The Opposition agreed that the Bill was, indeed, an extraordinary one. Its leader, Ben Chifley, summarised it in the following, often-quoted terms:

> Not only does the legislation … provide for the banning of communism and, in effect, curtail free expression of opinion in this country, but it also strikes at the very heart of justice. It opens the door to the liar, the perjurer and the pimp to make charges and damn reputations and to do so in secret without having either to substantiate or prove any charges they might make.[47]

He warned that similar legislation had either 'paved the road to totalitarian government or [sewn] the seeds of destruction for the political party that introduced it'.[48]

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[43] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1998 (Robert Menzies, Liberal).
[44] Communist Party Dissolution Bill 1950 (Cth), recitals 4–8.
[45] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1995 (Robert Menzies, Liberal).
[46] Commonwealth, *Parliamentary Debates*, Senate, 31 May 1950, 3423 (Malcolm Scott, Liberal).
[47] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2268 (Ben Chifley, Leader of the Opposition, ALP).
[48] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2268 (Ben Chifley, ALP).

For Labor's Deputy Leader, HV Evatt, the legislation's impact on individuals involved a profound departure from the rule of law and British justice.[49] In less measured terms, Eddie Ward MP described the Bill as 'the most odious, objectionable and dangerous legislation that has ever been introduced into any parliament in this country.'[50] The ALP's Deputy Senate Leader, Nicholas McKenna, agreed that the bill reposed 'extraordinary powers' in the executive government.[51] Although he supported the ban on the Communist Party and 'fellow travellers', David Watkins flagged his opposition to the bill's 'vicious and undemocratic clauses'.[52] Senator Stanley Amour called the bill 'one of the most far-reaching measures with which the Parliament has had to deal.'[53] Senator Cooke claimed that the legislation was 'without precedent in Australia'[54] and described the power to declare as 'extraordinary'.[55]

Labor politicians expressed concerns that the ALP itself, its members, other political parties and freely elected trade union officials could be declared.[56] One Labor parliamentarian prophesised that if the Bill was passed '[s]pies will stalk the land … Concentration camps will be established and our sons, our daughters, our brothers and our sisters will be thrown behind barbed wire into them'.[57] These views were not entirely fanciful.[58]

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[49] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2287, 2293.
[50] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2653–4.
[51] Commonwealth, *Parliamentary Debates*, Senate, 21 June 1950, 4591 (Nicholas McKenna, Deputy Opposition Senate Leader, ALP).
[52] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2501, 2502 (David Watkins, ALP).
[53] Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3811 (Stanley Amour, ALP).
[54] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3921 (Joseph Cooke, ALP).
[55] Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4096 (Joseph Cooke, ALP).
[56] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2656–7, (Eddie Ward, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2756 (Clyde Cameron, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2767 (Percy Clarey, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2785 (Edward Peters, ALP). Les Louis's research reveals that lists of union officials were examined to identify communists and in early 1951 the Government directed ASIO to prepare information about union officials that could be used for the purposes of declaring them under the *Dissolution Act*. See '"Operation Alien" and the Cold War in Australia 1950–1953' (1992) 62(May) *Labour History* 1.
[57] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 June 1950, 2942 (Daniel Curtin, ALP).
[58] The Menzies Government's 'Operation Alien' contained secret plans, in the event of a national emergency, to intern officials and key members of the Communist Party, certain 'enemy aliens' and, it appears, family members. See Les Louis, 'Pig Iron Bob Finds a Further Use for Scrap Iron:

Opposition speakers also alluded to the atmosphere of fear that had been created by the Government. Labor's Senate Leader, William Ashley, argued that the Government had deliberately attempted to 'create in the minds of the people a condition of fear and hysteria in which they might unthinkingly accept the theory that Australia was, in effect, at war or in danger of war.'[59] The Opposition also criticised the Bill as a political stunt and as 'theatricalism'.[60] In addition, many attempted to paint a picture of normality. Evatt pointed to the diplomatic and trade relations that existed between Australia and Moscow.[61] Others referred to the lack of heightened military preparations[62] or pointed out that the Communist Party's membership and influence were declining.[63]

However, in Labor the feeling that communism was, to some degree, a 'menace' was common.[64] Chifley remarked that 'Communists are seditious and subversive people'.[65] According to Gilbert Duthie MP, communism threatened 'the peace, sanity and security of this nation and other nations'.[66] Others described the Communist Party as 'a scourge',[67] 'part of an international conspiracy aimed at the free peoples of the world'[68] and a threat to Australia's trade unions.[69]

Barbed Wire for his Cold War Concentration Camps' (1993) 35 (January/June) *The Hummer* <http://asslh.org.au/hummer/no-35/pig-iron-bob/>.

[59] Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3822 (William Ashley, Opposition Senate Leader, ALP).

[60] Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3533 (Donald Cameron, ALP).

[61] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4559 (HV Evatt, ALP). Russia was an important market for Australian wool.

[62] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2917 (Reginald Pollard, ALP). For similar comments, including the suggestion that the Government had failed to address the issue of compulsory military service. See Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 2987 (William Bryson, ALP).

[63] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2289 (HV Evatt, ALP).

[64] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2483 (Alan Bird, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2501 (David Watkins, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2539 (Allan Fraser, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2678 (Standish Keon, ALP).

[65] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2913 (Ben Chifley, ALP). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2395 (Leslie Haylen, ALP).

[66] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2628 (Gilbert Duthie, ALP).

[67] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2499 (David Watkins, ALP).

[68] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2381 (Gordon Anderson, ALP).

Having described the international and domestic political context into which the Dissolution Bill [No 1] was introduced and documented the Government's claims of national emergency, the Opposition's response and descriptions of the Bill, I now turn to my own assessment of the Dissolution Bills' credentials as extraordinary laws.

IV COMMUNIST PARTY DISSOLUTION BILL 1950

A *Dissolution Bill [No 1] — A Summary*

As introduced in April 1950, the Dissolution Bill [No 1]'s important features were as follows. Its recitals enumerated the powers relied on to underpin the legislation's constitutional foundations, asserted that the Communist Party engaged in revolutionary and criminal activity and concluded that banning the party and taking action against individual communists was necessary for the security and defence of Australia and the execution and maintenance of the *Constitution* and Commonwealth laws.[70]

By legislative fiat, a political party — the Australian Communist Party — was to be declared an unlawful association and dissolved.[71] The Bill also enabled 'affiliated organisations'[72] to be banned. 'Affiliated organisations' included organisations with very tenuous connections to the Communist Party — for example, bodies whose policies were wholly or substantially influenced by communists who used them to advocate the principles of communism as expounded by Marx and Lenin.[73]

As Evatt pointed out in Parliament, the 'substantial influence' test was not necessarily a numerical one and could condemn an organisation and its members because of the influence of a minority with whom a majority of members disagreed.[74] By executive fiat, these affiliated organisations could be declared unlawful on the Governor-General's satisfaction that their continued

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[69] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2678 (Standish Keon, ALP).
[70] Dissolution Bill [No 1] recitals 1–9.
[71] Ibid cl 4.
[72] Ibid cl 5(1).
[73] Ibid cl 5(1)(d).
[74] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 3002.

existence was prejudicial to the Commonwealth's security and defence or the execution or maintenance of Commonwealth laws.[75]

Registered trade unions could not be banned. However, it was not true to say that industrial organisations were safe from declaration. Trades and labour councils were not registered bodies[76] nor was the Australian Council of Trade Unions. Additionally, it was certainly possible that, once deregistered, unions could be declared.[77]

Unlike the Communist Party, which had no statutory right to contest a declaration, other unlawful associations had 28 days to ask the High Court to set a declaration aside.[78] However, the right to contest a declaration was limited in three important ways. First, an application could only be made to the High Court; there was no statutory appeal path via state and territory courts.[79] Second, an applicant organisation could contest only the allegation it fell within the definition of 'affiliated organisation' — that is, the issue of communist connections, widely defined. It could not challenge, and the Commonwealth was not obliged to establish, the more serious issue of whether the body constituted a national security threat.[80] Third, the onus was on the applicant to satisfy the court that it was not an organisation with communist connections.[81] Clearly, this would be virtually impossible without some knowledge of the Commonwealth's case and, as Chifley remarked, opened the way for declarations to be based on anonymous and scurrilous allegations.[82] A declared body was dissolved 28 days after declaration unless it had made an application to the High Court. If the court

[75] Dissolution Bill [No 1] cl 5(2).
[76] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2879 (HV Evatt, ALP). Evatt considered that, in appropriate circumstances, cl 5(1)(d) could cover a trades and labour council.
[77] See *Commonwealth, Parliamentary Debates*, Senate, 17 October 1950, 813 (Nicholas McKenna, ALP). In 1950, an example of a deregistered union with a Communist Party official was the Building Workers' Industrial Union. See Commonwealth, *Parliamentary Debates*, Senate, 19 October 1950, 1084 (Donald Grant, ALP).
[78] Dissolution Bill [No 1] cl 5(3).
[79] Ibid cl 5(3).
[80] Ibid cl 5(3).
[81] Ibid cls 5(4)–(5).
[82] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2268.

found against it, the organisation was dissolved on the date of the court's decision.[83]

Clause 8 provided that the property of an unlawful association vested in a receiver. Any surplus remaining after its liabilities were met was to be forfeited to the Commonwealth.[84] Clause 17 allowed the receiver to direct that any disposition of property made by the association within one year of its dissolution was void, subject to protections for bona fide purchasers for value.

Beyond its impact on organisations, the Bill enabled the Governor-General to declare certain individuals who were deemed to be subversive. This potentially affected members and former members of the Communist Party, members and former members of 'unlawful associations' and persons who were or had been 'communists'.[85] Furthermore, the term 'communist' was widely and imprecisely defined as 'a person who supports or advocates the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin'.[86] Once again, there was a limited and largely worthless right to appeal to, and only to, the High Court with the onus on the applicant to prove that he or she was not a person to whom the section applied.[87]

Widely cast evidentiary provisions facilitated proof that a person was a member or officer of an unlawful association — for instance, if the person attended a meeting of, spoke publicly in support of or distributed literature for the organisation.[88] Similarly, where a person's name appeared on a Communist Party membership list obtained from the Commonwealth's raid on Marx House on 8 July 1949, this was evidence that the person had been a member of the party at the relevant time.[89] Although declarations of individuals were revocable, this could only occur on the initiative of the executive government.[90]

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[83] Dissolution Bill [No 1] cl 6.
[84] Ibid cl 14.
[85] Ibid cl 9(1). The potential for former members of declared organisations to be caught by the legislation occurred because of retrospective operation — from the 'specified date' ie 10 May 1950.
[86] Ibid cl 3 (definition of 'communist').
[87] Ibid cls 9(3)–(5).
[88] Ibid cl 22(1).
[89] Ibid cl 22(2).
[90] Ibid cl 9(6).

A number of serious consequences potentially attached to declared individuals, apart from the general public opprobrium attached to declaration itself. They were barred from employment by the Commonwealth and from service in the defence forces.[91] For those already so employed, they were immediately suspended and unless a successful application was made to the High Court, their position became vacant 28 days from the date of the declaration's gazettal.[92] Nor could declared individuals enter into contracts with the Commonwealth for the supply of services.[93] Further, declared individuals were prohibited from holding office in a trade union whose members worked in a declared industry.[94] These were industries deemed by the executive government to be vital to Australia's security and defence. They included, but were not limited to, the coal mining, iron and steel, transport, building and power industries. [95]

The Dissolution Bill [No 1] also contained derivative and status offences carrying harsh penalties — up to five years imprisonment. It was an offence to be an officer of an unlawful association, to carry or display anything indicating an association with such a body, to contribute or solicit anything 'to be used directly or indirectly for the benefit of the association'. These were imprecisely defined offences. It was also an offence to participate, in the 'direct or indirect interest' of an unlawful association, in any activity in which the association was or could have been engaged at the time it was declared.[96] These offences potentially criminalised political association and expression.

It was not an offence for officers or members of unlawful associations to participate in preparing a High Court application under cl 5.[97] However, there was no similar exemption for any Communist Party officials involved in preparing a legal challenge to the legislation.

Other features and some omissions are worth noting. The Bill operated retrospectively. It applied to 'affiliated' bodies and to certain individuals from 10 May 1948 — the last day of the most recent National Communist Party

[91] Ibid cls 10(1)–(2).
[92] Ibid cls 11(1)–(4).
[93] Ibid cl 13.
[94] Ibid cl 10(1)(c).
[95] Ibid cl 10(3).
[96] Ibid cl 7(1).
[97] Ibid cl 7(2).

Congress.[98] It did not include a sunset clause. No provision was made for periodic review of declarations or for revocation applications by organisations or individuals once they were out of time, irrespective of changed circumstances. In addition, declarations would be published in the Commonwealth *Gazette*, subjecting organisations and individuals to public opprobrium before the application period had expired.[99]

Also controversially, the Bill empowered an 'authorised person' to forcibly enter and search premises where any documents or property belonging to an unlawful association were suspected of being located and to seize such things.[100] This provision enabled the property of innocent third parties to be entered and searched without a warrant. 'Authorised persons' — who likely would have included ASIO officers — were not required to act on reasonable grounds. Mere suspicion was sufficient.[101]

B *The Fate of the Dissolution Bill [No 1]*

1 *Labor's Position*

The position of the Labor Party, which controlled the Senate, was of critical importance to the fate of the Dissolution Bills. However, the party was deeply divided. According to historian Robert Murray, Labor was split along the following lines. Its left and centre, including Chifley and Evatt, would have preferred to oppose the legislation. The right in caucus, the industrial right and the state parliamentary parties regarded the Bill as undesirable and unworkable but were unwilling to face a double dissolution election for the sake of the Communist Party. Those associated with the Movement supported the Bill.[102]

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[98] Ibid cl 3, definition of 'the specified date'.
[99] Ibid cls 5(2)–(3), 9(2)–(3).
[100] Ibid cl 20.
[101] Ibid cl 3(1). The Dissolution Bill [No 1] defined an 'authorised person' as a 'peace officer' and persons authorised by the Attorney-General. Peace officers were appointed under the *Peace Officers Act 1925* (Cth), which established a uniformed Commonwealth police force.
[102] Robert Murray, *The Split. Australian Labour in the Fifties* (Hale & Iremonger, 1984). The activists of the Catholic Social Studies Movement sought to infiltrate trade unions, wrest control of union affairs from communists and promote anti-communism — although they also had wider social and political agendas. See also Brian Costar and Paul Strangio, 'BA Santamaria. "A True Believer"?' (2005) 1(2) *History Australia* 256.

Overlaying individual preferences, factional or union allegiances and religious faith was the role of Federal Executive and the Federal Advisory Committee.[103] On 2 May 1950, following discussions between the party leadership and these bodies, a decision was made that the parliamentary party should support the Bill's second reading. This constituted in principle acceptance of the legislation. Additionally, it was determined that the ALP would confine its amendments to the onus of proof and warrantless searches. It would also propose an appeals pathway beginning in a state or territory Supreme Court and ending in the High Court. On 4 May, Labor's caucus agreed 34–27.[104] Opposition Leader, Ben Chifley, reportedly told the party that its amendments should be pressed 'to the finish'.[105]

2 *Progress through Parliament*

The Dissolution Bill [No 1] passed the House of Representatives for the first time on 23 May 1950 after 19 amendments had been made, some at the suggestion of the Opposition. It was introduced into the Senate on 24 May where the Government moved a further 16 amendments. Fourteen of these, including amendments originally proposed by the ALP, were accepted by the Senate.[106] A further 14 Labor amendments were made in the Senate, only one of which secured Government support.[107]

The Bill passed the upper house on 15 June 1950 and was returned to the House of Representatives on the same day. The Senate's amendments were considered on 20 June, when debate was guillotined and the disputed lower chamber amendments reinserted. On 21 June, the Senate insisted on its amendments. The Bill was returned to the Senate with that chamber's amendments removed on 22 June. At the same time, Prime Minister Menzies threatened its reintroduction in

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[103] The latter is described by Murray as 'an informal consulting body representing the Parliamentary Party, the "machine"' and the ACTU. Murray, above n 102, 80.
[104] Ibid.
[105] 'Labour will Move to Amend Red Bill', *The Argus* (Melbourne), 5 May 1950, 3.
[106] Commonwealth, *Parliamentary Debates*, Senate, 18 October 1950, 931 (William Aylett, ALP). Senator Aylett was referring to the Dissolution Bill [No 1].
[107] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4517 (HV Evatt, ALP).

accordance with section 57's double dissolution timetable.[108] The Senate again insisted on its amendments and returned the Bill to the House. On 23 June 1950, the Bill was laid aside[109] — an indication that the Government was willing to proceed along the double dissolution pathway provided for by the *Constitution*.

3 *The Amendments*

On 22 June 1950, when the Dissolution Bill [No 1] left the House of Representatives for the last time, it contained the following amendments.

One of the bases on which a person could be declared was narrowed by Government amendment. This removed membership of an 'unlawful association' as a criterion for declaration of an individual and substituted membership of the Communist Party.[110] However, persons covered by the wide definition of 'communist' could still be declared.

Government amendments to clauses 5 and 9, supported by Labor, provided that before the Executive Council advised the Governor-General to make a declaration, supporting materials would be considered by a high-level committee of five persons.[111]

The contentious onus of proof provisions in cls 5 and 9 had been through a number of iterations. Final Government amendments provided that an applicant must begin and give evidence — only then would the onus fall on the Commonwealth to establish that the applicant was a body or individual to whom

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[108] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 1950, 4798 (Robert Menzies, Liberal). Section 57 of the *Australian Constitution* deals with deadlocks between the houses of Parliament. It applies in the following circumstances. The House of Representatives passes a bill and the Senate rejects it, fails to pass it or passes it with amendments to which the House does not agree. Three months elapse. The bill is passed again by the House with or without the Senate's amendments. The Senate again rejects it, fails to pass it or passes it with amendments to which the House will not agree. The Governor-General can then dissolve both houses of parliament (a double dissolution).

If the Government is returned and is still unable to persuade the Senate to pass the bill, then a joint sitting of Parliament can be convened to consider the proposed legislation. At a joint sitting, the vote of an absolute majority of the combined chambers secures the passage of the bill.

Double dissolution elections are unusual. Normally, a federal election is held for the House of Representatives and half the Senate.

[109] House of Representatives, Parliament of Australia, *Votes and Proceedings,* No 48, 22–23 June 1950, 174.

[110] Dissolution Bill [No 1] new cl 9(1)(a).

[111] Dissolution Bill [No 1] new cl 5(3); new cl 9(3).

the relevant section applied. Government amendments also provided that a declaration constituted prima facie evidence of what they contained.[112]

A sunset clause had been inserted by the Government, supported by Labor, effective at the discretion of the Executive Government.[113] In addition, Labor amendments had ensured that a warrant was required for searches and seizures under new cl 22.

As a result of Government amendments, initially flagged by Labor, applications could be made to state and territory Supreme Courts, with final appeals to the High Court.[114] Labor amendments also ensured that the fault element of knowledge applied to the offences in cl 7. Further, a number of amendments, not opposed by Labor, had added to the offence provisions. For example, it became an offence knowingly to continue or pretend to continue any activity of a dissolved organisation.[115] As counsel for the Communist Party suggested in the *Communist Party Case*, this offence may have extended to participation in 'innocent' activities in which the Communist Party or other unlawful associations had been engaged. [116]

These amendments — particularly the tightening of criteria for the declaration of individuals and the insertion of a fault element into the offences — constituted improvements to the Bill but should not be overstated. For example, there was no requirement that the committee of five's advice be either considered or acted on by the Executive Council.[117] The likelihood of the committee making independent assessments was, arguably, remote. Its members were appointed by the Government and included the Director-General of Security — the person responsible for the initial assessment that a person or organisation should be declared. Amendments to the onus of proof arguably provided little comfort to or justice for applicants. The onus only shifted to the Commonwealth if an applicant first gave evidence, without any knowledge of the case against him or her. In

[112] Ibid new cls 5(5)–(6), 9(5)–(6).
[113] Ibid new cl 27.
[114] Ibid cl 3 (definition of 'the appropriate court'), new cls 5(4), 9(4), 23.
[115] Dissolution Bill [No 1] new cl 7(2).
[116] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 29 (EAH Laurie) (during argument); 39 (FW Paterson) (during argument).
[117] The committee consisted of the Solicitor-General, the Defence Department Secretary, the Director-General of Security and two appointees of the Governor-General (cls 5(3) and 9(3)).

addition, an applicant could not effectively exercise a right to silence and the Commonwealth could use cross-examination as a fishing expedition. The issue of subversion remained incontestable.

Further, deeply problematic features remained. The Communist Party was banned. Its property was forfeit without any appeal process. Mere membership of the Party or an affiliate was, absent any criminal conduct, a criminal offence. Other criminal sanctions potentially affected political speech and association. Because of the wide definition of 'unlawful association', these offences also potentially applied to associations and individuals who had no connection to communism.

V COMMUNIST PARTY DISSOLUTION BILL 1950 [NO 2]

In June 1950, North Korean forces invaded South Korea. In early July the United Nations Security Council authorised military intervention on the latter's behalf. By the end of July, Australia had agreed to commit navy and army contingents to the conflict. The Dissolution Bill [No 2] was introduced without the security measures and fanfare that had accompanied its predecessor. Nevertheless, 28 September 1950, the day of its introduction, was also the date on which Australian forces, under the UN's mandate, arrived in Korea.[118] The Bill was also debated at a time when Chinese intervention in the conflict was feared.[119] The Prime Minister described the menace of communism as far greater than it had been when the Dissolution Bill [No 1] was introduced and noted that 'Australians are fighting and dying in a war against aggressive communism overseas'.[120]

[118] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 78 (Robert Menzies, Liberal).
[119] Laurence W Maher, 'Downunder McCarthyism: The Struggle against Australian Communism 1945–1960. Part 2' (1998) 27 *Anglo-American Law Review* 438.
[120] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 87. In fact, the first deaths of Australian military personnel in Korea did not occur until 3 October 1950 — see Department of Veterans' Affairs (Cth), 'Australia's Involvement in the Korean War', <http://korean-war.commemoration.gov.au/cold-war-crisis-in-korea/timeline.php>.

For constitutional reasons,[121] the Dissolution Bill [No 2] reflected the Dissolution Bill [No 1] in the amended form in which it had left the House of Representatives for the final time in the early afternoon of 22 June 1950.

In early September 1950, a meeting of the ALP's Federal Executive split evenly on the question of whether it should change its position on the Bill,[122] effectively reaffirming its original position of insisting on its amendments.

On 28 September in the House of Representatives, the Bill was declared urgent and guillotined.[123] Labor again, unsuccessfully, proposed amendments. However, the Bill passed the lower chamber on 3 October 1950 without any further changes. It had its first reading in the Senate on 4 October. However, on 16 October, before the Senate's second reading debate began, Labor's Federal Executive met once again and, in an 8–4 vote,[124] issued a statement and gave a number of directions to the parliamentary party. It directed the party to pass the Bill, as reintroduced, in order to 'test the sincerity of the Menzies Government before the people, and to give the lie to its false and slanderous allegations against the Labour party'. It affirmed that the parliamentary party was justified in its criticisms of the Bill. It allowed parliamentarians the freedom to 'criticise the controversial clauses'. It pledged that Labor would insert its own amendments 'immediately upon its resumption of governmental office'.[125]

After a number of ALP Senators had attacked the Bill or particular clauses, but declined to vote against the legislation, it passed the Senate without any further changes on 19 October. It received Royal Assent on 20 October 1950 and commenced the same day.

Roger Douglas considers that Labor's view of the likely impact of the Dissolution Act was too pessimistic, that difficulties of proof would have attended the legislation, that declared persons and organisations were afforded a measure of

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[121] In broad terms, s 57 of the *Constitution* requires the reintroduced Bill to be the same Bill previously rejected twice by the Senate. It can include amendments that the Senate has made or agreed to.
[122] Murray, above n 102.
[123] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 78–9.
[124] George Winterton, 'The Communist Party Case' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 108, 124.
[125] Commonwealth, *Parliamentary Debates*, Senate, 17 October 1950, 811 (Nicholas McKenna, ALP).

protection via the application process, and that the legislation might well have languished on the statute books just as Part IIA of the Crimes Act had done before it.[126] However, while some of Labor's claims were, perhaps for political effect, exaggerated, the Dissolution Bills did seek to forbid and punish political speech and association and to displace freely elected trade union officials. They aimed to deny communists the benefits of party affiliation, organisation and financing. The application process available to declared associations and individuals was weighted in the Government's favour, and unavailable to the Communist Party. In addition, the legislation's potentially chilling and normalising effects cannot be discounted, had the High Court not invalidated it.

Further, and as important for the purposes of this thesis, until October 1950, Labor appears to have been prepared to risk internal division and a possible double dissolution election in its refusal to pass the Dissolution Bills, absent its own amendments. This position further indicates that Labor regarded the Bills as deeply troubling.

Section II concluded that politicians from all sides of Parliament characterised the Dissolution Bills as extraordinary. It showed that the Government introduced the Dissolution Bill [No 1] in a highly theatrical way, arguably for the purpose of underlining its claims that the nation faced an emergency. It also noted that, while many in Labor including its leadership regarded communism as a menace, there was scepticism, with some exceptions, about the Government's claims of a national emergency.

In sections III–V, I argued that the Dissolution Bill [No 1] could be appropriately characterised as extraordinary and that, despite some amendments, it retained that character. For the purpose of completeness, section IV described the geopolitical context in which the Dissolution Bill [No 2] was introduced and its eventual passage. Further indicators of the contentious nature of the Dissolution Bills were noted — the number of amendments made or proposed and Labor's

[126] Roger Douglas, 'A Smallish Blow for Liberty? The Significance of the Communist Party case' (2001) 27(2) *Monash University Law Review* 253. Some commentators also point out that during its wartime ban, communists had participated in elections as candidates. In 1940 in the federal election, candidates included Fred Paterson in Herbert (18.3% of the vote) and Ralph Gibson in Yarra (9.1%). In the NSW state election, candidates included Bob Gollan in Hunter (25%), Rupert Lockwood in Martin (14.9%) and Jack Hughes in Reid (10.6%). See Stuart Macintyre, *The Reds: The Communist Party in Australia from Origins to Illegality* (Allen & Unwin, 1998).

refusal, until October 1950, to pass the Bills despite the threat of a double dissolution election and the possibility of internal schism.

Section VI, which follows, considers the constitutional and rule of law landscape in which the Bills were introduced and debated before applying Gross's assumption of constitutionality to the Dissolution Bills.

VI Assumption of Constitutionality

A *Background*

Gross considers that one of the many flawed assumptions underlying traditional models of emergency powers is the assumption of constitutionality. This is the assumption that 'constitutional norms and legal rules control governmental responses to emergencies and terrorist threats'.[127]

Gross does not develop this assumption to any degree or consider how it might operate, except to suggest that it has not served as a 'real check on governmental powers during "times of crisis"'.[128] My approach is that any assessment of the assumption of constitutionality necessitates an understanding of the constitutional and legal landscape in which legislation was introduced. So before making an assessment of whether Parliament's response to the Dissolution Bills can be explained using Gross's framework, I consider three issues. The first is the Commonwealth's constitutional power. The second relates to the underlying constitutional principles of representative democracy and liberty. The third is the rule of law.

1 *Constitutional Power*

The powers of the Commonwealth Parliament are enumerated and limited under the polity's basic law — the *Australian Constitution*. Further, Commonwealth legislation is subject to judicial review by the High Court and can be invalidated

[127] Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis. Emergency Powers in Theory and Practice* (Cambridge University Press, 2006) 86.
[128] Oren Gross, 'Chaos and Rules. Should Responses to Violent Crises Always be Constitutional?' (2003) 112(5) *Yale Law Journal* 1011, 1023.

for transgressing constitutional limits.[129] The Dissolution Bills thus needed a secure constitutional foothold. This part of the thesis turns to potentially relevant case law that might have informed parliamentary debate. It does not, therefore, travel beyond 1950.

The Dissolution Bills' most likely constitutional foundations were the defence power (s 51(vi))[130] and its self-protective power.[131] I turn first to the defence power and then to the power of self-protection.

(a) Defence Power

Menzies' proposal to ban the Communist Party and affiliated organisations was not unprecedented.[132] During the Great War, the *Unlawful Associations Act 1916* (Cth) ('*Unlawful Associations Act*') had been passed by Parliament. It contained a preamble asserting that the Industrial Workers of the World ('IWW') had committed 'diverse crimes and offences' and that its proscription was necessary for the 'effective prosecution of the present war'.[133] It also empowered the Governor-General to outlaw organisations that advocated the endangering of

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[129] See, for example, *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488, 533–4 (Griffith CJ, Barton and O'Connor JJ) quoted in Matthew Stubbs, 'A Brief History of the Judicial Review of Legislation under the *Australian Constitution*' (2012) 40(2) *Federal Law Review* 227 248.

[130] Section 51(vi) of the *Constitution* gives the Commonwealth Parliament power to make laws for peace, order and good government with respect to 'the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth'.

[131] Now referred to as the 'nationhood power'. In 1950, High Court jurisprudence suggested, variously, that this power was either inherent or located in a combination of ss 51(xxxix) and 61 of the *Constitution*. Section 51(xxxix) of the *Constitution* gives the Commonwealth Parliament power to make laws for peace, order and good government with respect to 'matters incidental to the execution of any power vested by this Constitution' in the Parliament, Executive or judiciary. Section 61 vests the executive power of the Commonwealth in the Queen, exercisable by the Governor-General. It 'extends to the execution and maintenance' of the *Constitution* and 'of the laws of the Commonwealth'.

[132] For a history of federal proscription laws see Andrew Lynch, Nicola McGarrity and George Williams, 'Lessons from the History of Proscription of Terrorist and other Organisations by the Australian Parliament' (2009) 13(1) *Legal History* 25; Andrew Lynch, Nicola McGarrity and George Williams, 'The Proscription of Terrorist Organisations in Australia' (2009) 37(1) *Federal Law Review* 1. See also Roger Douglas, 'Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth *Crimes Act*' (2001) 22(2) *Adelaide Law Review* 259.

[133] The IWW was an activist, leftist, anti-war group — see Frank Cain, 'Australian Intelligence Organisations and the Law: A Brief History' (2004) 27(2) *UNSW Law Journal* 296.

human life or the destruction of property.[134] Derivative and status offences were created.[135] The property of banned organisations could be forfeited and their members were excluded from Commonwealth employment.[136]

The *Unlawful Associations Act's* proscription provisions were not subject to constitutional challenge. However, in *Pankhurst v Kiernan* two High Court judges made approving, if passing references, to them.[137] Barton J declared that the 'associations declared unlawful and the things made punishable by this Act are such as may easily tend … to the hampering or dislocation of the proper conduct of the defence of Australia'.[138] Isaacs J indicated that he regarded as valid the provisions relating to unlawful associations because their 'aims and objects [were] inimical to the national capacity for defence'.[139]

Other wartime decisions, then and later, in England[140] and in Australia,[141] had held that the Executive Government possessed a very wide discretion in national security matters, including the ability to indefinitely deprive a person of their liberty — 'a matter of the very highest concern to the law'[142] — on the basis of a ministerial opinion that the person was disaffected or disloyal. However, there were limits as to whether ministerial opinion could be conclusive as to constitutional facts. These had been canvassed in a peacetime decision — *Ex parte Walsh and Johnson; re Yates* ('*Walsh and Johnson*').[143] In that case, Chief

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[134] *Unlawful Associations Act 1916* (Cth) s 3(c). As with the *Communist Party Dissolution Act*, registered trade unions were exempt from declaration.
[135] For example, it was an offence to make or seek donations for an unlawful association — *Unlawful Associations Act* s 7A. Under the original *Unlawful Associations Act*, the membership offence also required a person to incite action intended to hinder the war effort (s 5). However, under amendments made in 1917 membership per se was an offence (s 3A). In addition, provisions were inserted to facilitate proof of membership (s 7F).
[136] *Unlawful Associations Act* ss 7E, 7D, respectively.
[137] *Pankhurst v Kiernan* (1917) 24 CLR 121 was an appeal by the anti-war activist Adela Pankhurst who had been convicted for encouraging injury to property (*Unlawful Associations Act* s 4). She contested the validity of s 4. The High Court upheld s 4 as a valid use of the defence and express incidental powers — 131 (Barton J), 133 (Isaacs J), 138 (Gavan Duffy J), 139 (Powers J), 139 (Rich J), 138 (Higgins J, dissenting).
[138] Ibid 130.
[139] Ibid 132.
[140] For example, *R v Halliday* (1917) AC 260; *Liversidge v Anderson* (1942) AC 206.
[141] For example, *Lloyd v Wallach* (1915) 20 CLR 299; *Farey v Burvett* (1916) 21 CLR 433.
[142] *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 136 (Latham CJ).
[143] *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36.

Justice Knox had concluded that 'Parliament has no power to define the ambit of any of [its] powers'.[144]

The defence power came under further, detailed judicial scrutiny during World War II. As Sugerman and Dignam point out, during that period of total war, the reach of the federal Government as it marshalled the nation's resources was particularly extensive, effectively producing unitary government in Australia and granting wide, discretionary powers to the executive.[145] Some of these wartime powers were challenged in the High Court. Constitutional scholar Geoffrey Sawer points out that there were 17 major World War II cases centred on the defence power, most of which were decided in the Commonwealth's favour.[146] They also reinforced or yielded a number of important principles.[147]

First, is the purposive nature of the power. In 1946, Sawer wrote that this approach to s 51(vi) had prevailed and that [t]he only proposition generally accepted by the Court is … not … whether the law is *actually* such as to further the purposes of defence, but only whether it *may* do so'.[148] Second, is the power's elasticity.[149] As Dixon J remarked in 1941, the 'existence and character of hostilities, or a threat of hostilities, against the Commonwealth are facts which will determine the operation of the power'.[150] Third, the constitutional facts on which the exercise and extent of the power depends are matters about which the court could take judicial notice, according a measure of deference to the executive and the legislature but not vacating the field to them.[151]

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[144] Ibid 67. For convenience and to avoid repetition, further details about *Walsh and Johnson* are provided in the section of this thesis that deals with parliamentary debate on the Dissolution Bills.
[145] B Sugerman and W J Dignam, 'The Defence Power and Total War' (1943) 17(7) *Australian Law Journal* 207, 210–211.
[146] Geoffrey Sawer, 'The Defence Power of the Commonwealth in Time of War' (1946) 20(8) *Australian Law Journal* 295.
[147] See George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams Australian Constitutional Law & Theory. Commentary & Materials* (Federation Press, 6th ed, 2014) 825–7 for a discussion of the principles elucidated by Dixon J in the World War II cases.
[148] Sawer, above n 146, 297. Italics in original. See, for example, *Farey* (1916) 21 CLR 433, 455 (Isaacs J) and *Stenhouse v Coleman* (1944) 69 CLR 457, 471 (Dixon J).
[149] *Stenhouse* (1944) 69 CLR 457 472 (Dixon J). See also Isaacs J who said the power was 'commensurate with the peril it is designed to encounter' — *Farey* (1916) 21 CLR 433, 455.
[150] *Andrews v Howell* (1941) 65 CLR 255, 278.
[151] *Stenhouse* (1944) 69 CLR 457, 470.

Nonetheless, Sawer also noted a lack of precision, predictability and 'satisfactory evidentiary process' in the wartime cases.[152] And despite the breadth of the executive's discretion and generally favourable High Court decisions, not all such regimes were safe. The 1943 case of *Adelaide Company of Jehovah's Witnesses v Commonwealth*[153] is of particular interest. It struck down a wartime measure — the *National Security (Subversive Associations) Regulations 1940* ('*Subversive Associations Regulations*') — that bore some similarities to the Dissolution Bills. Like the Dissolution Bills, the Regulations enabled bodies to be declared; affected property, expressive and associational rights, and contained defects as to process.[154]

The *Jehovah's Witnesses Case* involved a challenge to the *Subversive Association Regulations* by the Adelaide Company of Jehovah's Witnesses.[155] It had been proscribed and dissolved. In addition, an order had been made empowering the Commonwealth to take exclusive possession of the Company's meeting place, Kingdom Hall. The challenge was successful. Rich, Starke and Williams JJ agreed that lack of connection with defence placed particular Regulations, variously, beyond the defence power or its parent legislation (*National Security Act 1939* (Cth) ('*National Security Act*')). In addition, Williams concluded that the Regulations breached the separation of federal judicial power. [156]

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[152] Sawer, above n 146, 300. He repeated these observations in 1953, arguing that despite a plethora of cases relating to wartime and 'unwinding', it was 'impossible to lay down any precise definitions or limitations on the [defence] power, or to predict the course of decision with reasonable certainty'. Neither was he certain that peacetime decisions on the use of s 51(vi) would be characterised by predictability. Geoffrey Sawer, 'Defence Power of the Commonwealth in Time of Peace' (1953) 6(2) *Res Judicatae* 214, 214, 215.

[153] *Jehovah's Witnesses Case* (1943) 67 CLR 116.

[154] For a discussion of the lessons provided by the decision for the drafters of the Dissolution Bill [No 1] see Douglas, above n 126.

[155] In addition to challenging the validity of the regulations, the Adelaide Company of Jehovah's Witnesses also sought damages and an injunction restraining the Commonwealth from trespassing on its Kingdom Hall premises.

[156] Rich J, with little explanation, held that regs 3–6B were beyond s 51(vi) (150). Regulations 3–6B provided for the declaration and dissolution of organisations, the forfeiture of their property and the occupation by the Commonwealth of real property used by or belonging to the association. They also provided that anyone possessing property belonging to or used by a declared organisation could be required to surrender it. Regulation 6A is described below. Rich J agreed with Williams J about the wide ambit of the regulations.

Starke J held the regulations invalid in their entirety as beyond the *National Security Act*. He described them as having 'little, if any, real connection with defence' (154). His decision on validity encompassed all the offence provisions in the regulations. These were regs 7 and 8 (criminalising advocacy by way of the publication of unlawful doctrines or through the holding of

One of two pivotal questions in the case was whether the Court would hold that the defence power supported the impugned Regulations.[157] The Chief Justice and McTiernan J, upholding all but one of the Regulations, agreed that it was contrary to case law to question the Government's wartime opinion about national security measures.[158] These opinions may have given heart to the Menzies Government. Starke J, too, concluded that 'those responsible for the national security must be the best judges of what the national security requires'. Nevertheless, he held the Regulations entirely invalid, emphasising that the law could never transcend constitutional limits. [159]

Potentially relevant for the Dissolution Bills were a number of matters. The first was the declaration itself. For both Latham CJ, who generally upheld the Regulations, and for Starke J, who invalidated them, the declaration of an organisation 'standing alone' was not open to attack.[160] Rather, as Lynch, McGarrity and Williams point out, it was the Regulations' 'extreme consequences' that enabled earlier wartime cases to be distinguished. [161] Starke J categorised them as 'arbitrary, capricious and oppressive'.[162] Williams J called

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meetings) and reg 9 (a prohibition on financing the promotion of unlawful doctrines). Also of note and invalid was reg 11 (enabling the Minister to prohibit meetings at which unlawful doctrines would likely be advocated).

Williams J held that regs 3–8 lacked connection with defence and so were beyond s 51(vi) and the *National Security Act*. His Honour expressed no opinion about the validity of the remainder of the regulations (167). Williams J also found that regs 6(4) and 6B(1) & (2) breached the separation of federal judicial power on the ground that they enabled the police and the Attorney-General to determine controversies that could arise relating to property ownership (167). He found it unnecessary to elaborate on this view.

In dissent Latham CJ held only regulation 6A invalid (141). The Chief Justice concluded it breached s 51(vi) (141). Regulation 6A enabled the Commonwealth to occupy real property belonging to or used by or on behalf of the organisation so long as any of the organisation's property remained on the premises. His Honour held that this occupation was not contingent on any connection between the premises and their continued use or possible use by an unlawful body (141). The Chief Justice also read down part of the definition of 'unlawful doctrines'. McTiernan J agreed with the Chief Justice (157). The conclusions of their Honours about reg 6A also meant that the Attorney-General's direction relating to the occupation of Kingdom Hall by the Commonwealth had no effect.

[157] The plaintiffs had also argued that the regulations breached s 116 of the *Constitution*. Among other things, s 116 prohibits the Commonwealth from legislating to prohibit the free exercise of any religion. The s 116 argument failed to win support.

[158] *Jehovah's Witnesses Case* (1943) 67 CLR 116 135–136 (Latham CJ), 157 (McTiernan J).

[159] Ibid 152 (Starke J)

[160] Ibid (Starke J). See also Latham CJ (134).

[161] Lynch, McGarrity and Williams, above n 132, 37. See also Sawer, above n 146.

[162] *Jehovah's Witnesses Case* (1943) 67 CLR 116, 154.

them 'drastic'[163] — with impacts that 'exceed[ed] anything which could conceivably be required in order to aid, even incidentally, in the defence of the Commonwealth'.[164] Rich J agreed with Williams J's view of the sweeping and unrestrained nature of the Regulations.[165]

Declared bodies were dissolved.[166] Impacts on property rights were severe — amounting, in the words of Williams J, to a 'holocaust'.[167] The property of organisations and individuals, including that of anyone with interests in an organisation's property or holding property on its behalf such as creditors, shareholders and trustees, could be forfeit to the Commonwealth.[168] These effects were permanent despite the time-limited nature of the *National Security Act*.[169] In addition, reg 6A provided that premises occupied by a declared body immediately before its proscription, including premises owned by third parties, could be exclusively occupied by the Commonwealth so long as any property whatever that was suspected of belonging to the declared organisation was present.[170] This property might include, as Latham CJ pointed out, 'a table or chair'.[171] In other words, reg 6A did not depend on the continued or possible use of the premises by the declared organisation.[172]

Arguably important, in addition, were potentially extensive effects on rights of expression and association as well as the issue of process. The definition of 'unlawful doctrines' extended to any doctrine advocated by a declared organisation — definitional breadth that failed to secure the support of s 51(vi).[173] Further, this definition informed derivative offences contained in regs 7–9 that criminalised the advocacy and publication of 'unlawful doctrines',

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[163] Ibid 166.
[164] Ibid. See also 154 (Starke J).
[165] Ibid 150.
[166] Regulation 4. For the Chief Justice and McTiernan J, their conclusions as to validity also meant that the Jehovah's Witnesses were no longer competent plaintiffs ibid 147 (Latham CJ), 156 (McTiernan J).
[167] Ibid 167.
[168] *National Security (Subversive Associations) Regulations 1940* (Cth) regs 6 and 6B.
[169] *Jehovah's Witnesses Case* (1943) 67 CLR 116, 153 (Starke J); 166 (Williams J). Latham J dismissed objections relating to permanence (137–8). Section 19 of the *National Security Act* continued the Act during the war and 'for a period of six months thereafter, and no longer'.
[170] *Subversive Associations Regulations* reg 6A.
[171] *Jehovah's Witnesses Case* (1943) 67 CLR 116, 141.
[172] Ibid.
[173] *Subversive Associations Regulations* reg 2.

forbad meetings in which they were advocated and prohibited appeals for funds used to further them. Both Starke and Williams JJ noted these effects.[174] As Starke J remarked, the doctrines or principles of a declared body:

> whether they be religious, political, economic or social, innocent or injurious, are all prohibited whether they be or be not prejudicial to the defence of the Commonwealth or the efficient prosecution of the war.[175]

Last, were the issues of process and judicial power explored by Williams J. His Honour noted that the Regulations enabled the Governor-General to decide that a body was prejudicial to Commonwealth defence or the war effort 'on an almost indefinite number of wholly undefined grounds'.[176] He identified process deficits, adding that the body would not be told 'what the prejudicial conduct consists of … [or be given] an opportunity of rectifying it'.[177] In addition, he drew attention to regulations that, in his view, impermissibly gave police and the Attorney-General 'judicial powers not subject to appeal of determining the ownership of property'.[178]

One further point should be made about the decision in the *Jehovah's Witnesses Case*. This relates to the ambit of s 51(vi). Potentially relevant for the Dissolution Bills was Latham CJ's assertion that ss 61 and 51(vi) of the *Constitution* extended not only to defence against external aggression but to defence against 'internal attack'[179] — raising the question of whether, although not necessarily how, the defence power might be used against revolutionary or subversive associations in peacetime.

The reach of s 51(vi) was thus unclear. Additionally, if a constitutional challenge eventuated it was uncertain how much importance the High Court would attach to the recitals[180] or what public facts the court might notice judicially. It was unknown whether lessons learned from the *Jehovah's Witnesses Case,* some of

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[174] *Jehovah's Witnesses Case* (1943) 67 CLR 116, 153 (Starke J), 164–5 (Williams J).
[175] Ibid 153.
[176] Ibid 166 (Williams J).
[177] Ibid.
[178] Ibid 164.
[179] Ibid 132.
[180] Laurence W Maher, 'Dealing with the King's Enemies: The Drafting of the Communist Party Dissolution Bill 1950' (2013) 44(1) *Australian Historical Studies* 37.

which informed Menzies' legislation, might help protect the proposed Communist Party Dissolution Act from invalidity.[181]

The situation was further complicated. A new type of conflict was unfolding — a Cold War.[182] From June 1950, international tensions escalated and Australian troops had been deployed to Korea. These factors raised the question of whether the Government's opinion could found the necessary connection with a head of power in such a situation.

Moreover, constitutional impediments to banning the Communist Party outside a period of 'hot war' were not unrecognised. As Douglas has pointed out, John Latham when federal Attorney-General had acknowledged that Parliament could not recite itself into power and ban the Communist Party.[183] Introducing amendments to the *Crimes Act* in 1926 that were designed to respond to a High Court defeat,[184] Latham had remarked that it would not have been possible to retain the *Unlawful Associations Act* — which enabled organisations to be banned by the Executive Government or by legislative declaration — in peacetime.[185] Finally, there was the composition of the High Court. Two of the majority in the *Jehovah's Witnesses Case*[186] had retired. In addition, Justices Dixon and Webb, who had been members of the court, had not sat on that occasion. This made the outcome of a constitutional challenge even more difficult to predict.

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[181] For instance, under the Dissolution Bills, the property of a declared organisation could only be forfeit to the Commonwealth after the rights of creditors and others had been satisfied. In addition, there was a (limited) appeals process available for affiliated organisations and declared individuals. See Douglas, above n 126.

[182] It may have been for these reasons that, in addition to its own law officers, the Government took advice from senior counsel of the Melbourne and Sydney bars on drafting the Bill, on amendments and on a potential High Court challenge. Cain and Farrell, above n 19; Maher, above n 180.

[183] Douglas, above n 126, 277–8.

[184] *Walsh and Johnson* (1925) 37 CLR 36.

[185] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 January 1926, 467. The *Crimes Act 1926* (Cth) defined unlawful associations but it was a matter for a court to determine whether an association fell within the definition in the course of criminal proceedings under Part IIA. Attorney-General Latham's second reading speech contains a detailed analysis of *Walsh and Johnson*, the case that prompted the introduction of Part IIA, together with some discussion of the role of Parliament as constitutional actor and an acknowledgment that Parliament could not 'effectively … define any of its constitutional powers'. See Commonwealth, *Parliamentary Debates*, House of Representatives, 28 January 1926, 472, 469–75.

[186] Justices Rich and Starke had been replaced by Justices Fullagar and Kitto.

(b) The Power of Self-Protection

This section deals with the Commonwealth's self-protective power and considers whether case law might have yielded potentially useful principles for Australia's politicians as they considered the Dissolution Bills in 1950.

As early as 1915, Isaacs J had remarked that the Commonwealth has 'an inherent right of self-protection' involving 'except where expressly prohibited — all necessary powers to protect itself and punish those who would endeavour to obstruct it'.[187] A number of Commonwealth laws were, arguably, based on this power. Beginning in World War I, Commonwealth legislation had been enacted that provided for offences against the government including treason[188] and sedition.[189] Furthermore, in the 1920s Part IIA ('Protection of the Constitution and of Public and other Services') had been inserted into the *Crimes Act*.[190] Among other things, Part IIA (as amended in the 1930s) enabled revolutionary and seditious associations to be declared 'unlawful' by a court with the onus on an association's members to show cause why it should not be declared.[191] Part IIA also provided for a number of derivative offences in addition to other penalties.[192]

Case law on Part IIA was of little assistance, however, because its provisions had barely been used.[193] Only one prosecution had ever materialised and, on appeal to the High Court, the conviction had been overturned on the narrow issue of whether the averments and evidence in the case established the offence

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[187] *R v Kidman* (1915) 20 CLR 425, 444, 445.
[188] *Crimes Act 1914* (Cth) ('*Crimes Act*') s 24. Section 24 (as amended) was repealed by *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and inserted in an amended form into the *Criminal Code* (Cth) ('*Criminal Code*') (s 80.1).
[189] *Crimes Act* ss 24A–24E, as inserted by the *War Precautions Act Repeal Act 1920* (Cth) s 12. Sections 24A–24E (as amended) were repealed by the *Anti-Terrorism Act (No 2) 2005* (Cth) and inserted in an amended form into the *Criminal Code* (Cth) ss 80.2 and 80.3.
[190] *Crimes Act 1926* (Cth) s 17 as amended by *Crimes Act 1932* (Cth) ss 3–8.
[191] *Crimes Act* s 30AA. Unlawful associations were bodies with revolutionary or seditious aims or that advocated the destruction of Commonwealth property or property used in constitutional trade or commerce (s 30A). The unlawful associations provisions were repealed by the *National Security Legislation Amendment Act 2010* (Cth).
[192] For instance, under s 30FD, officers of declared organisations were disenfranchised for seven years unless otherwise constitutionally entitled to vote.
[193] In 1935, consideration had been given to using Part IIA to ban the Friends of the Soviet Union and the Communist Party but the cases were settled in 1937. See Douglas, above n 132.

charged.[194] Only Rich J (in dissent) and Evatt J had pondered the constitutionality of Part IIA. Justice Rich concluded, 'it [was] impossible to doubt' the Commonwealth's legislative power to ban revolutionary associations and criminalise those who assisted them.[195] However, Justice Evatt, without deciding, asked whether and how Part IIA could be supported, expressing some scepticism that s 51(xxxix),[196] s 61 or an inherent power could act as constitutional buttresses. [197] Referencing the Privy Council, his Honour noted that Commonwealth legislative power did not extend to '"general control over the liberty of the subject"'.[198] And he suggested that Part IIA might be 'largely invalid' if it sought 'to prevent all advocacy of Communism as against Capitalism' rather than seeking to prevent the dissemination of doctrines that advocated or encouraged 'the use of force with the immediate object of overturning the Government of the Commonwealth'.[199] In passing, he also remarked that the history of communism's attempts to gain control of working class political movements illustrated 'the extreme gradualness, of inevitability'.[200]

There had been no prosecutions under Commonwealth sedition laws until the late 1940s when three Communist Party officials — Gilbert Burns, Lance Sharkey and Kevin Healy — were charged under s 24D of the *Crimes Act*.[201] In *Burns v Ransley*, which upheld Burns' conviction, Chief Justice Latham built on remarks he had made in the *Jehovah's Witnesses Case*[202] and held that ss 61 and 51(xxxix) empowered the Commonwealth to protect itself against 'fifth column activities'.[203] In *R v Sharkey*, which upheld Sharkey's conviction, both Latham CJ

[194] *R v Hush; Ex parte Devanny* (1932) 48 CLR 487. Francis Devanny was the publisher of the Communist Party's newspaper. An edition of the paper contained an appeal for donations. It was alleged that, in publishing this appeal, Francis Devanny had solicited contributions for an unlawful association (the Communist Party) and thus breached s 30D of the *Crimes Act.* It was held that the offence was not established by the evidence and averments — 502 (Gavan Duffy CJ and Starke J), 508 (Dixon J), 515–16 (Evatt J), 521 (McTiernan J), 504–5 (Rich J, dissenting).
[195] Ibid 506 (Rich J).
[196] The *Constitution*'s express incidental power.
[197] *Devanny* (1932) 48 CLR 487, 510–12, 518–19.
[198] Ibid 518 quoting *Attorney-General (Cth) v Colonial Sugar Refining Co* [1914] AC 237, 255.
[199] Ibid.
[200] Ibid.
[201] Maher, above n 8. Healy was acquitted.
[202] *Jehovah's Witnesses Case* (1943) 67 CLR 116, 132.
[203] *Burns v Ransley* (1949) 79 CLR 101, 110 (Latham CJ).

and Dixon J recognised a self-protective power, though they differed as to its source.[204]

Last, it was uncertain whether the self-protective power would assist the Government. Decided cases on that power related to offence provisions and were thus subject to judicial oversight. And while the existence of a self-protective power may have been on reasonably firm footing by 1950, questions remained about its operation as well as its source. Was it elastic like the defence power? Did it enable the legislature or the executive conclusively to determine constitutional facts?[205]

2 *Representative Democracy and Liberty*

Having considered the question of constitutional power, I turn next to principles that underlie the *Australian Constitution*. First, I consider representative democracy.[206] In doing so, I am not suggesting that the content of representative democracy was (or is) clear or that, in 1950, any rights associated with it were either constitutionalised or absolute. Like the section dealing with constitutional power, this section does not include consideration of late-20th century and early 21st century Australian jurisprudence that, for example, sourced an implied freedom of political communication and a requirement for 'universal adult suffrage' in ss 7 and 24 of the *Constitution*.[207] Second, I consider the 'fundamental'[208] principle of liberty. The Dissolution Bills arguably affected political as well as personal, and legal liberty.

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[204] *R v Sharkey* (1949) 79 CLR 121. Latham CJ located it in s 51(xxxix) and the executive power (135). For Dixon J it was an inherent power (148).

[205] In the *Communist Party Case*, Fullagar J addressed these questions. He concluded that the self-protective power did expand during domestic emergencies but that it fundamentally differed from the defence power because it did not support legislation 'imposing legal consequences on a legislative or executive opinion which itself supplies the only link between the power and the legal consequences of the opinion' — *Communist Party Case* (1951) 83 CLR 1, 261.

[206] I use the terms 'representative democracy' and 'representative government' interchangeably, although the latter expression tends to appear more commonly in parliamentary debates.

[207] See George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 126–7, 242–3 referring to *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 in relation to the freedom of political communication and to *Roach v Electoral Commissioner* (2007) 233 CLR 162 and *Rowe v Electoral Commissioner* (2010) 243 CLR 1 in relation to universal adult suffrage.

[208] *Walsh and Johnson* (1925) 37 CLR 36, 79 (Isaacs J).

(a) Representative Democracy

Sections 7 and 24 of the *Australian Constitution* provide that senators for each state and members of the House of Representatives are, respectively, 'directly chosen by the people of the State' and 'directly chosen by the people of the Commonwealth'. The early constitutional commentators Quick and Garran regarded the processes that led to the establishment of the Commonwealth — the Constitutional Conventions and referenda of the late 1890s[209] — as 'democratic'.[210] They noted the decision to allow for popular election of the Senate rather than, for example, selection by state parliaments.[211] They referred to the House of Representatives as not only 'the national chamber' but as the 'democratic chamber', styling it 'the grand repository and embodiment of the liberal principles of government which pervade the entire constitutional fabric'.[212] They noted that natural born and naturalised subjects of the Queen had 'a dual right and power; viz to join in returning members to the House of Representatives in which centralizing … nationalizing, and progressive elements of the community are represented, and also to assist in returning members to the Senate'.[213]

Writing almost a decade after Quick and Garran, Harrison Moore concluded that the reference to 'the people' in the preamble to the *Constitution Act* as well as in covering cl 3 signalled the 'democratic origins of the Commonwealth' and 'the nature of its Constitution'.[214] Later again, in 1926, Isaacs J commented that the

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[209] With the exceptions of Western Australia whose delegates were appointed by parliament and Queensland, which did not participate, delegates to the Constitutional Conventions of 1897–8 were directly elected. There was also popular participation in two constitutional referenda, although not all colonies participated in either. Most women, Aborigines and people receiving charity did not have the vote although, as Anne Twomey points out, the franchise was 'extremely liberal for its time'. See Anne Twomey, 'The Constitution — 19th Century Colonial Document or a People's Constitution' in *The Constitution Papers. Parliamentary Research Service. Subject Collection No 7* (Australian Government Publishing Service, 1996) 1, 3.

[210] John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 290.

[211] Ibid 418 (referring to s 8 of the *Constitution*).

[212] Ibid 448.

[213] Ibid 448, 450.

[214] W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Sweet & Maxwell, 2nd ed, 1910) 67. The preamble states that 'the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania … have agreed to unite in one indissoluble Federal Commonwealth'. Covering cl 3 also refers to 'the people'. At the time of the *Constitution Act's* passage by the British Parliament, Western Australia had not voted to join the federation.

Constitution was 'for the advancement of representative government'.[215] Arguably, one way of securing representation was through a party system.[216] This was something that Harrison Moore himself acknowledged, although reluctantly, as a means of ensuring the election of talented politicians.[217]

Representative government arguably involves other broad participatory rights.[218] These were given early, if fleeting, expression by the High Court in the 1912 case of *R v Smithers; Ex parte Benson*. There, Barton J remarked that 'every free citizen' under the *Constitution* had 'the right of access to institutions, and of due participation in the activities of the nation'.[219] Griffith CJ considered that citizens were entitled to come to the seat of government to assert claims, to transact business with government and '"to seek its protection, *to share its offices, to engage in administering its functions*"'.[220] It is arguable that both judges were interested not only in access to the seat of government[221] for the purpose of pressing claims but, arguably, in participation in 'national affairs' and in government itself.

In 1950, Indigenous Australians were still generally disenfranchised and electors in the mainland territories lacked full representation in Parliament.[222] In

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[215] *Federal Commission of Taxation v Munro* (1926) 38 CLR 153, 178.
[216] *Communist Party Case* (1951) 83 CLR 1, 34, 37–8 (FW Paterson) (during argument). The ARU's counsel made similar arguments in relation to state constitutions — ibid 82–3 (M Ashkanasy KC) (during argument). George Williams describes Paterson's submissions as 'radical' for their time, likely rejected by the High Court because the *Engineers Case* 'supposedly established' that implications could not be drawn in constitutional interpretation. George Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case' (1993) 15(1) *Sydney Law Review* 3, 18.
[217] Harrison Moore, above n 214, 611. Harrison Moore was critical of party government but queried whether any other system was preferable.
[218] Kirk argues that breach of associational rights was an 'underlying theme' in the *Communist Party Case*. He notes that Dixon J spoke of freedom of action and 'the personal rights of men and associations of men'. McTiernan J referred to civil liberties while at the same time noting that they could be impinged during grave emergencies. Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23(1) *Federal Law Review* 37, 55 and see *Communist Party Case* (1951) 83 CLR 1, 194–5 (Dixon J), 206–7 (McTiernan J).
[219] *R v Smithers; ex parte Benson* (1912) 16 CLR 99, 109–10 (Barton J).
[220] Ibid 108 (emphasis added). The Chief Justice was quoting Miller J in *Crandall v State of Nevada* (6 Wall 35, 44).
[221] Williams and Hume point out that the meaning of the term 'seat of government' is unclear. Later decisions regard it as meaning a right of access to the Australian Capital Territory. See Williams and Hume, above n 207, 214.
[222] MPs representing the ACT and Northern Territory had limited voting rights. There was no provision for territory senators.

addition, political disqualifications had long existed.[223] However, as Williams and Hume note, Parliament has been an important source of representational rights.[224] They had largely voted to expand the franchise,[225] introduced compulsory voting,[226] and established a system of proportional representation for Senate elections.[227] And, with the aim of increasing the diversity of views in Parliament, they had also voted to increase its size.[228]

This is the context in which it was proposed that the Communist Party, which had participated under its own name in local, state and federal elections since the mid-1920s, should be banned.[229] In addition, successor and 'affiliated' organisations — bodies that were defined in political terms — could also be proscribed. Further, the Bills sought to criminalise any participation in or support for the Communist Party and other unlawful bodies. The Dissolution Bills thus potentially and arguably affected electors' ability to freely and effectively organise and associate, communicate politically and choose their elected representatives.

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[223] Anyone 'attainted of treason' was disenfranchised — arguably an exclusion that was permanent (*Commonwealth Electoral Act 1918* (Cth) s 39(4) — as it stood in 1950). Officers of bodies declared to be 'unlawful associations' under Part IIA of the *Crimes Act* were disenfranchised for seven years unless entitled to vote under s 41 of the *Constitution* (*Crimes Act* s 30FD). The *Commonwealth Electoral Act* disenfranchised anyone 'under sentence' for crimes carrying penalties of more than one year's imprisonment (s 39(4)). This would have included anyone serving a sentence for sedition offences (*Crimes Act* ss 24C and 24D).

[224] Williams and Hume, above n 207, 126.

[225] For example, under the *Commonwealth Franchise Act 1902* (Cth), men and women over the age of 21 were enfranchised and were not subject to a property qualification. The *Commonwealth Electoral Act 1925* (Cth) scaled back, to some extent, exclusions based on race — enabling naturalised Australians, regardless of their race and 'natives of British India', to vote. In 1950, there was still no general right to vote for Indigenous Australians but the *Commonwealth Electoral Act 1949* (Cth) had enabled them to vote in Commonwealth elections if they had served in the Defence Forces.

[226] *Commonwealth Electoral Act 1924* (Cth).

[227] The *Electoral Act 1948* (Cth) established a system of proportional representation for the Senate which, the Government claimed, would provide scope for the representation of minority interests.

[228] *Representation Act 1948* (Cth).

[229] For example, barrister Fred Paterson had served on the Townsville City Council and later represented the Queensland state seat of Bowen from 1944 until a redistribution in 1950. See Diane Menghetti, *Frederick Woolnough (Fred) Paterson (1897–1977). Australian Dictionary of Biography* (National Centre of Biography, ANU). As stated earlier, 87,958 votes had been cast for the Communist Party at the 1949 election. See Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1996 (Robert Menzies, Liberal).

(b) Liberty

In addition to the political liberty that arguably underlies the constitutional principle of representative democracy, liberty more generally is an important value. In 1951, then Commonwealth Solicitor-General KH Bailey remarked, 'it is only the *document* that we call "the Constitution" which we can truly think of as beginning its life in 1901'. It was informed by an 'unbroken' tradition of self-government in the Australian colonies and by centuries of British 'public law and convention'.[230]

Liberty is an important part of those traditions. According to Blackstone's influential 18th century *Commentaries on the Laws of England*, the protection of individual liberty 'is the first and primary end of human laws'.[231] In *Walsh and Johnson*, Isaacs J noted that certain 'fundamental principles' while not expressly written into Australian constitutions were codified in *Magna Carta* 'that great confirmatory instrument … which is the groundwork of all our Constitutions'.[232] Referring to *Magna Carta*, his Honour remarked that, 'every free man has an inherent individual right to his life, property and citizenship'.[233] In addition, he said, 'the initial presumption in favour of liberty' meant that the onus was on a prosecutor to establish a lawful basis for imprisonment — it being the duty of courts to ensure that this occurred.[234] Liberty was not, of course, absolute. In *Walsh and Johnson*, Justice Isaacs had stressed that the rights to which he referred were subject to 'the necessities of the general welfare at the will of the State'.[235]

Liberty can also be viewed as an important theme of the rule of law,[236] which is briefly considered in the following section.

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[230] K H Bailey, 'Fifty Years of the Australian Constitution' (1951) 25(5) *Australian Law Journal* 314, 336.
[231] William Blackstone, *Commentaries on the Laws of England* (1765), vol 1, 120 quoted in *Antunovic v Dawson* (2010) 30 VR 355, 359 (Bell J).
[232] *Walsh and Johnson* (1925) 37 CLR 36, 79.
[233] Ibid.
[234] Ibid.
[235] Ibid.
[236] Although see Brian Z Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge University Press, 2007) 36–8 for a discussion of the tensions between political liberty, legal liberty and personal liberty.

3 *The Rule of Law*

Gross argues that we assume that emergency laws are bounded by legal rules and norms. This section briefly describes the rule of law and its place in the Australian legal system. Like the two previous sections, this section is designed to inform my later assessment of whether and, if so, how parliamentary debate reflects Gross's assumption of legal normativity.

In 1951, in the *Communist Party Case*, Dixon J said that the *Constitution* was 'framed in accordance with many traditional conceptions, to some of which it gives effect … others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption'.[237] However, long before this in *Walsh and Johnson*, Isaacs J remarked that 'the law of the land is the only mode by which the State can … declare its will'. [238]

While the rule of law has an 'ancient lineage',[239] as Tamanaha remarks it is an 'elusive concept'; [240] an idea with which everyone agrees according to their 'contrasting convictions about what it is'. [241] However, a useful place to start is with Albert Venn Dicey whose *Introduction to the Study of the Law of the Constitution* first appeared in 1888. Dicey's first rule of law is that punishment is contingent on 'a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land'.[242]

Formal theories of the rule of law, like those proposed by Dicey or later by Hayek, require law to be general, public, clear and prospective.[243] This enables citizens, said Hayek, to predict with some certainty how the State will use its coercive powers and to plan their affairs based upon this knowledge. [244] Further, both Hayek and Dicey conclude that the judiciary plays an important role in rule

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[237] *Communist Party Case* (1951) 83 CLR 1, 193.
[238] *Walsh and Johnson* (1925) 37 CLR 36, 79.
[239] John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4(3) *Public Law Review* 158, 159.
[240] Brian Z Tamanaha, 'The History and Elements of the Rule of Law' (2012) (December) *Singapore Journal of Legal Studies* 232, 232.
[241] Tamanaha, above n 236, 3.
[242] Williams, Brennan and Lynch, above n 147, 18 quoting AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, first published 1885, 1959 ed) 188.
[243] Tamanaha, above n 236, 119.
[244] Friedrich Hayek referred to 'rules fixed and announced beforehand' (*The Road to Serfdom* (Routledge, 1944) 54 — quoted in Williams and Hume, above n 207, 131.

of law systems. Dicey's first rule of law speaks of the 'ordinary Courts of the land' and of legal contests being decided in the 'ordinary legal manner'. Further implications can be drawn from these concepts including the existence of an independent and impartial judiciary and certain procedural guarantees such as a fair hearing.

In addition, it can be argued that underlying Dicey's exposition of the rule of law is the idea of personal liberty.[245] This is reflected in his first rule of law, which assumes the existence of personal liberty in two senses. It sets out the circumstances in which it can be circumscribed and it compares rule of law systems with government based on 'wide, arbitrary, or discretionary powers of constraint'.[246] Dicey also contends that the rule of law pervades the English constitution and, in passing, gives two examples of constitutional principles — the 'right to personal liberty … [and] the right to public meeting' — that are the result of judge-made law.[247] Taking up the point made by KH Bailey, referred to above, these principles can be said to 'pervade' the *Australian Constitution*.

The provisions of the Dissolution Bills can be contrasted with these rule of law principles, which arguably seek to protect personal liberty against wide, discretionary power and require fair hearings and rules that are general, prospective and clear.

Having provided background information about constitutional power, representative democracy, liberty, and the rule of law, I now turn to an examination of *Hansard* in order to determine whether and to what extent Gross's assumption of constitutionality helps explain Parliament's response to the Dissolution Bills.

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[245] Williams, Brennan and Lynch, above n 147, 22 quoting WI Jennings, *The Law and the Constitution* (University of London Press, 5th ed, 1959) 53; Haig Patapan, 'The Author of Liberty: Dicey, Mill and the Shaping of English Constitutionalism' (1997) 8(4) *Public Law Review* 256.
[246] Williams, Brennan and Lynch, above n 147, 18 quoting Dicey, above n 242, 188.
[247] Williams, Brennan and Lynch, above n 147, 18 quoting Dicey, above n 242, 195.

B *Parliament and the Assumption of Constitutionality*

This section examines Parliament's engagement with the question of constitutional power. I then analyse parliamentary debate and the influence of ideas of representative democracy and liberty before turning to the rule of law.

1 *Constitutional Power*

In a federal system where the national government has enumerated and limited powers, the question of constitutional power is a part of every legislative project. In this section on constitutional power, I look first at whether and, if so, how constitutionality figured in the Government's approach and then at the Labor Opposition.

Prominent in the Government's claims to constitutional power was the text of the Dissolution Bills. As indicated earlier, they contained recitals specifying the powers on which they relied and the circumstances that necessitated their use. As well as contributing to an atmosphere of crisis, the recitals may have been intended as a persuasive device in the event of a High Court challenge — an assertion of knowledge not appropriately examined or contested by a court.

The Bill's first recital called into aid the defence power; the second conjured up section 61 and the third referred to the incidental power. Recitals 4–8 stated that the Communist Party in Australia and, as part of a worldwide revolutionary movement, engaged in destabilising and criminal activities in pursuit of revolutionary goals. Recital 9 sought to further anchor the Bill by stating that it was necessary for constitutional purposes to dissolve the Communist Party, forfeit its property to the Commonwealth and disqualify its members and other communists from certain employment. Other constitutional hooks were provided in the Bill's operative clauses. So, for example, organisations and individuals could not be declared unless the Governor-General was satisfied that

they were prejudicial to the security and defence of the Commonwealth[248] or the execution or maintenance of the *Constitution* or Commonwealth laws.[249]

It seems clear, in addition, as Douglas has pointed out, that the Dissolution Bills were drafted in light of the decision in the *Jehovah's Witnesses Case*.[250] In particular, there was an appeal process for organisations (apart from the Communist Party) and individuals who wished to contest a declaration. The property of unlawful associations was not simply forfeited. There were protections for third party property rights as well as provision for the appointment of a receiver and for the receiver to apply for a judicial determination of questions relating to an association's rights and liabilities.

Apart from the text of the Dissolution Bills, the issue of constitutional power was raised by Government speakers in the following ways. First, in direct assertions of constitutional power. Second, in references to case law. Third, in occasional acknowledgements that the Dissolution Bills' use of the defence power was unprecedented. Fourth, indirectly, through the language of war and crisis. Fifth, in claims about the respective roles of Parliament and the High Court.

In his second reading speech for the Dissolution Bill [No 1], Prime Minister Menzies carefully enumerated the Bill's recitals and asserted that they 'set out the power that the Commonwealth is using to deal with the Communists'.[251] It was, he said, 'a bill for an act about the defence of this country'.[252] Further, given that Australia was effectively at war, the Prime Minister referenced the decisions in *Lloyd v Wallach* and *Liversidge v Anderson*,[253] arguing that in wartime courts deferred to the executive's discretion on the issue of a person's hostile associations.[254] That the Dissolution Bill was an unusual piece of legislation,

[248] The wording of cl 9(2) differed slightly from that of cl 5(2). In the case of an individual, the Governor-General needed to be satisfied that the person 'is engaged or *is likely* to engage in prejudicial activities'.
[249] See cls 5(2) and 9(2), Dissolution Bill [No 1].
[250] Douglas, above n 126.
[251] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1998. In contrast, Senator O'Sullivan, the Minister for Trade and Customs, who delivered the second reading speech in the Senate said that the Bill's recitals relating to constitutional power 'call for no comment'. Commonwealth, *Parliamentary Debates*, Senate, 25 May 1950, 3139 (Neil O'Sullivan, Liberal).
[252] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1998.
[253] *Lloyd v Wallach* (1915) 20 CLR 299; *Liversidge v Anderson* [1942] AC 206.
[254] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4556.

however, was acknowledged by Liberal Senator John McCallum, who said it made a novel use 'of the defence power such as we have never known in time of peace'.[255]

More frequent and, arguably, used in part to bolster the Government's reliance on the defence power, was the repeated employment of the language of war and crisis. For Menzies and others, Australia was 'in [a] time of war'[256] or at peace 'only in a technical sense'.[257] There were enemies foreign and domestic. The Minister for Supply, Howard Beale, feared that Australia was 'in very great peril from an external enemy'.[258] The Member for Bass claimed that Australia was 'technically at war with Russia'.[259]

The Prime Minister alleged that, in addition to external threats from the Soviet Union and the spread of communism south through Asia, the Commonwealth was threatened internally. He contended that the Communist Party operated as a 'fifth column in advance of hostilities'.[260] According to the Minister for External Affairs, Australia was in a state of internal war with communist conspirators.[261] In short, said the Prime Minister, there was 'a conspiracy against the life of this country'.[262] Arguably, in these ways the Commonwealth's self-protective as well as its defence powers were called up.

Further, the Government's rhetoric was ramped up when the Dissolution Bill [No 2] was introduced. The Prime Minister referred to Australians 'fighting and

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[255] Commonwealth, *Parliamentary Debates*, Senate, 31 May 1950, 3430. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 173 (Howard Beale, Minister for Supply, Liberal).
[256] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2928 (Robert Menzies, Liberal).
[257] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1995 (Robert Menzies, Liberal). Country Party Senator Wilfred Simmonds argued that the legislation was being introduced under 'defence conditions' — see Commonwealth, *Parliamentary Debates*, Senate, 18 October 1950, 935.
[258] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2373 (Howard Beale, Minister for Supply, Liberal).
[259] Commonwealth, Parliamentary Debates, House of Representatives, 11 May 1950, 2503 (Bruce Kekwick, Liberal).
[260] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1996.
[261] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2283 (Percy Spender, Minister for External Affairs, Liberal).
[262] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 2005.

dying in a war against aggressive communism overseas'.[263] He defined his notion of a 'Cold War' as follows:

> The whole foundation of this piece of legislation is that Australia is in a cold war, if that term means a war in which Australian lives are being lost in action, and is also in a state of imminent danger of what people might call a hot war.[264]

Menzies was a KC whose successful practice at the Bar had included constitutional cases. So this statement can be viewed as another attempt to place the Bill squarely within the bounds of s 51(vi) — informed by High Court jurisprudence that spoke of the use of the defence power not only in terms of 'war' but during 'a threat of hostilities'.[265]

Amidst its claims that the emergency facing the Government dictated an extraordinary legal response, the Government sometimes portrayed the Dissolution Bills as far from 'drastic'. Menzies, for instance, sometimes emphasised that the legislation contained only mild civil disabilities and stressed that the Bills' criminal offences conformed to the principle that the prosecutor should bear the onus of proof.[266] It is arguable that such claims implicitly acknowledged the lessons from the *Jehovah's Witnesses Case.*

Finally, a different view about constitutionality was also espoused by the Government. This was the argument that constitutionality was a matter for the High Court. Parliament should fulfil its role by legislating and enable the High Court to do its job of deciding the constitutional question.[267]

The remainder of this section on constitutional power turns to Labor's contributions to parliamentary debate. In doing so, it pays particular attention to

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[263] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 87.
[264] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 196.
[265] Williams, Brennan and Lynch, above n 147, 845 citing *Andrews v Howell* (1941) 65 CLR 255, 278 (Dixon J).
[266] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 197. The Prime Minister professed astonishment at the 'mildness' of the consequences of a declaration.
[267] Commonwealth, *Parliamentary Debates*, 11 May 1950, 2554 (Leonard Hamilton, Country Party). See also Liberal and lawyer Gordon Freeth who said that the recitals were not conclusive and that 'The High Court is a jealous interpreter of the Constitution and … would not allow misuse of the defence power'. Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2562.

the contributions of the ALP's Deputy Leader, HV Evatt. Evatt did not subject the Bills to detailed constitutional critique. However, he was a constitutional scholar. He had been a barrister, a High Court judge and federal Attorney-General. In addition, influences of two important cases are threaded through his contributions to parliamentary debates on the Dissolution Bill [No 1]. The first case is *Walsh and Johnson*,[268] in which he had appeared as counsel. The second is the *Jehovah's Witnesses Case*,[269] which was heard and decided during his time as Attorney-General.

Evatt's focus was the defence power. Without it, he maintained, the legislation would be 'unconstitutional'.[270] Possibly for this reason, he did not address the self-protective power and only briefly likened the Dissolution Bill [No 1] to an Act of Attainder without pursuing this line of argument.[271]

A threshold issue for Evatt was the legislation's reliance on the defence power during peacetime. In June 1950, Evatt's view was that, despite the Government's assertion of an 'emergency', the Dissolution Bill [No 1] had been introduced during a 'time of peace'.[272] He called Menzies' claims that Australia was only technically at peace 'utterly mischievous as well as untrue'.[273] This assessment of the international situation, if correct, had clear implications for the scope of the defence power and the validity of the Bill.

Also important was connection to constitutional power. This was potentially relevant in the following interlocking and overlapping ways. First, was the law 'with respect to' a head of power or merely one 'with respect to' the opinion of

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[268] *Walsh and Johnson* (1925) 37 CLR 36.
[269] *Jehovah's Witnesses Case* (1943) 67 CLR 116.
[270] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4552.
[271] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2288. Later, in argument before the High Court, Evatt submitted that Acts of Attainder and Bills of Pains and Penalties were impliedly prohibited by the *Constitution* because they were purported exercises of judicial power — *Communist Party Case* (1951) 83 CLR 1, 74 (during argument).
[272] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2879. Evatt also referred to a 'state of peace between Australia and Russia', although he acknowledged that relations were 'strained'. Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4559.
[273] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4559. Other Labor politicians also contested the Government's claims. See Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2384 (Gordon Anderson, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2762 (William Bryson, ALP); Commonwealth, *Parliamentary Debates*, Senate, 31 May 1950, 3437 (Donald Grant, ALP); Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4071 (Nicholas McKenna, ALP).

Parliament and the Executive? In *Walsh and Johnson,* Evatt had argued that s 8AA of the *Immigration Act 1901* (Cth)[274] was not a law with respect to trade and commerce, public services or matters incidental to the executive power.[275] In relation to the trade and commerce power, for example, he had contended that it contained no relevant command or sanction. Instead, it was 'merely a law with respect to the opinion of the Government concerning certain persons'[276] and was thus invalid. The influence of these ideas can be seen in Evatt's comments on the Dissolution Bill [No 1]. For instance, he maintained that the Government's assertions were not evidence[277] and he criticised the Bill for 'outlawing supporters of certain doctrines and associations rather than prosecuting definite actions directed against the State'.[278]

In *Walsh and Johnson*, Chief Justice Knox had accepted Evatt's submissions and held that references to heads of power in s 8AA had been inserted 'merely for the purpose of furnishing a condition precedent to the exercise by the Minister of the power of deportation'.[279] Knox CJ said that the 'real aim and object' of s 8AA, in other words its legal operation, was to allow the deportation of anyone who, in the Minister's opinion, was likely to be injurious to 'peace, order or good government' in relation to matters falling within legislative heads of power.[280]

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[274] Section 8AA provided that, after a Board hearing, a person not born in Australia could be deported if (a) a serious industrial disturbance had been proclaimed by the Governor-General and (b) the Minister was satisfied that the person had been concerned in obstructing or hindering constitutional trade or commerce or the provision of Commonwealth services and (c) that their presence in Australia would be injurious in relation to matters over which the Commonwealth had legislative power. A majority of the court upheld s 8AA under s 51(xxvii), the Commonwealth's immigration power (Knox CJ, Isaacs, Rich and Starke JJ). Knox CJ, Higgins and Starke JJ upheld it only under that power. Higgins J concluded that s 8AA could not be upheld under s 51(xxvii).

[275] *Walsh and Johnson* (1925) 37 CLR 36, 50–2, 54 (during argument).

[276] Ibid 50.

[277] Evatt referred to the Prime Minister's assumption that 'because you allege these things against bodies and describe them in a certain way in the bill, then they are truly described'. He added, '[t]hat involves a point to be determined by the judiciary'. Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4557.

[278] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 93. This was a quote from a letter to the editor signed by a number of academics — see 'Dangers in Anti-Communist Bill', *The Age (Melbourne),* 24 May 1950, 2. The signatories criticised the Dissolution Bill [No 1] calling the punishment of beliefs rather than conduct breaches of the principles of criminal and constitutional law.

[279] *Walsh and Johnson* (1925) 37 CLR 36, 69.

[280] Ibid 70. Higgins J's judgment refers to the Minister's opinion but he did not find it necessary to come to a conclusion on this point (113, 117, 122). Starke J noted that s 8AA involved the 'rule of the Minister' (136).

In Parliament in June 1950, Evatt called the employment of the defence power in the Dissolution Bill [No 1] a 'sham' — designed to give the legislation a 'flavour of defence'.[281] He asserted that the Bill contained references to defence to mask the real purpose of the legislation — arguably a reference to its legal effect. This purpose, he said, was to deal with communists in the trade union movement, not itself a subject of Commonwealth constitutional power.[282]

Second, potential questions about connection to power arose because of the Bills' exclusion of appeals in relation to the matters in cls 5(2) and 9(2). In *Walsh and Johnson*, Evatt's argument that s 8AA was merely a law with respect to the Government's opinion was reinforced because of the absence of judicial oversight of the Minister's decision. This absence, he said, provided 'strong or conclusive evidence that Parliament has gone outside the field indicated in ss 51 and 52 of the Constitution'.[283] Evatt's submission had been accepted by Chief Justice Knox who had added that the function of constitutional interpretation was assigned to Chapter III courts. His Honour said, 'Parliament has no power to define the ambit of any of [its] powers, nor can it confer such power on any person or tribunal except some competent organ of judicial power'.[284]

Evatt's parliamentary criticisms of cls 5(2) and 9(2) and Labor's amendments that would have allowed a court to decide questions of subversive activities or tendencies went to issues of justice and fairness. In addition, however, these and other process amendments, had they been accepted by the Government, may have strengthened the legislation's constitutional foundations.

Third was the question of whether the statutory language of the Dissolution Bills was impermissibly vague. Evatt criticised the Dissolution Bill [No 1] for empowering the Governor-General to make declarations based on his satisfaction that the existence of an organisation or the activities of an individual was 'prejudicial … to the execution or maintenance … of the laws of the Commonwealth'. High Court judges, he claimed, had 'condemned' such

[281] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4553.
[282] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4552.
[283] *Walsh and Johnson* (1925) 37 CLR 36, 50.
[284] Ibid 67.

'phraseology'.[285] This was likely a reference to comments made by Knox CJ, Higgins and Starke JJ in *Walsh and Johnson*. Their Honours had remarked on similar but not identical terminology in s 8AA(2) of the *Immigration Act* — noting that a person could be liable to deportation if the Minister considered their presence in Australia might, for example, be injurious in relation to divorce or matrimonial causes or lighthouses.[286] In Parliament Evatt also described the Dissolution Bills as insufficiently 'specific'[287] — arguably reflecting the judgment of Knox CJ who had remarked in *Walsh and Johnson* that the nature of injury to the Commonwealth referred to in s 8AA(2) was 'not defined'.[288]

Fourth, was the question of whether the consequences of declarations for organisations and individuals severed connection to power. Evatt's portrayal of the Dissolution Bill [No 1] as 'arbitrary, capricious and unjust'[289] suggested that he believed it failed this test. His description drew on the words of Starke J in the *Jehovah's Witnesses Case.*[290] It reflected the conclusions of Williams J who had called the *Subversive Associations Regulations* 'drastic' and Rich J who agreed on this point. [291] Like those judges, Evatt focused on what he said were 'most severe penalties' [292] together with the wide-ranging and permanent effects of declarations — especially their impacts on 'innocent parties'. For example, he emphasised that affiliated bodies and their members could be declared and an organisation's property expropriated despite the fact that '90 or 95 per cent of … members may have nothing whatever to do personally with the Communist party'.[293] And he spoke of the permanent stigma, with its effects on employment

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[285] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2289.
[286] *Walsh and Johnson* (1925) 37 CLR 36, 69–70 (Knox CJ), 116 (Higgins J). Starke J objected that deportation could occur if the presence of a person was deemed injurious in relation to a matter in respect of which no law had been made and, as such, was 'unconnected with the exercise of any specific legislative power' (135).
[287] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2289. Evatt noted, in particular, that there were 25 volumes of Commonwealth law.
[288] *Walsh and Johnson* (1925) 37 CLR 36, 69.
[289] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2294.
[290] *Jehovah's Witnesses Case* (1943) 67 CLR 116, 154.
[291] Ibid 166 (Williams J). Rich J agreed with Williams J and described the Regulations as 'so widely expressed and … so difficult to restrain by interpretation' (150).
[292] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2878.
[293] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2747. Also Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2925; Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 3001–2. These concerns are reminiscent of Justice Williams' comments in the *Jehovah's Witnesses Case*. His Honour had also noted that 'the rights of a minority who might have done all they could to

prospects and a person's family, which would remain even where a person successfully challenged their declaration.[294]

Evatt was not alone in expressing constitutional reservations. Referring to the High Court's decision in the *Jehovah's Witnesses Case*, Labor's former acting Attorney-General Nicholas McKenna observed that the 'constitutionality of this bill is not beyond doubt'.[295] Like Evatt, he compared the Dissolution Bill [No 1] to the *Subversive Associations Regulations*. Those Regulations, he said, had been struck down as 'too arbitrary, too capricious and [for] vesting too much arbitrary authority in the Executive or a Minister'.[296]

Ben Chifley also expressed doubts, without much elaboration, about the constitutionality of the Dissolution Bill [No 1] — referring to the High Court's unwinding cases [297] and arguing that, unlike the Commonwealth, state governments did have the power to ban the Communist Party.[298] Other Opposition politicians predicted not only a constitutional challenge by the Communist Party but its success.[299] In the House of Representatives, Labor lawyer William Riordan called the defence power a 'weak reed' in a time of peace.[300] In the Senate, Donald Grant maintained that 'the proposal is

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oppose [conduct prejudicial to the war] would be forfeited in the same way as the rights of the majority who approved of or condoned it'. *Jehovah's Witnesses Case* (1943) 67 CLR 116, 166, 167.

[294] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4552. He also commented on the expropriation of the property of declared organisations (4557).

[295] Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3317 (Nicholas McKenna, ALP).

[296] Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3317 (Nicholas McKenna, ALP).

[297] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2277 (Ben Chifley, ALP). Chifley may have concluded that, because the expanded wartime defence power had unwound and because no new hot war existed, there was no scope for using the power to ban the Communist Party. The 'unwinding cases' were the High Court's joint judgment in *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43, which also dealt with two other matters. These cases effectively terminated the Commonwealth's post-war reconstruction power — see Geoffrey Sawer, 'The Transitional Defence Power of the Commonwealth' (1949) 23(5) *Australian Law Journal* 255.

[298] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2277. Mr Chifley referred to a pre-election pledge, not acted upon, by the then Liberal Party Premier of Victoria, Thomas Hollway, to ban the Communist Party.

[299] Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3516 (Richard Nash, ALP); Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3533 (Donald Cameron, ALP); Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3812 (Stanley Amour, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 120 (Clyde Cameron, ALP); Commonwealth, *Parliamentary Debates*, Senate, 17 October 1950, 819 (Sidney O'Flaherty, ALP); Commonwealth, *Parliamentary Debates*, Senate, 19 October 1950, 1049 (Archibald Benn, ALP).

[300] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2532 (William Riordan, ALP).

unconstitutional because the Government is assuming that the country is at war'.[301] And ALP Senator Sidney O'Flaherty declared he had gone so far as to commission a KC's opinion, parts of which he read into *Hansard*. It concluded, he said, that the provisions dealing with the Communist Party were challengeable.[302]

The initial absence of a sunsetting mechanism also raised constitutional questions for Labor. It supported a Government amendment enabling the legislation to be repealed if the Governor-General was satisfied that it was no longer needed for Australia's defence and security. Nicholas McKenna suggested that the High Court was more likely to uphold the legislation if it 'is obviously intended to meet an emergency'.[303] He considered that the legislation needed all the help it could get given its reliance on the defence power. And even with the sunset clause, he 'reserve[d]' his doubt that the High Court would uphold the legislation.[304]

2 *Representative Democracy and Liberty*

This section asks what, if any, influence the ideas of representative democracy and liberty had in debates on the Dissolution Bills. I deal first with Government and then with Labor contributions to parliamentary debate.

As indicated earlier in this chapter, the Dissolution Bills sought to ban the Communist Party, enabled other organisations to be banned and permitted the party's former members and members to be declared. Offence provisions involved considerable potential restrictions on speech and association for communists and former communists. For example under cl 7(2)(b), it was an offence knowingly to continue any of the activities of an unlawful association. Given that the Communist Party had contested elections, this prohibition could

[301] Commonwealth, *Parliamentary Debates*, Senate, 15 June 1950, 4342 (Donald Grant, ALP).
[302] Commonwealth, *Parliamentary Debates*, Senate, 17 October 1950, 817–18.
[303] Commonwealth, *Parliamentary Debates*, Senate, 15 June 1950, 4344 (Nicholas McKenna, ALP).
[304] Ibid.

have extended to political or electoral activity.[305] Arguably, activities unconnected with a dissolved organisation could also be criminalised.[306]

For the Government, the nature and alleged activities of the Communist Party placed it outside the normal protections of the law in a democratic society. However, aware of concerns about banning a political party, it responded in a number of ways. Some in its ranks conceded that the legislation involved a diminution of civil rights and contained 'an unusual provision for the abolition of a political party'.[307] Nevertheless, the Government dismissed any suggestion that the Bills' powers could be abused, citing the system of representative government as the safeguard of liberty.[308]

Others asserted that democratic rights were not threatened because the Communist Party was not a political party but rather a criminal conspiracy[309] or a 'terrorist organisation'[310] that endangered the polity. The Prime Minister objected to the idea that the 'enemies of liberty' should be given 'untrammelled liberty'.[311] It was communists themselves rather than the Dissolution Bills that threatened democratic rights such as 'freedom of speech, freedom of the press and freedom of assembly'.[312]

Further, it was said, communists' liberties could be forfeited because these were premised on 'the recognition of the State and, in a democracy … the recognition of self-governing institutions'.[313] Government members — especially those from

[305] *Communist Party Case* (1951) 83 CLR 1, 33 (EAH Laurie) (during argument).
[306] Ibid 39 (FW Paterson) (during argument).
[307] Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3804 (John Gorton, Liberal).
[308] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2775 (Harold Holt, Minister for Labour and National Service, Minister for Immigration, Liberal). Mr Holt quoted from Lord Wright's judgment in *Liversidge v Anderson* [1942] AC 206, 261.
[309] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2632 (WC Wentworth, Liberal); Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2678 (Lewis Nott, Independent); Commonwealth, *Parliamentary Debates*, Senate, 31 May 1950, 3432 (John McCallum, Liberal); Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3916 (James Guy, Liberal); Commonwealth, *Parliamentary Debates*, Senate, 15 June 1950, 4349–50 (John Spicer, Attorney-General, Liberal).
[310] Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3804, 3808 (John Gorton, Liberal).
[311] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2749.
[312] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2553 (Leonard Hamilton, Country Party).
[313] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1995 (Robert Menzies, Liberal).

the Country Party — equated democracy with capitalism.[314] Charles Anderson MP, for instance, declared that 'capitalism is democracy' and 'the only philosophy that allows men freedom of thought, freedom of speech and political freedom'.[315] Yet others in the Government constructed a majoritarian argument — that the suppression of activities in a democratic society involved no infringement of democratic principles '[s]o long as the will of society is freely expressed through a freely elected Parliament'.[316]

In Parliament, most Labor politicians declared, variously, that they did not oppose cl 4, that they supported a ban on the Communist Party and that they supported a ban on auxiliary and successor organisations.[317] Given the policy position taken by the party, few expressed outright opposition to the Bill.[318] The Opposition did not, in general, quarrel with the power to declare communists *per se* or communists who were a security risk, resist bans on communists holding

[314] In his 1949 election policy speech, Mr Menzies had said that '[t]he real freedoms are to worship, to think, to speak, to choose, to be ambitious, to be independent, to be industrious, to acquire skill, to seek reward'. Menzies, above n 21.

[315] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2350 (Charles Anderson, Country Party). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2535 (Billy Hughes, Liberal). Laurence Failes (Country Party) referred to 'the system of democracy that is known as capitalism' Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2639.

[316] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2387 (Paul Hasluck, Liberal).

[317] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2272 (Ben Chifley, ALP); Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4071 (Nicholas McKenna, ALP); Commonwealth, *Parliamentary Debates*, Senate, 31 May 1950, 3449, 3450 (Richard Nash, ALP); Commonwealth, *Parliamentary Debates*, Senate, 6 June 1950, 3701 (Donald Willesee, ALP); Commonwealth, *Parliamentary Debates*, Senate, 6 June 1950, 3710 (Albion Hendrickson, ALP); Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3812 (Stanley Amour, ALP); Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3920 (Joseph Cooke, ALP); Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4191 (Nicholas McKenna, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 109 (Ben Chifley, ALP).

[318] Commonwealth, *Parliamentary Debates*, Senate, 6 June 1950, 3675, 3677 (Sidney O'Flaherty, ALP); Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3828 (William Morrow, ALP); Commonwealth, *Parliamentary Debates*, Senate, 15 June 1950, 4341 (Donald Grant, ALP). Senator Morrow had campaigned against a ban on the Communist Party in 1949. He believed that the best way of combatting communism was 'by truth and argument' (Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3828). Later in the year, Allan Fraser MP declared, 'a very powerful case can be made against the taking of any action whatever against the Communist party'. Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 171.

trade union office,[319] or oppose the expropriation of Communist Party property.[320]

There was some acknowledgment of cl 4's impact on civil liberties and the possible consequences for democracy. Ben Chifley recognised that banning communism curtailed 'the free expression of opinion in this country'.[321] Others in Labor were concerned about outlawing political organisations in a democratic society,[322] especially because the Communist Party had contested federal elections.[323] This view was acknowledged by other speakers who nevertheless agreed with banning the Party in order to 'support those essential features of our society that the Communists seek to destroy'.[324] In addition to its support for banning the Communist Party, Labor generally supported action against 'known communists' and successor bodies — Nicholas McKenna conceding that 'if the Communist Party is to be effectively banned the Government must be free to pursue Communists into other organisations'.[325]

It was in relation to the Dissolution Bills' application to non-communist organisations and individuals, that Labor was more likely to employ the language of rights and freedoms.[326] It criticised cl 5(1)(d), which extended the legislation's application to bodies the policies of which were influenced wholly or

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[319] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2913 (Ben Chifley, ALP).

[320] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 88 (HV Evatt, ALP); Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4192 (Nicholas McKenna, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 109 (Ben Chifley, ALP). There were exceptions. For example, Senator Richard Nash disagreed with the confiscation of the Communist Party's property without due process of law because its property belonged to its members. Commonwealth, *Parliamentary Debates*, Senate, 31 May 1950, 3451.

[321] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2268.

[322] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 150 (Percy Clarey, ALP).

[323] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2482 (Alan Bird, ALP); Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3517 (Richard Nash, ALP).

[324] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2490–1 (John Cremean, ALP).

[325] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3957.

[326] Note that it is sometimes difficult to determine whether these concerns only applied to non-communists or whether they applied more widely. And it is sometimes difficult to distinguish the party political stance of ALP members and senators from their personal views. For instance, the anti-communist Deputy Senate Leader Nicholas McKenna declared, in line with party policy, that he supported the ban on the Communist Party but campaigned with Evatt to defeat the 1951 referendum — see Parliament of Australia, 'McKenna, Nicholas Edward (1895–1974)' in *The Biographical Dictionary of the Australian Senate* (online edition).

substantially by communists or by persons who used the body to advocate or propagate the teachings or principles of Marx and Lenin. Evatt referred to this as [t]he preposterous doctrine of infection of 1,000 people by 20'.[327] Senator Reginald Murray noted the legislation's impacts on 'our democratic rights, our freedom of speech, and our freedom of thought'.[328] Standish Keon criticised the abrogation of Australians' 'constitutional freedoms and liberties'.[329] Senator McKenna denounced cls 5 and 9 as eroding 'the two great freedoms — freedom of expression and of association.[330] Others listed the attributes of democracy as 'freedom to vote without intimidation, freedom to worship, and freedom of expression'.[331] Labor speakers also referred to 'democratic rights'; the curtailment of 'democracy'[332] and 'free expression'[333] or spoke about the 'undemocratic' clauses of the Bills[334] and their assault on 'civil liberties'.[335]

There was also concern about the legislation's chilling effect[336] on dissenting opinion. In 1950, the ALP was a reasonably broad church whose members included self-described democrats,[337] socialists[338] and militant trade unionists,[339] as well as serving and former union officials who had worked their

[327] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 3002.
[328] Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3551.
[329] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2911.
[330] Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3318. See also Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3517 (Richard Nash, ALP).
[331] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 112 (Ben Chifley, ALP).
[332] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2390 (Les Haylen, ALP).
[333] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2267 (Ben Chifley, ALP).
[334] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2502, (David Watkins, ALP); Commonwealth, *Parliamentary Debates,* 11 May 1950, 2538 (Allan Fraser, ALP).
[335] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2391 (Les Haylen, ALP).
[336] Commonwealth, *Parliamentary Debates*, Senate, 31 May 1950, 3442 (Donald Grant, ALP). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 131 (Allan Fraser, ALP).
[337] Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3828 (William Morrow, ALP).
[338] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2395 (Leslie Haylen, ALP); Commonwealth, *Parliamentary Debates*, Senate, 6 June 1950, 3681 (Albion Hendrickson, ALP); Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3950 (Donald Grant, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 153 (Percy Clarey, ALP).
[339] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2504 (Daniel Curtin, ALP). See also Commonwealth, *Parliamentary Debates*, Senate, 19 October 1950, 1065 (William Large, ALP).

way up from the shop floor or been political activists.[340] So for many in the parliamentary Labor party, a chilling effect was particularly worrisome. Senator Don Willesee argued that dissenters were integral to social progress and would be silenced by the legislation.[341] Senator Morrow maintained that democratic gains were the result of 'concessions that have been won by rebels from time to time'.[342] And Allan Fraser considered there were four basic democratic rights — 'the right to criticise, the right to hold unpopular beliefs, the right to protest, and the right of independent thought'.[343]

A further point is worth making. This is the question of where the rights and freedoms about which politicians spoke were anchored. The importance of the nation's British heritage arises in the context of Parliament's discussion of the onus of proof and appeal rights. However, it is evident, too, in relation to rights and freedoms more generally. At times these rights and freedoms were constitutionalised by speakers. Liberal Party MP and lawyer Keith Wilson referred to the framers' indebtedness to 'British ideas of freedom — freedom of speech, freedom of religion and freedom of political opinion'. However, he argued that the framers provided for the protection of these freedoms by giving the Parliament powers to make laws with respect to defence and entrusting the Executive with the preservation of the *Constitution*.[344] Some in Labor referred to constitutional freedoms and liberties[345] but, unsurprisingly perhaps, did not point to constitutional text or case law. Throughout the parliamentary debates are references to Australia's British heritage and its status as a British nation.[346]

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[340] For example, Ben Chifley was a former engine driver who had been sacked but later reinstated and demoted for his participation in the Great Strike of August–September 1917. See Day, above n 17. Senator Donald Grant had been a member of the Sydney Twelve. He and 11 other IWW members had been arrested and charged in 1916, first with treason and then, instead, with conspiracy to commit arson, to defeat the ends of justice and to commit sedition. Grant was sentenced to 15 years imprisonment but released in 1920 following a public campaign and a royal commission. See Frank Cain, 'The Industrial Workers of the World. Aspects of its Suppression in Australia 1916–1919' (1982) 42 *Labour History* 54; Michael Head, *Crimes Against the State. From Treason to Terrorism* (Ashgate, 2011).

[341] Commonwealth, *Parliamentary Debates*, Senate, 6 June 1950, 3704.

[342] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3905.

[343] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 131.

[344] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2486–7.

[345] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2911 (Standish Keon, ALP).

[346] For example, Labor's Allan Fraser spoke of 'British concepts of freedom and justice' — Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2540. Liberal

These freedoms and liberties were said to belong to 'all the decent Britishers who believe in freedom'.[347] Such references can also be seen as giving both heft and legitimacy to politicians' arguments. For Labor they also served as a counter-weight to Government claims that the party was pro-communist.

Labor also looked further afield. A number of Opposition speakers criticised cl 9 for its infringement of the Four Freedoms[348] and of the rights and freedoms protected by the Universal Declaration of Human Rights.[349] Senator Stanley Amour declared that if the proposed legislation had simply banned communists, it would have been passed. However, he said, it went further and was out of step with the United Nations Charter 'the special purpose of which was to protect minorities'.[350]

3 *The Rule of law*

(a) Introduction

This section of my thesis uses *Hansard* to explore how politicians understood and used rule of law concepts as they debated the Dissolution Bills. I look first at politicians' understandings of the rule of law, its sources and its implications. Second, I consider how rule of law considerations influenced amendments proposed by Labor and the Government's responses to them. Third, I examine matters with rule of law implications that were not the subject of proposals for amendment and consider why this was so.

MP Harold Holt referred to 'British democracy and justice' — Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 183.

[347] Commonwealth, *Parliamentary Debates*, Senate, 31 May 1950, 3444 (Donald Grant, ALP).

[348] US President Franklin Roosevelt in his 1941 State of the Union address enunciated the Four Freedoms. They are freedom of speech and expression, freedom of religion, freedom from want, freedom from fear. See Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2772, 2773 (Reginald Pollard, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 2992 (Leslie Haylen, ALP); Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3812 (Stanley Amour, ALP). Labor politicians also referred to 'freedom of want' — arguing that communism flourished in conditions of economic inequality and that it was best combated by removing inequality.

[349] Adopted by the UN General Assembly on 10 December 1948. Labor speakers who referred to the Declaration included Leslie Haylen (Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2393) and Percy Clarey (Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 150).

[350] Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3812. Senator Morrow recorded his belief in 'free speech, the right of free assembly, and the right of minorities to express themselves'. Commonwealth, *Parliamentary Debates*, Senate, 17 October 1950, 840.

The rule of law provided an important focus for Labor objections to the Dissolution Bills and its proposals for amendments. However, it is important to note Labor's references to other standards — such as British justice and natural justice. Sometimes these terms were used synonymously with the rule of law and, at other times, it appears they were regarded as distinct. For convenience, I refer to the rule of law.

Labor's rule of law focus is evidenced in a number of ways. First, in a report by the Labor-dominated Senate in June 1950 that described the purposes of the Senate's amendments. These were said to include preventing the Dissolution Bill [No 1] from completely departing 'from appropriate and just processes for the administration of justice' and from 'the rule of law'. Second, in the language employed by Labor politicians. Apart from references to 'the rule of law, there were occasional mentions of Dicey[351] and, more commonly, use of the expressions 'ordinary processes of law' and 'ordinary courts' that reflect his first rule of law.[352]

The key to Labor's amendments was the rule of law in its procedural guise. As Nicholas McKenna emphasised, 'The Opposition is arguing only about the method to be employed' in wiping out communism and removing 'its accredited representatives out of key positions in the Public Service and trade unions associated with vital industries'.[353] Labor's key criticism of the Bill — what Evatt described as a 'narrow' difference between the parties[354] — was about the nature of declaration processes for organisations and individuals. He described the legislation's processes as 'a complete departure from the established British principles of the rule of law'.[355]

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[351] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2933 (William Bourke, ALP); Commonwealth, *Parliamentary Debates*, 30 May 1950, 3316 (Nicholas McKenna, ALP).
[352] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2369 (Edward Peters, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2765 (Standish Keon, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 110 (Ben Chifley, ALP).
[353] Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4076.
[354] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 88 (HV Evatt, ALP).
[355] Ibid.

Labor's focus on process arose, at least in part, from its conception of the rule of law's purpose. This was a Diceyan view — protection from 'arbitrary action by the executive government'.[356] Safeguarding 'life, liberty, reputation and property' were also regarded as key.[357] The Dissolution Bills' partial, secret and political processes were condemned.[358] Eddie Ward criticised the Government for wanting to appoint itself 'the accuser and the executioner … [as well as] the judge'.[359] Evatt made a number of fair process criticisms. First, there was no hearing before a declaration was made — a declaration simply involved a secret cabinet process of which no notice was given and in which the individual or organisation could not participate.[360] Second, was the flawed nature and deceptive trappings of the application process. 'I object', said Evatt, 'to the elaborate machinery in this bill of pretence and evasion, designed to suggest that a man will have a real opportunity to go before a court and prove that he is not a traitor'.[361] In these complaints, we can perceive what David Dyzenhaus calls a 'legal grey hole'.[362]

Labor's remedy was a just process. What was required, argued Ben Chifley, was 'an ordinary fair trial by an ordinary judicial process'.[363] Put simply, said Evatt, the rule of law meant a 'fair go' for individuals who were effectively facing

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[356] Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3316 (Nicholas McKenna, ALP); Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3960 (Nicholas McKenna, ALP); Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4095 (Nicholas McKenna, ALP).
[357] Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3316 (Nicholas McKenna, ALP).
[358] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 110 (Ben Chifley, ALP). See also Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3922 (Joseph Cooke, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 89 (HV Evatt, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 130 (Allan Fraser, ALP); Commonwealth, *Parliamentary Debates*, Senate, 19 October 1950, 1036 (Joseph Cooke, ALP).
[359] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2659 (Eddie Ward, ALP).
[360] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 90–1.
[361] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 92.
[362] David Dyzenhaus, 'Schmitt v Dicey: Are States of Emergency Inside or Outside the Legal Order?' (2006) 75(5) *Cardozo Law Review* 2005, 2018. A legal grey hole involves a law that has the outward appearance of legality but not its substance.
[363] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 110 (Ben Chifley, ALP).

criminal charges[364] and for 'any body' whose civil and property rights could be affected.[365] It meant processes that would achieve just outcomes.[366]

The fact that declarations contained allegations of serious criminal conduct and involved punishment was key to Labor's amendments. Evatt argued that, as a general rule, 'charges of sedition and seditious conspiracy and treason should be established before the courts of the land, using the safeguards provided for under the procedures of those courts'.[367] The cardinal principles of what Labor variously referred to as 'the rule of law', the 'just rule of law',[368] 'British justice', 'natural justice', and a fair trial or hearing meant no punishment without a trial, the onus of proof on the Government, particularised allegations, the right to face an accuser and cross-examine them, trial by an impartial authority and, except in rare cases, the presumption of innocence.

Labor sought to give weight to its concerns about the Dissolution Bills by emphasising the place of the rule of law in British and Australian legal systems, its deep roots and its universal acceptance. The rule of law was regarded as an underlying constitutional principle[369] and a component of British justice.[370] Rule of law principles were said to be grounded in historical documents such as the Bill of Rights, *Magna Carta*[371] and foreign constitutions — such as the due process clause of the US Constitution.[372] Labor also pointed to the rule's incorporation in contemporary instruments such as the United Nations

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[364] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 94.
[365] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4559 (HV Evatt, ALP).
[366] Evatt argued that the legislation's partial and arbitrary processes would produce unjust outcomes — Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4569.
[367] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2288. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 195 (Ben Chifley, ALP).
[368] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 160 (HV Evatt, ALP).
[369] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2933 (William Bourke, ALP).
[370] Commonwealth, *Parliamentary Debates*, Senate, 19 October 1950, 1056 (Frederick Katz, ALP).
[371] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2532 (William Riordan, ALP); Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4083 (Richard Nash, ALP); Commonwealth, *Parliamentary Debates*, Senate, 19 October 1950, 1044 (John Ryan, ALP).
[372] Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4082 (Richard Nash, ALP).

Charter[373] and the Universal Declaration of Human Rights, including the latter's implications,[374] its preamble[375] and article 11(1).[376]

Government speakers referred less frequently to the rule of law than their Labor counterparts although, as the Minister for Trade and Customs declared, '[w]e all stand for the rule of law'.[377] First, the Bills' hybrid nature was central to the Government's characterisation of Labor's analysis as simply misplaced. The Bills were characterised as preventive not punitive measures.[378] None of the criminal offences, said the Government, contained reverse onus provisions.[379] The application process followed the rules of civil procedure with the declared organisation or person (the applicant) averring. Second, as discussed in more detail in the next section, the Government relied on matters of exception — for instance, statutes where the onus of proof was reversed. Third, it argued that matters of national security should not be canvassed either in open courts or in jury trials.[380] The Government's argument was that protection of the nation and its democratic institutions was most appropriately achieved by allowing it to take responsibility for matters of national security.

The next part of this chapter deals with fair process. Following that, I briefly canvass matters of rule of law formality — generality, prospectivity and clarity. I also deal with the *nulla poena* principle, which is associated with the rule of law

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[373] Commonwealth, *Parliamentary Debates*, Senate, 19 October 1950, 1044 (John Ryan, ALP).
[374] Evatt argued the Declaration implied that legal procedures must be just, there must be a fair hearing, adequate time to prepare a defence and trial by a judge or jury. Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 94–5.
[375] The Declaration's preamble states 'human rights should be protected by the rule of law'. Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3551 (Reginald Murray, ALP).
[376] Article 11(1) reads: 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.' See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 150 (Percy Clarey, ALP).
[377] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3927 (Neil O'Sullivan, Minister for Trade and Customs, Liberal).
[378] See, for example, Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3806 (John Gorton, Liberal); Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3929 (Neil O'Sullivan, Minister for Trade and Customs, Liberal).
[379] This was incorrect. Clause 19 provided an offence of obstructing a receiver by destroying property. If the prosecution proved that any of an unlawful association's records had been destroyed, then the onus of proving an absence of intention to obstruct lay with the defendant. Additionally, evidential clauses assisted proof of the cl 7 membership offences.
[380] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 179 (Robert Menzies, Liberal).

and which includes substantive values.[381] Each of these issues was raised during parliamentary debate.

(b) Fair Process

(i) Introduction

Labor proposed a number of 'fair process' amendments to the Dissolution Bills. These included an appeals pathway through state supreme courts to the High Court. This suggestion was accepted by the Government.[382] In addition, Labor unsuccessfully pressed for applicants to have the option of a jury trial, a process for the revocation of declarations and the right to pursue compensation for wrongful declarations. Central to the contest between the Government and Opposition, however, were two additional fair process issues. The first was the onus of proof — a focus of public attention and Opposition concern. The second matter, which Evatt regarded as the more important, was 'particularity'.

(ii) Onus of Proof and Particularity

To recap, the original Dissolution Bill [No 1] provided that before an organisation could be declared, the Governor-General needed to be satisfied of two matters. First, its communist connections, expansively defined. Second, that it was subversive. In the case of an individual, a declaration required the Governor-General's satisfaction first that the person was a member of an unlawful association or was a communist and second that the person engaged in subversive activities or had subversive tendencies. A Government amendment had later substituted membership of the Communist Party for membership of an unlawful association.

The onus of proof provisions in the Dissolution Bill [No 1] were twice the subject of Government amendments. The first made a declaration prima facie evidence

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[381] Nulla poena is a 19th century legal maxim meaning no punishment without law and no crime without law. These maxims import rule of law values into the criminal law. See Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Law Book Co, 3rd ed, 2010).
[382] Labor then withdrew its amendments and the Government's amendments were inserted into the Dissolution Bill [No 1].

of communist connections. The second added a provision that if an applicant began and gave evidence, the onus of proof would shift to the Commonwealth. The issue of subversion was not contestable.

In the Labor-dominated Senate, amendments were passed that broadly did two things. First, they placed the onus of proof on the Commonwealth to establish communist connections. Second, the issue of subversion was made contestable, with the onus of proof placed on the Commonwealth. In neither case was an applicant obliged to give evidence. These amendments were repeatedly rejected by the House of Representatives. They remained matters of irresolvable difference between the two chambers until October 1950 when Labor decided not to oppose the passage of the Dissolution Bill [No 2].

The influence and use of the rule of law is evident in both Government and Opposition contributions to debate on the onus of proof. First, it is clear that despite the Government's generalised claim that no principles of British justice had been compromised, there was unease among some of its backbenchers. The onus of proof clauses were described by them as 'drastic', 'unpalatable' and, 'a negation of … a fundamental concept of … British justice'.[383]

At times engaging with the ALP's arguments, the Prime Minister acknowledged that a reverse onus should only operate in exceptional circumstances. However, its use in the Bill grounded (often contradictory) arguments about exigency, precedent and rightfulness. Menzies said that in wartime 'we have not hesitated to [reverse the onus of proof] and that ['t]his is one of those few occasions on which it is right' to do so.[384] Others argued that '[d]rastic situations demand

[383] George Bowden (Country Party) acknowledged that there was 'some merit in criticisms of the onus of proof provisions' (Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2498). Malcolm McColm (Liberal) agreed that reverse onus provisions could be 'dangerous' but had to give way to national security interests (Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2546). Henry Gullett regarded the reverse onus provisions as 'in a sense … a negation of what has been regarded for a long time as a fundamental concept of the British justice which is the birthright of this country'. (Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 2970). Allen Fairhall (Liberal) conceded that the Opposition's concern for those 'who might be innocently caught by this bill is right and proper' and referred to the onus of proof clauses as 'unpalatable' but 'necessary'. (Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 2973, 2974).
[384] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 2005.

drastic remedies.[385] At the same time, the provisions were sometimes dismissed as simply 'matters of machinery'[386] or as neither 'novel'[387] nor 'new'.[388] They were in keeping, it was argued, with commonplace and well-recognised matters of exception found in criminal laws, regulatory offences and other legislation.

One of these ordinary exceptions, raised on many occasions by Government speakers was the *Immigration Act 1901* (Cth) ('*Immigration Act*'). That Act contained a number of provisions designed to facilitate proof that a person was a prohibited immigrant.[389] The judgment of Isaacs J in *Williamson v Ah On* ('*Ah On*')[390] was often cited by those on the Government benches — because of the *Immigration Act's* averment and onus of proof provisions, because analogies were drawn between (politically dangerous) aliens and the communist 'other', and because of his Honour's musings on the onus of proof.

In *Ah On*, the High Court held that averment and onus of proof provisions in the *Immigration Act* were valid[391] — despite the burden they placed on a defendant in relation to constitutional facts. Like laws applying to unlawful immigrants, the Dissolution Bill was said to be 'directed against persons who improperly claim the advantage of citizenship of Australia'.[392] Like the onus of proof provisions in the Bill, said the Government, those in the *Immigration Act* recognised that the only effective way to prevent a 'nefarious and dangerous practice' and to safeguard the nation was 'to throw the burden of proof as to membership of the

[385] Commonwealth, *Parliamentary Debates*, House of Representatives, 8 June 1950, 3920 (James Guy, Liberal).
[386] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2751 (Robert Menzies, Liberal).
[387] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2761 (John Howse, Liberal).
[388] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 178 (Robert Menzies, Liberal).
[389] For example, a prosecutor's averment that a defendant was an immigrant who had evaded a customs officer was proof in the absence of proof to the contrary by the defendant — s 5(3).
[390] *Williamson v Ah On* (1926) 39 CLR 95.
[391] Ibid 108, 110–11, 112 (Isaacs J), 122–3 (Higgins J found it had been proved that Ah On was an immigrant and expressed some doubt about whether, if there was no evidence of immigration, a 'mere averment' as to a jurisdictional fact would be valid), 126–7 (Powers J), 128 (Rich and Starke JJ), 101–2 (Knox CJ and Gavan Duffy J, dissenting).
[392] Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3332 (John Spicer, Attorney-General).

community on the suspected person'.[393] This, Isaacs J had said, was 'only elementary self-protection … inseparable from any self-governing constitution'.[394] Without it 'persons who are criminals, anarchists, public enemies or loathsome hotbeds of disease may, by secret or fraudulent entry into the country … defy and injure the entire people of a continent'.[395]

'[N]otable exceptions'[396] to the 'golden rule'[397] were also cited — in national security legislation; in Commonwealth customs, quarantine and taxation laws; in the industrial clauses[398] and unlawful associations provisions[399] of the *Crimes Act*; and in state laws covering the possession of stolen goods, vagrancy and gaming offences.[400] The jurisprudence of Justice Isaacs, together with quotations from a range of legal texts,[401] was also employed. As a matter of principle, said the Government, the onus should rest where justice is served taking into account public and private interests. Without 'exceptional cases' being recognised 'justice

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[393] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2283 (Percy Spender, Minister for External Affairs, Liberal). Quotation from *Ah On* (1926) 39 CLR 95, 104 (Isaacs J).
[394] Ibid 104.
[395] Ibid 104. Quoted in Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2283 (Percy Spender, Minister for External Affairs, Liberal).
[396] Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3530 (Edward Mattner, Liberal).
[397] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 155 (Billy McMahon, Liberal). These were references to the 'golden thread' of English criminal law described by Lord Sankey in *Woolmington v DPP* [1935] AC 462, 473–4 ('*Woolmington*'). It is the duty of the prosecution to prove the defendant's guilt subject to statutory exceptions and the insanity defence.
[398] Section 30R. Labor opposed the 'industrial clauses' but despite its policy to repeal them, it had never done so while in office. See Commonwealth, *Parliamentary Debates*, Senate, 6 June 1950, 3680 (Robert Wordsworth, Liberal).
[399] *Crimes Act* s 30AA — see Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3925 (Neil O'Sullivan, Minister for Trade and Customs, Liberal); Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4193 (John Spicer, Attorney-General, Liberal).
[400] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2357 (Arthur Fadden, Treasurer, Country Party), 2377 (Howard Beale, Minister for Supply, Liberal); Commonwealth, Parliamentary Debates, House of Representatives, 11 May 1950, 2489 (Keith Wilson, Liberal); Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2750 (Robert Menzies, Liberal), 2778 (William Haworth, Liberal); Commonwealth, *Parliamentary Debates*, Senate, 5 October 1950, 322 (Neil O'Sullivan, Minister for Trade and Customs, Liberal).
[401] *Halsbury's Laws of England*, *Stephen's Digest of the Law of Evidence* and *Phipson on Evidence* were cited in Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2646 (Frederick Osborne, Liberal); Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 2925 (Neil O'Sullivan, Minister for Trade and Customs, Liberal). The Attorney-General referred to *Allen's Legal Duties* — see Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3331 (John Spicer, Attorney-General, Liberal).

would sometimes be frustrated and the very rules intended for the maintenance of the law of the community would defeat their own object'.[402]

Other arguments were also employed. Since proceedings were civil proceedings instituted by an applicant organisation or individual, it was appropriate the organisation or individual establish its claims.[403] And in criminal cases, said the Government, it was well-established that where 'the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it lies upon the latter'.[404]

In contrast, the Opposition maintained 'that persons who make imputations … should prove them'.[405] More specifically and in response to the Government's reliance on the fact that declarations were civil not criminal matters, the ALP focused on the legislation's text, the language employed by Government speakers and the nature and consequences of a declaration in order to argue that criminal conduct was effectively alleged and that the penalties involved were severe. The recitals asserted that the Communist Party was engaged in criminal conduct. Communism was described by Liberal and Country party speakers as 'traitorous'[406] and communists categorised as 'traitors'.[407] A declaration, argued Senator McKenna, thereby constituted 'an allegation of treachery and treason'.[408] Further, said Labor, a declaration and its publication in the *Gazette* involved serious and long-lasting consequences for organisations, for personal reputation, for individuals and their families, for employment not only in the public service but more generally.[409] This meant that a declaration was a form of punishment

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[402] *Ah On* (1926) 39 CLR 95, 113. Quoted in Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2647 (Frederick Osborne, Liberal).
[403] Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4091 (John Spicer, Attorney-General, Liberal).
[404] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2749–50 (Robert Menzies, Liberal). The Prime Minister relied on *Halsbury's Laws of England*.
[405] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4558 (HV Evatt, ALP).
[406] See, for example, Commonwealth, *Parliamentary Debates*, Senate, 15 June 1950, 4339 (John Spicer, Attorney-General, Liberal).
[407] See, for example, Commonwealth, *Parliamentary Debates*, Senate, 15 June 1950, 4339 (George Rankin, Country Party).
[408] Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4231.
[409] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 3005 (Fred Daly, ALP); Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3323 (Nicholas McKenna); Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3955 (Nicholas McKenna); Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4066 (Nicholas

and consequently that a declared person should have the same rights as a suspect in criminal proceedings,[410] including a right of silence.[411] Failure to accord these rights, said Labor, offended the rule in *Woolmington*,[412] precepts of British justice, the rule of law, and natural justice.

As stated earlier, particularity was also a point of disagreement between Government and Opposition. Labor criticised the fact that the Commonwealth was not obliged to establish and an applicant could not contest the second allegation contained in a declaration — that of subversive conduct or propensity. Because Labor regarded a declaration as akin to a criminal charge, it argued that allegations should be particularised[413] — especially in relation to accusations of subversive activity or tendency, which it maintained were more serious than allegations of communist connections.[414] It was a breach of 'fundamental justice',[415] said the Opposition, that an individual or organisation should go into the witness box not knowing any details of the allegations made against them and thus be deprived of an opportunity to construct a proper defence and rebuttal.[416] Here, Evatt argued that the Government was proposing to treat Australian communists less fairly than enemy aliens had been treated under Labor's wartime administration.[417]

McKenna); Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4213, 4232 (Nicholas McKenna). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 2981–2 (Charles Morgan, ALP). There was clear potential for impact on a person's general employment prospects. For example, the Minister for Trade and Customs suggested that the 'Law Society … could deal with a lawyer who was declared'. Commonwealth, *Parliamentary Debates*, Senate, 19 October 1950, 1092 (Neil O'Sullivan, Liberal).

[410] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3913–14 (George Cole, ALP).

[411] Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4094 (Nicholas McKenna); Commonwealth, *Parliamentary Debates*, Senate, 21 June 1950, 4583 (Nicholas McKenna).

[412] *Woolmington* [1935] AC 462.

[413] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2293 (HV Evatt, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 160 (HV Evatt, ALP).

[414] Commonwealth, *Parliamentary Debates*, Senate, 21 June 1950, 4583 (Nicholas McKenna).

[415] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2879 (HV Evatt, ALP).

[416] Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4105 (William Aylett, ALP); Commonwealth, *Parliamentary Debates*, Senate, 21 June 1950, 4584 (Nicholas McKenna); Commonwealth, *Parliamentary Debates*, Senate, 21 June 1950, 4585 (Joseph Cooke, ALP); Commonwealth, *Parliamentary Debates*, Senate, 21 June 1950, 4589 (William Morrow, ALP).

[417] During World War II, the Curtin Labor Government had allowed internees access to an independent tribunal and to some information about the case against them. The *National Security (General) Regulations 1942* (Cth) required advisory committees hearing objections to restriction and internment orders to ensure, 'so far as is compatible with securing the public safety or

In response to Government arguments about the exposure of security-sensitive information and the identity of security officers and agents, the Opposition countered that a court could judge what information should be protected in the public interest[418] and if necessary conduct closed proceedings. Further, in peacetime matters could be disclosed that would be kept secret during war. The Government rejected Labor's amendments on grounds that were both spurious and dangerous. First, it said, the entirety of national security information would be exposed. Second, it argued that the crux of the matter was the allegation of communism. To quote Liberal Senator John Gorton, 'being a Communist organization or a Communist, [means] at all times [being] ready and willing to engage in treasonable or subversive activities'.[419]

(iii) Other Aspects of the Rule of Law

Parliament's debates on the Dissolution Bills acknowledge other rule of law issues. The first is the principle of generality. Evatt argued that by applying specifically to the Communist Party, communists and communist-inspired organisations, the Dissolution Bills breached this principle. He contrasted the Bills with two pieces of Chifley Labor Government legislation. Both these statutes were expressed in general terms but were directed at communists.[420] The first was the *Approved Defence Projects Protection Act* 1947 (Cth), the purpose of which was to target communists who threatened to obstruct or boycott Australia's weapons testing program. The second was the *Coal Strike Act* 1949 (Cth), which was aimed at the communist-led miners' union. Evatt pointed out that both these Acts employed 'the general rule of law' by 'applying equally to every member of the Australian community'.[421]

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defence of the Commonwealth', that 'the objector is informed of the grounds on which the order was made against him' (reg 26A(1)(j)).

[418] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 3003 (HV Evatt, ALP); Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3960 (Nicholas McKenna, ALP).

[419] Commonwealth, *Parliamentary Debates*, Senate, 21 June 1950, 4586.

[420] Commonwealth, Parliamentary Debates, House of Representatives, 3 June 1947, 3244–5, 3248. See also Herbert Vere Evatt, *Hands off the Nation's Defences* (Federal Capital Press, 1947).

[421] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2286–8.

Second, the rule of law requires that laws operate prospectively so that citizens can plan their affairs. The Dissolution Bills operated retrospectively — from 10 May 1948.[422] This effect was compounded by cl 25, which contained provisions that eased proof of membership of the Communist Party or an unlawful association.[423]

The Government tackled the issue of retrospectivity in two ways. In his second reading speech for the Dissolution Bill [No 1], the Prime Minister conceded that '[n]ot one of us in this House has any love of retrospective legislation' but that it was essential to make the bill effective.[424] Attorney-General Spicer, on the other hand, maintained that the legislation's effect was prospective because it required the Government to be satisfied that an organisation or individual represented a current threat to security.[425] This is a point also stressed by Roger Douglas.[426] However, the breadth of cls 5(2) and 9(2)[427] and the fact that the issue of subversion was not contestable opened up the possibility that organisations and persons without any current subversive tendencies could be declared.

The Opposition criticised the legislation's retrospective operation for its potential to produce unjust outcomes. Evatt remarked that this was a particular 'vice' of cl 9 — it could apply to people with no present connection with communism — for instance, to someone who resigned from the Communist Party on 11 May 1948.[428] And, as Nicholas McKenna noted, it effectively penalised conduct that would have been 'perfectly innocent according to the law of the land' before the legislation's commencement.[429] However, although it suggested that the legislation should operate from 10 November 1949 — the

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[422] 10 May 1948 was the 'specified date' — see Dissolution Bill [No 1] cl 3(1).
[423] For instance, if a person's name appeared on membership rolls or other records found as the result of the Labor Government's raid on Marx House on 8 July 1949, this was evidence that the person was a member of the Communist Party — cl 25(2), ibid.
[424] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 2006.
[425] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3954. In the case of an individual, a decision could be based on the likelihood that he or she would engage in subversive activities. However, as a decision about subversion was secret and not contestable, the important part of the legislation was the decision about communism.
[426] Douglas, above n 126.
[427] For example, a person's engagement or likely engagement in activities prejudicial to security and defence or to the execution and maintenance of the *Constitution* or Commonwealth laws — cls 5(2) and 9(2), Dissolution Bills [No 1] and [2].
[428] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 3001.
[429] Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3321.

date of Menzies' election promise to ban the Communist Party[430] — Labor failed to move any amendments on this topic.

The Diceyan idea of punishment for a breach of the law assumes that we know what the law is. The third rule of law issue engaged by the Dissolution Bills was their lack of clarity.[431] Both the Government and Labor were aware of definitional uncertainties in the Bills. The definitions of 'communist' and 'communism' provide two examples. WC Wentworth, no friend of left politics, reportedly suggested that the definition of 'communist' should be narrowed to encompass only bodies and persons advocating Marxism-Leninism by violent revolution.[432] Attorney-General Spicer admitted that it was not 'easy' to define 'communist'. However, he argued that the wording was 'no wider than is necessary' and that, in any event, no one had suggested a preferable alternative.[433] On the Labor side of politics, Evatt pointed to the 'wide definition' of 'communism'[434] and like WC Wentworth, Labor's Senator Donald Cameron suggested 'communist' should be limited to those advocating the 'overthrow of society by violence' and pointed to the difficulties of defining Marxism-Leninism.[435] Labor sought clarification of how the Government meant to interpret the definition of 'communism' but said that, given the 'grave difficulty' of defining the term, it would not propose any amendments.[436]

Last, Labor's criticisms also arguably related to an aspect of the *nulla poena* principle — a reflection of the rule of law in relation to criminal law.[437] This is the idea that punishment should attach to criminal acts rather than criminal types.[438] In this regard, Evatt and others quoted Lord Macaulay's statement that punishment on the basis of beliefs and associations rather than conduct was

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[430] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3953 (Nicholas McKenna, ALP).
[431] Tamanaha, above n 236; Tom Bingham, *The Rule of Law* (Penguin Books Ltd, 2010).
[432] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2948 (Charles Morgan, ALP).
[433] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3936–7.
[434] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 3001.
[435] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3941.
[436] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3938 (Nicholas McKenna).
[437] Francis Allen, *The Habits of Legality — Criminal Justice and the Rule of Law* (Oxford University Press, 1996) 14.
[438] Bronitt and McSherry, above n 381, 9 referring to Allen, above n 437, 15.

both 'foolish and wicked'.[439] The proposed legislation, said Evatt, was a breach of this principle. It punished individuals by assuming criminality based on their beliefs. It also subjected an accused to an extremely unfair process.[440]

These issues raised important questions but were not the subject of proposals for amendment by Labor. There are a number of explanations, which are explored in the conclusion to this chapter. The next section of the thesis uses Gross's assumption of separation to explore Parliament's response to the Dissolution Bills.

VII THE ASSUMPTION OF SEPARATION

This section draws on parliamentary debate in order to test Gross's assumptions of temporal, national security and communal separation. As stated earlier, the assumptions of spatial and foreign affairs separation are not relevant to the Dissolution Bills.

A *Temporality*

Gross argues that we believe '[n]ormalcy and emergency occupy alternative, mutually exclusive time-frames' and that emergency powers will cease when an emergency ends.[441] He regards the use of sunset clauses as evidence of these beliefs.[442]

As described earlier in this chapter, the Government's rhetoric located Australia in a dangerously turbulent world, threatened by fifth-columnism from within and potential engulfment from a tide of revolutionary communism from without. However, like the war on terror and unlike a conventional war, the Government did not envisage an endpoint to the 'threat'. This thinking was reflected in the text of the Dissolution Bill [No 1] that, in contrast to the *War Precautions Act*

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[439] Commonwealth, *Parliamentary Debates*, Senate, 15 June 1950, 4338 (Sidney O'Flaherty, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 89–90 (HV Evatt, ALP); Commonwealth, *Parliamentary Debates*, Senate, 17 October 1950, 840 (William Morrow, ALP).

[440] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 89–90. Clauses 9(1) and (2) enabled a person to be declared because they belonged to the Communist Party or were a communist and on the basis of the likelihood that they would engage in activities prejudicial to Commonwealth security and defence etc.

[441] Gross and Ní Aoláin, above n 127, 174–5.

[442] Ibid 174–9.

1914 (Cth), the *Unlawful Associations Act*, the *National Security Act* or the *Coal Strike Act*,[443] did not contain a sunsetting mechanism when introduced. This was a significant point of difference, argued Labor, with the *Coal Strike Act*, which had operated only during the coal strike and allowed deemed repeal to occur on the Governor-General's proclamation once the strike had ended.[444]

There were, apparently, proposals for a termination date for the Dissolution Bill [No 1] — at 'one, two, five, or seven years' time'.[445] Some, at least, of these came from uneasy Government politicians. Backbencher Wilfred Kent Hughes reportedly circulated an amendment, never moved, that would have limited the Dissolution Bill [No 1]'s duration to 12 months.[446] And although he ultimately decided against it, WC Wentworth contemplated proposing a sunset date of 31 December 1952. Because he regarded the bill as 'foreign to accepted tradition', he believed it should operate no longer than necessary.[447] Setting a termination date was, however, rejected on the basis that it was impossible to forecast how long the threat from communism would last.[448]

Even with a sunset clause it was clear that some of the legislation's effects would be permanent. Somewhat glibly, the Prime Minister pointed out that 'it does not seem to matter much whether it [an organisation] is to be dissolved under a temporary measure or a permanent measure because its dissolution will be complete'.[449] This was certainly the case in relation to the property of the

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[443] Respectively, ss 2, 2, 19 and 14.
[444] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2287 (HV Evatt, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 2966 (Tom Burke, ALP).
[445] Commonwealth, *Parliamentary Debates*, Senate, 6 June 1950, 3692 (Walter Cooper, Country Party).
[446] The Opposition on several occasions referred to this amendment. See Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2765 (Standish Keon, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 2965–6 (Tom Burke); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 2989 (William O'Connor); Commonwealth, *Parliamentary Debates*, Senate, 6 June 1950, 3682 (Albion Hendrickson); Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3793 (Charles Sandford); Commonwealth, *Parliamentary Debates*, Senate, 21 June 1950, 4597 (Albion Hendrickson).
[447] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2635. Wentworth did, however, want the disqualification of declared individuals to extend to other employment categories and preferred that communists should be registered, with heavy penalties for failure to do so.
[448] Commonwealth, *Parliamentary Debates*, Senate, 3692–3 (Walter Cooper, Country Party).
[449] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 3000.

Communist Party and unlawful associations, which would be forfeited to the Commonwealth.

Ultimately, however, Attorney-General Spicer agreed that, as an emergency measure for a specific purpose, the legislation should not 'remain in force any longer than is necessary to meet the circumstances'.[450] As a result, and with the Opposition's support, cl 26 was inserted into the Dissolution Bill [No 1]. It provided that when the Governor-General was satisfied that the legislation was no longer needed, a proclamation would be issued and deemed repeal would result. Welcoming the amendment, Senator McKenna suggested that it would 'give the measure the standing of emergency legislation only'.[451] This statement arguably related not only to constitutionality but reflects Gross's assumption of temporality.

B *National Security*

Gross suggests that exceptional laws are more readily accepted when they deal with national security because of the special deference accorded to the executive when the safety of the nation is at stake.[452] This section of the thesis examines the nature of national security claims made by the Government, the response of the Opposition and the role of deference in parliamentary debates.

The Government's national security claims were advanced in the following ways. First, in the text of the Dissolution Bills. The legislation itself was a canvass on which national security claims were writ large — in nine recitals that asserted constitutional power and contained sensational allegations against the Communist Party.

Second, were claims about the role and knowledge of the Executive Government. In Parliament, the Government used the idea and nature of executive responsibility for national defence and security to enhance atmospherics, justify the legislation and reject Opposition amendments. In the words of the Prime Minister:

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[450] Commonwealth, *Parliamentary Debates*, Senate, 15 June 1950, 4344.
[451] Ibid.
[452] Gross and Ní Aoláin, above n 127, 214–20.

> … any democratic parliament confronted by a state of affairs such as exists today will properly repose a great degree of responsibility in the government, which should have and must have more knowledge of the security affairs of Australia than anybody else outside the Security Service itself …[453]

The 'safety and defence of Australia', said Menzies, 'are matters in respect of which a particular responsibility has been imposed on the King's Ministers' in the 'King's Australian Parliament'.[454] Attorney-General Spicer agreed that these were subjects 'peculiarly within the knowledge of the government of the day'.[455] They involved information obtained from the security service, foreign governments, diplomats and Australia's defence intelligence.[456] Armed with this knowledge and given the state of emergency, it was appropriate for parliament to accept that only the executive could make informed judgments about the safety of the nation.[457] In these ways, the Government sought to make its claims incontestable. National security issues were for the executive alone.

Third, were claims designed to divorce national security decisions from any suggestions of Government bias or politicking — these were also claims for deference and trust. The idea of the 'King's Ministers', allowed the Government to portray itself as divorced from partisan politics, as unsullied by foreign and radical doctrines, and as unquestionably loyal. Communists, by contrast, were the 'King's enemies'.[458] Government descriptions of the making of declarations

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[453] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2929 (Robert Menzies, Liberal).
[454] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4548.
[455] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3958 (John Spicer, Attorney-General).
[456] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 156 (William McMahon, Liberal).
[457] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2929 (Robert Menzies, Liberal).
[458] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1995 (Robert Menzies, Liberal). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2396 (Eldred Eggins, Country Party); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2504 (Bruce Kekwick, Liberal).

by the Governor-General, on the advice of the 'King's Ministers',[459] served a similar purpose.[460]

Given that it was the 'King's Ministers' who would have concluded that an organisation was a security threat, the Attorney-General asked why it was unreasonable to place the onus of proof on an officeholder of that body.[461] Frederick Osborne, a future Minister in Menzies' administrations, described the Executive Council as 'the highest and most responsible body in the land'.[462] It was 'futile' to contend that grave injustices would occur, said the Minister for Social Services, William Spooner, given that Cabinet would act on the advice of its public servants and after making a 'solemn' recommendation to the Governor-General.[463] Although Evatt argued that the 'King's courts' should play a vital role in protecting the individual against the might of the State,[464] the Government responded that opinion and policy — especially in matters of national security — were inappropriate subjects for judicial or jury deliberation[465] and were the responsibility of the 'properly elected democratic government'.[466]

Fourth, the debates show close connections between Government demands for trust and deference on national security issues and claims for trust in the administration of the law-based principle of responsible government. Isaacs J's statement in *Ah On* that '[a] nation has the strongest right to trust its executive officers' in their administration of the law[467] was quoted to suggest that Australia's system of responsible government involved a presumption that the

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[459] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1995 (Robert Menzies, Liberal).
[460] That Labor was aware of these tactics is clear. For example, Labor Senators William Ashley and James Sheehan commented on the Attorney-General's frequent use of the term 'the King's Ministers'. Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4215, 4228, respectively.
[461] Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4194 (John Spicer, Attorney-General, Liberal).
[462] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2648.
[463] Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4100.
[464] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4559.
[465] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4548 (Robert Menzies, Liberal); Commonwealth, Parliamentary Debates, Senate, 14 June 1950, 4194 (John Spicer, Attorney-General, Liberal).
[466] See also Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4228 (John Spicer, Attorney-General, Liberal).
[467] *Ah On* (1926) 39 CLR 95, 104.

Government 'will do its best to administer the law fairly'[468] — that is, it could be trusted. Further, it was argued that any potential for the abuse of power would be checked through close scrutiny of executive action by Parliament, the possibility of 'no confidence' motions or the ultimate popular sanction of punishment at the ballot box.[469]

Fifth, national security claims were used to reject Opposition amendments — for instance, for jury trials and for appeals on the question of subversive tendency — on the spurious ground that it would expose and destroy the security service.[470] It would include, claimed future Prime Minister Billy McMahon, 'everything that occurred in the Prime Minister's Department and the Department of External Affairs'.[471] These disclosures would be 'fatal to the security of [the] country'.[472]

When the Dissolution Bill [No 2] was introduced in September 1950, the Government's national security claims increased. In October 1950, Harold Holt argued that justification for the legislation had strengthened because of events in Korea. Ordinary, peacetime rules, he said, would be ineffective in the present circumstances. [473]

Labor's position on the issue of national security was complex and often inconsistent. Some in the ALP pointed to declining Communist Party membership and the findings of the Lowe Royal Commission.[474] They argued that an atmosphere of fear that had been deliberately manufactured by the

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[468] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2565 (Gordon Freeth, Liberal); Commonwealth, *Parliamentary Debates*, 23 May 1950, 2991 (Howard Beale, Minister for Supply, Liberal).
[469] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2775 (Harold Holt, Minister for Labour and National Service, Minister for Immigration, Liberal); Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2897 (Keith Wilson, Liberal); Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4548 (Robert Menzies, Liberal).
[470] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2782 (Hubert Anthony, Postmaster-General, Country Party); Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2883 (Robert Menzies, Liberal). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2778 (William Haworth, Liberal).
[471] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2758.
[472] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2882 (Robert Menzies, Liberal).
[473] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October, 1950, 184 referring to the war in Korea.
[474] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 186 (Eddie Ward, ALP).

Government. In addition, most in the party and particularly its leadership disputed the Government's assertions that Australia was confronting an international emergency and an extremely dangerous fifth column. As Nicholas McKenna remarked in May 1950, 'Up to the point that the Labour party ceased to be the government, the facts which justified … [the] action being taken had not arisen'.[475] The Labor leadership maintained this stance when the Dissolution Bill [No 2] was introduced — Ben Chifley asserting in September 1950 that Australia was in less danger than it had been 'at any time during the last two decades'.[476]

A second and related matter was the accuracy of the recitals. Labor's Nicholas McKenna accepted that the Government possessed secret and 'special knowledge' about and had responsibility for allegations made in the recitals.[477] He thought the recitals were 'true' but emphasised that this was merely a belief.[478] Had the recitals been *demonstrably* true, McKenna argued, the Government would surely have commenced prosecutions under the *Crimes Act*[479] — legislation that Labor argued contained all the powers necessary to deal with communists.[480] Others expressed scepticism about the recitals[481] but many simply refused to be drawn on the question of their veracity.[482]

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[475] Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3318, 3319. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4564 (Eddie Ward, ALP).
[476] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 113.
[477] Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3318–19.
[478] Commonwealth, *Parliamentary Debates*, Senate, 17 October 1950, 812.
[479] Commonwealth, *Parliamentary Debates*, Senate, 15 June 1950, 4346–7 (emphasis added).
[480] Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3516 (Richard Nash, ALP); Commonwealth, *Parliamentary Debates*, 7 June 1950, 3824 (William Ashley, Opposition Senate Leader, ALP). In response the Government argued that the point of the Dissolution Bills was to prevent crimes not punish them after the event — Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3929 (Neil O'Sullivan, Minister for Trade and Commerce). Labor Senator John Ryan said the recitals were supported by the findings of the Lowe Royal Commission. However, he considered that a better way of dealing with communists was to segregate them and prosecute them for any criminal conduct. See Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3524.
[481] When asked by the Attorney-General whether he believed the recitals to be true, Labor Senator Aylett replied 'as much as does the Attorney-General' (Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4103.
[482] Senator Ashley argued that because the Government had not briefed the Opposition on matters of security and defence, it was not in a position to comment on the recitals (Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3824).

Outspoken party members labelled the recitals a 'propagandist statement' and demanded that the Government provide evidence for its claims.[483] Eddie Ward, a minister in the Curtin, Forde and Chifley administrations, castigated the Government on this point and contended that there was '[no] danger at all of a dictatorship of the Communist party being established in Australia'.[484] Similarly, William Morrow said he had asked the Government 'to bring forward evidence to show that the defence of the Commonwealth is being prejudiced' but had not received any response.[485]

In addition, a third issue affected deference. This was the question of Labor's confidence in ASIO and its central role in administering the proposed Dissolution Act and advising the Government. Labor politicians expressed various degrees of confidence[486] and scepticism about the security agency and its operatives but were particularly critical of its likely sources of information. It was predicted that ASIO would rely on a 'network of pimps and informers' to administer the legislation. [487] ASIO itself was occasionally referred to as a 'pimping organisation'[488] or as a 'secret police' force.[489] Labor also noted the errors, likely based on security service information, that had been made by the Prime Minister

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[483] Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3574 (Sidney O'Flaherty, ALP). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2773 (Reginald Pollard, ALP).

[484] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2654. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2791.

[485] Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4223.

[486] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2942 (Daniel Curtin, ALP); Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3553, 3555 (Reginald Murray, ALP). Both Curtin and Murray expressed confidence in ASIO.

[487] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2942 (Daniel Curtin, ALP). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2268, 2269 (Ben Chifley, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2753 (Kim Beazley Snr, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2788 (John Rosevear, ALP); Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3335 (John Armstrong, ALP).

[488] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2789 (John Rosevear, ALP). It is not clear whether this was a reference to ASIO itself or the informers on which it would rely. Eddie Ward said Labor's references to pimps and informers did not include the security service — Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2884. However, Senator William Aylett's comments suggest he was referring to ASIO or at least to the opportunities provided by the legislation for 'peace officers or security police' to 'frame' people — Commonwealth, *Parliamentary Debates*, Senate, 6 June 1950, 3696.

[489] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2752, 2753 (Kim Beazley Snr, ALP); Commonwealth, Parliamentary Debates, 23 May 1950, 2982 (Charles Morgan, ALP).

when he read out the names of 53 communists on 27 April 1950.[490] In addition, Chifley expressed some doubts about the appointment of Charles Spry, a former director of military intelligence, as ASIO's new Director-General. This can be understood, in part, in the context of Chifley and Evatt's reluctant decision to establish ASIO in 1949 and against an historical backdrop of spying on left-wing organisations by Commonwealth military intelligence during two world wars. For example, as Prime Minister, Chifley had wanted ASIO to be a civilian rather than a military organisation, with a limited remit in order to prevent the flourishing of 'spies, pimps and informers'.[491]

Referring to Labor's appointee and first Director-General — Justice Geoffrey Reed — Chifley remarked that when ASIO's head 'was a judge … I felt that we could trust him completely to exercise his functions in a judicial manner'.[492] This statement can be read as an expression of reservations about impartiality, independence from partisan politics and fair process.

Fourth, Labor did not defer to the Government's national security criticisms when it introduced and pressed amendments designed to allow (as far as possible) particularised allegations of subversion to be tested in open court and before a jury.[493]

Fifth, although it did not oppose the creation of the committee of five, some in Labor raised concerns about bias, given that one of its members would be ASIO's Director-General — the person responsible for initial security assessments about organisations or individuals.[494]

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[490] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2242 (Ben Chifley, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2242 (John Rosevear, ALP); Commonwealth, *Parliamentary Debates*, 11 May 1950, 2512 (Charles Morgan, ALP); Commonwealth, *Parliamentary Debates*, 18 May 1950, 2938 (Alan Bird, ALP); Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3335 (John Armstrong, ALP).

[491] Jenny Hocking, *Terror Laws. ASIO, Counter-Terrorism and the Threat to Democracy* (UNSW Press, 2004) 24–5 citing John Burton, Submission 7 in Nicholas Whitlam and John Stubbs, *Nest of Traitors. The Petrov Affair*, (Jacaranda, 1974) 170. On the decision to establish ASIO see also Cain, above n 9; Day, above n 17, 473; Maher, above n 9; Maher, above n 8.

[492] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 195 (Ben Chifley, ALP).

[493] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 152 (Percy Clarey).

[494] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 October 1950, 162–3 (Reginald Pollard).

Sixth, and perhaps most importantly, despite the Government's claims of a national security emergency, the Opposition was not convinced. It refused to defer to the Government's claims and refused to pass the dissolution legislation until October 1950 when internal politics resulted in a change of mind.

C *Communal Divisions*

Gross notes that '[c]ounter-terrorism measures and emergency powers are often perceived as directed against a clear enemy of "others"'.[495] He argues that this separation — between 'us' and 'them' — fulfils a number of functions. It allows fear and anger to be expressed towards individuals and groups perceived as 'different'. Enlarged emergency powers are more likely to be supported if they have a clear target of the 'other'. And because the 'other' is likely to be politically powerless, the costs to political parties are minimised and the costs to the target group magnified. Gross concludes that in terms of policy outcomes, security will overwhelmingly trump liberty.[496]

This section adopts the format of previous ones. It considers communal separation in the light of the parliamentary debates on the Dissolution Bills. It begins with an examination of contributions from Government members and senators and then turns to the Labor Party.

The Government's descriptions of the Communist Party, communism and communists were designed to stigmatise and marginalise; to paint a very detailed and threatening picture of the 'other'. First, as indicated earlier in this chapter, it described the Communist Party as a criminal conspiracy — engaging in treason and sedition, 'a dagger at the heart of [Australia]'[497] — rather than a political party. It worked against Australia's national interests, disrupting the economy through strikes and industrial action, causing shortages and inflation.[498] It was a 'subversive, terrorist organization, organised in the interests

[495] Gross and Ní Aoláin, above n 127, 220.
[496] Ibid 220–2.
[497] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2536 (Billy Hughes, Liberal).
[498] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2510 (Thomas Gilmore, Country Party); Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2790 (Roy Wheeler, Liberal).

of a foreign power and with the object of causing economic misery in Australia so that a revolution may overthrow our system of government'.[499]

Second, communism as an ideology was described as profoundly alien in economic, political, religious and racial terms. Future External Affairs Minister and Governor-General, Paul Hasluck, categorised it as 'incompatible' with Australian democracy and 'foreign'.[500] 'Capitalism is democracy', said Country Party MP Charles Anderson.[501] Socialism and communism, on the other hand, were foreign totalitarian systems. Further, like socialism, communism was 'materialistic'[502] and 'atheistic'.[503] It served foreign masters — the Soviet Union and Cominform. Unlike Australia — quintessentially Anglophile — communism was deeply anti-British. All 'true Australians', claimed the Member for Bass, should support the legislation.[504] In short, said the Prime Minister, communism was a movement of 'scoundrels, of subversive radicals, of enemies, of people whose one desire is to pull this country down'.[505] In other senses, too, communism presaged a racially 'foreign' threat — some politicians feared that the forces directed by Russia against Australia would be neither 'white nor European' but 'Asiatic communists'.[506]

Communists were similarly described and denigrated. On the one hand, they were likened to 'vermin';[507] 'mad dog[s]';[508] 'virulent cancer';[509] and portrayed as

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[499] Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3804 (John Gorton).
[500] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2388 (Paul Hasluck, Liberal); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 2968 (Rupert Ryan, Liberal).
[501] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2530.
[502] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2528 (Charles Anderson).
[503] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2677 (Athol Townley, Liberal); Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2875 (Alan Hulme, Liberal).
[504] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2502 (Bruce Kekwick, Liberal).
[505] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2749.
[506] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2529 (Charles Anderson). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2555 (Leonard Hamilton, Country Party).
[507] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2907 (Hugh Leslie, Country Party).
[508] Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3523 (John Tate, Liberal).
[509] Commonwealth, *Parliamentary Debates*, Senate, 31 May 1950, 3445 (Annabelle Rankin, Liberal).

'morons, failures, loafers, sadists and thugs'[510] and as 'misfits … psychiatric cases … [with a] lust for power'.[511] On the other hand, they were endowed with almost superhuman powers. Percy Spender described them as 'highly organized' and centrally coordinated under orders from Moscow.[512] Other Government politicians characterised them as 'skilled and ruthless' tacticians;[513] as having 'a whispering machine of almost unexampled efficiency which is able to put distorted ideas into people's minds';[514] and as 'a crafty and clever foe'.[515] They had carefully infiltrated positions in industry and government where they could engage in sabotage and disrupt the economy.[516] Virtually no organisation in Australia, including universities, progress associations and local government councils was entirely free of them.[517] Conveniently for the Government, communists' alleged skills meant that the fall in Communist Party membership was irrelevant.[518] Their positional strategy in important trade unions was key.

Communists were also portrayed as profoundly foreign in other ways by the Government. They were loyal 'solely to Stalin'[519] and were 'servile slaves of an alien power'.[520] They rejected 'British standards of loyalty to God, King and country'[521] and thus were not part of 'the people' in Australia's democracy.[522]

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[510] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2497 (George Bowden, Country Party).
[511] Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3806 (John Gorton, Liberal).
[512] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2280. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2516 (Bruce Wright, Liberal).
[513] Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3562 (Edmund Maher, Country Party).
[514] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2634 (WC Wentworth, Liberal).
[515] Commonwealth, *Parliamentary Debates*, Senate, 18 October 1950, 949 (John Spicer, Attorney-General, Liberal).
[516] Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3806 (John Gorton, Liberal).
[517] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2902 (Hugh Leslie, Country Party).
[518] See, for example, the Country Party MP Eldred Eggins, who argued that the numerical strength of the Communist Party was not as important as its organisational capacity. Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2396.
[519] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3917 (James Guy, Liberal).
[520] Commonwealth, *Parliamentary Debates*, Senate, 19 October 1950, 1077 (Neil O'Sullivan, Minister for Trade and Customs, Liberal).
[521] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 2974 (Allen Fairhall, Liberal).
[522] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 116 (Winton Turnbull, Country Party).

They were disloyal to the Crown.[523] And, reprising a theme evident in politics at least since World War I,[524] it was said that Communist leaders and many party members were not 'Australian-born'.[525]

The nature of communists' alleged activities — 'a diabolical … conspiracy'[526] to overthrow established institutions, seize power and establish a proletarian dictatorship — meant that communists transgressed the boundaries of legitimate political dissent[527] and placed them outside the normal protections of the law.[528] Their alleged mode of operation — said to be careful avoidance of individual criminal acts,[529] use of front organisations and infiltration of community groups — also meant that ordinary legal protections could be put aside.[530] Every communist was 'an actual or potential traitor'.[531] Given the danger posed by communism, criminal laws were inappropriate and ineffective because they targeted past behaviour and were not preventive.[532] Last, by its very nature, the Communist Party was said to be 'protean in its shape'.[533] As a result, exceptional measures were needed to follow communists into new organisations once the party itself had been dissolved.

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[523] Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3529 (Edward Mattner, Liberal).
[524] Introducing the Unlawful Associations Bill 1917, Prime Minister Billy Hughes said that '[a] large proportion of the members [of the IWW] are foreigners' (Commonwealth, *Parliamentary Debates*, House of Representatives, 18 July 1917, 231). Almost a decade later, Attorney-General Latham's introduction to the Crimes Bill 1926 referred to foreign ideas and to foreigners in the Communist Party (Commonwealth, *Parliamentary Debates*, House of Representatives, 28 January 1926, 457–75).
[525] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2509 (Thomas Gilmore, Country Party).
[526] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2934 (Bruce Graham, Liberal).
[527] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1950, 1995, 1998 (Robert Menzies, Liberal).
[528] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2749 (Robert Menzies, Liberal).
[529] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2280 (Percy Spender, Minister for External Affairs); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2563 (Gordon Freeth, Liberal).
[530] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2546 (Malcolm McColm, Liberal).
[531] Commonwealth, *Parliamentary Debates*, Senate, 31 May 1950, 3431 (John McCallum, Liberal).
[532] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2756–7 (Billy McMahon, Liberal) quoting a wartime speech by Attorney-General Evatt and drawing an analogy with wartime preventive measures. See also Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3817 (Reginald Wright, Liberal).
[533] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2375 (Howard Beale, Minister for Supply, Liberal). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2881 (Robert Menzies, Liberal).

The importance of Gross's assumption of communal separation for the Government is evident in a number of other ways — in the title and text of the Dissolution Bills, as well as in the Government's descriptions of the Communist Party, communism and communists. These portrayals of the communist 'other' were important in justifying the Bill and its operation on communists and in attempts to assure the rest of the community that it had nothing to fear from the legislation.

There were, nonetheless, concerns that the Bill was not sufficiently targeted. These were influential — with Labor claiming some credit for Government amendments that replaced membership of an unlawful association as a threshold test for declaration of an individual and substituted membership of the Communist Party.[534] Introducing the amendments, Attorney-General Spicer said that the Government was responding to criticisms that the clause might apply to persons 'who were not in any sense Communists or members of the Communist party'.[535]

As indicated earlier in this chapter, Labor's accusations about the Communist Party, communism and communists generally reflected those of the Government. These criticisms can be seen as fulfilling several functions. First, Labor's description of communists and communism identified them as 'other' in terms of their 'foreignness' and the threat that they posed to Australia. Second, this meant they were deserving of 'exceptional' treatment — legitimising the Opposition's decision to support, with appropriate amendments, the banning of the Communist Party and associated organisations and the declaration of communists. Third, they were a statement of anti-communist credentials. Fourth, they constituted attempts to protect Labor from accusations that it was the 'other'.

The Deputy Leader of the Opposition in the Senate regarded the Communist Party's aims as 'evil'.[536] Others contended that communism violated 'natural law',

[534] Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4213 (Nicholas McKenna, ALP).
[535] Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4212.
[536] Commonwealth, *Parliamentary Debates*, Senate, 21 June 1950, 4584 (Nicholas McKenna, ALP).

was 'anti-religious … [and] criminal'.[537] Ben Chifley regarded communists as 'seditious and subversive'.[538] And communism and the Communist Party were variously depicted by Labor politicians as a 'menace' to religion, civilised society, law and order, and democracy;[539] as 'un-Australian';[540] and as fanatical.[541] For these reasons, the normal protections of justice did not apply.[542]

For many in Labor, communism was an enemy in a real and visceral sense. Its politicians emphasised the mutual and historical antagonism that existed between them and the Communist Party.[543] Evatt cited 'the incessant attack from the Communists' on himself and other ALP leaders.[544] Labor believed that the Communist Party had deliberately sought to undermine its government and to wrest control of the trade union movement.[545]

The Opposition, therefore, stressed that it did not oppose banning the Communist Party or removing communists from trade union office.[546] Nor, said Chifley, was the labour movement 'concerned with what the Government does about Communists'.[547] Furthermore, with some exceptions, the Opposition did not argue against the banning of successor or infiltrated organisations[548] 'down

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[537] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2637 (Thomas Andrews, ALP).
[538] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2913.
[539] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2491 (John Cremean, ALP).
[540] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 1950, 2504 (Daniel Curtin, ALP).
[541] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2628 (Gilbert Duthie, ALP).
[542] Commonwealth, *Parliamentary Debates*, Senate, 18 May 1950, 2948 (Charles Morgan, ALP).
[543] Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3312 (Nicholas McKenna). McKenna quoted from ALP conference resolutions passed in 1948, which referred to the 'basic hostility' between the two parties, the ban on Communist Party organisations affiliating with the ALP and on communists joining the party. Conference had also noted that the Communist Party sought to destroy democracy and replace it with totalitarian dictatorship.
[544] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4568.
[545] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2368 (Edward Peters, ALP).
[546] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2913 (Ben Chifley, ALP). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2945 (Gilbert Duthie, ALP); Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3944 (Nicholas McKenna, ALP).
[547] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 111.
[548] Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3320 (Nicholas McKenna, ALP). See also Commonwealth, *Parliamentary Debates*, Senate, 31 May 1950, 3450 (Richard Nash, ALP); Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3957–8 (Nicholas McKenna, ALP).

to the remotest form'.[549] It did not generally object to the expropriation of Communist Party property. It was rare that the Opposition contended explicitly that a person could be a communist and not participate in subversive activities.[550] And due to the directive from its Federal Executive, it was even rarer for Labor politicians to declare in-principle opposition to the legislation.[551]

It was the Bills' potential application beyond the Communist Party and communists that attracted Labor's criticisms and, until October 1950, helps explain its decision to oppose the legislation unless its amendments were accepted. This wider application arguably operated in two ways.

There was the (unlikely) possibility that the party itself or Labor politicians might be declared. Leading figures in the Government were careful to dismiss suggestions that the ALP would be targeted but repeatedly emphasised Labor's supposed connections with communism.[552] The Minister for External Affairs, Percy Spender, called suggestions that Labor politicians could be declared 'fantastical'.[553] However, he also described Chifley's second reading speech as 'an apology for communism'.[554] The Prime Minister asked why Labor amendments to the bill were 'designed to give the Communist privileges that they deny to the common burglar'.[555] It was said that Labor had opened its door to communism when it adopted its socialisation objective.[556] And, repeatedly, the Government

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[549] Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4095 (Nicholas McKenna, ALP).
[550] An exception was Senator James Sheehan — see Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4229.
[551] Senator Grant said 'I dislike the bill from beginning to end but I shall abide by the decision of my party'. Commonwealth, *Parliamentary Debates*, Senate, 15 June 1950, 4341. However, it should be noted that he also remarked that 'if the Government wants to declare the Communist party illegal, let it do so, but it should stop there'. Commonwealth, *Parliamentary Debates*, Senate, 15 June 1950, 4341.
[552] These connections were asserted as least as early as debates on the Crimes Bill 1926. They are contained in Menzies' 1949 campaign speech, in which he accused Labor of planning 'Socialism in our time'. He referred to the party's platform of socialising 'industry, production, distribution and exchange' and said it had been 'adopted and hailed by Labour leaders as the splendid product of the teachings of Karl Marx'. See Menzies, above n 21.
[553] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2281.
[554] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2279.
[555] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4550.
[556] Commonwealth, *Parliamentary Debates*, Senate, 7 June 1950, 3799 (Albert Reid, Country Party). The objective of 'socialization of industry, distribution and exchange' was confirmed at the 1921 ALP National Conference. At the same time, however, conference also adopted a resolution moved by lawyer, politician and civil libertarian, Maurice Blackburn, which qualified that objective. The Blackburn Interpretation stated that the ALP 'proposes collective ownership for the purpose of preventing exploitation' and 'does not seek to abolish private ownership, even if an instrument of production, where such instrument is utilised by its owner in a socially useful

alleged that the difference between Labor and communism was not a difference in ends — the goal of both was socialism — but a difference in means.[557]

Other connections between Labor and communism were alleged. It was blamed for presiding over an increase in Communist Party membership during its time in government, for allowing the Communist Party to control key industries[558] and for permitting communists 'to white-ant the Australian way of life and infiltrate the Labour movement'.[559] Perhaps most dramatically, Minister for National Development, Works and Housing and future Governor-General RG Casey argued that, under Labor, government of the country had effectively passed to the Communist Party.[560]

Some Government politicians also suggested that Labor party members might be declared. In May 1950, Menzies said that it would be easy to declare at least one Labor senator and possibly one member of the House of Representatives.[561] These were references to Senator William Morrow and to MP Eddie Ward.[562] In addition, WC Wentworth advised Labor's Reginald Pollard to be careful because

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manner and without exploitation'. 'Socialisation Objective Reaffirmed. ALP Conference Unanimous', *The Argus* (Melbourne), 29 September 1948, 3.

[557] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2356 (Arthur Fadden, Treasurer, Country Party).

[558] Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4225 (George McLeay, Liberal). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1950, 2353 (Arthur Fadden, Treasurer, Country Party); Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2640 (Laurence Failes, Country Party); Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2671 (John McEwen, Minister for Commerce and Agriculture, Country Party). Mr McEwen suggested that links existed between Labor and communism through the affiliation of communist-controlled unions.

[559] Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4197 (Ian Wood, Liberal). Senator McLeay claimed that communists controlled the coal, transport, iron and steel industries and had 'dictated policy' to the Labor Government. Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4225 (George McLeay, Minister for Fuel, Shipping and Transport, Liberal).

[560] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2660.

[561] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 May 1950, 2219. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 3 May 1950, 2177 (Harold Holt, Minister for Labour and National Service, Minister for Immigration, Liberal); Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 1950, 2357 (Arthur Fadden, Treasurer, Country Party). Ministers Holt and Fadden singled out Eddie Ward. One reason was that Ward's former staffer, Jock Garden, had been one of the founders of the Communist Party in Australia. Minister Fadden also referred to Mr Garden. And see Macintyre, above n 126, 21–22.

[562] Both the Government and the Commonwealth Investigation Service believed that Senator Morrow was a member of the Communist Party. In the Senate, William Spooner alleged that communists had funded Senator Morrow's election campaign. Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4084.

'he has a shocking pro-Communist record'.[563] Genuine concerns in the Labor Party, as a result of such claims, may have given rise to suggestions that Labor might propose a statutory exemption for parliamentarians.[564] It is noteworthy, too, that in October 1950 Labor stated that it had decided to allow the Dissolution Bill [No 2] to pass in order 'to give the lie to [the Government's] false and slanderous allegations against the Labour party.'[565] These were the allegations of communist associations of its members and doctrinal influences on the party's policies.

Beyond its possible application to the Labor party and Labor politicians, Labor also argued that the legislation would have more generalised effects. Some of the ALP's criticisms were rhetorical — far-fetched and legally unsound — designed for their political resonance. They included suggestions that the Liberal Party itself or a person advocating the use of electricity, nationalisation of the banks or free education could be declared.[566] However, there was also genuine concern — about the definition of 'communism', the power to declare and stigmatise individuals, and about potential impacts on trade unions and their (non-communist) leaders, on dissidents and radicals and on progressive voices in the community both as a result of the power to declare and because of the potential chilling effect of the legislation.[567]

Concerns about 'innocent' groups and individuals are reflected in Labor's rhetoric and its characterisation of its proposed amendments to the Dissolution Bills. Chifley spoke of justice for 'ordinary men and women' but qualified this by saying, 'I do not mean Communists or members of Communist organizations, but men and women who may be militant trade unionists or, to some degree,

[563] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2787.
[564] According to Liberal backbencher, WC Wentworth — Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2634.
[565] Commonwealth, *Parliamentary Debates*, Senate, 17 October 1950, 811.
[566] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3904 (William Morrow, ALP).
[567] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 113 (Ben Chifley, ALP); See also Commonwealth, *Parliamentary Debates*, House of Representatives, 16 May 1950, 2631 (Gilbert Duthie, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 2656 (Eddie Ward, ALP); Commonwealth, *Parliamentary Debates*, Senate, 1 June 1950, 3525, (John Ryan, ALP); Commonwealth, *Parliamentary Debates*, Senate, 6 June 1950, 3704 (Don Willesee, ALP); Commonwealth, *Parliamentary Debates*, Senate, 14 June 1950, 4203, 4204 (Joseph Cooke, ALP).

irrational or careless in their talk'.[568] Like Menzies, he used parliamentary privilege to name 'guilty people' — 'the Healys, McPhillipses, the Thorntons and their like'.[569] Evatt also distinguished communists from 'innocent people'.[570] Senator Richard Nash claimed, 'I will not be a party to abrogate the democratic rights of the people of this country', but agreed that the Communist Party should be banned.[571] And future Opposition leader, Arthur Calwell declared that the ALP was not trying to protect communists or communist organisations but, rather, innocent persons and groups.[572]

Finally, the ALP attempted to use its own sense of 'the other' to attack the Bills. It portrayed parts of the legislation as foreign — 'undemocratic and totalitarian' — and some in the party voiced similar criticisms of the Government. Eddie Ward, for example, accused Menzies of wanting to establish a 'fascist dictatorship'.[573] Some of these claims can be regarded as simply a reflection of the hysterical, politicised atmosphere in which the Bills were debated or simply as rhetorical flourishes that excitable politicians like Ward were inclined to employ. However, they also speak to a sense of unease — unease that may have been heightened given suggestions by the Government that even if the legislation resulted in injustice it was necessary given the threat to national security.[574] And they were designed to advance the argument that the legislation's application might extend to the community at large and subvert democracy.

VIII CONCLUSION

In two major works,[575] Oren Gross theorises about and explores the response of law to times of crisis. Among other things, he posits two models of legal

[568] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 2996.
[569] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 1950, 113.
[570] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1950, 2926. He did concede, however, that '[t]he fundamental principle is justice for Australian citizens whether they are Communists or non-Communists'. Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 3003.
[571] See Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4082 and also Commonwealth, *Parliamentary Debates*, Senate, 31 May 1950, 3450.
[572] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2780.
[573] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 1950, 4564.
[574] Commonwealth, *Parliamentary Debates*, Senate, 13 June 1950, 4100 (William Spooner, Minister for Social Services, Liberal).
[575] Gross, above n 128; Gross and Ní Aoláin, above n 127.

response. The first is Business-as-Usual, where the legal system remains unaffected by crisis. The second is Accommodation, where legal norms are modified. Gross argues that these models depend on two assumptions — the assumption of constitutionality and that of separation. My thesis asks whether Gross's assumptions provide a useful framework for understanding the legislative process in times of crisis. In this chapter I used the Dissolution Bills as case studies. These were Bills that, I argued, fit Gross's criteria.

I did so by sketching the international and domestic political scene into which the Bills were introduced — a Cold War era of change, fear and highly charged anti-communism. I noted the Government's claims that the nation was facing a security crisis. I then set out the Bills' claims to being special emergency legislation — a type of legislative Accommodation. I found evidence of the Bill's exceptional nature in the dramatic parliamentary atmospherics that accompanied the introduction of the Dissolution Bill [No 1], in parliamentarians' own descriptions of that Bill, the Bill's provisions and in the many proposals for amendment. Further evidence was provided by Labor's resistance, until October 1950, to the Government's threats of double dissolution and, when it capitulated, to its waiver of party discipline to allow Labor senators to speak against the Dissolution Bill [No 2].

Following these introductory sections, the chapter described aspects of the constitutional landscape into which the Bills were introduced together with a brief summary of rule of law principles. It then applied Gross's framework to Parliament's debate on the Dissolution Bills.

This concluding section undertakes a number of tasks. First, it assesses the usefulness of Gross's assumptions in understanding Parliament's engagement with the Dissolution Bills and the eventual passage of the Dissolution Bill [No 2]. This assessment also throws light on the relative importance of each assumption. Second, it notes other factors that drove the legislative process.

A *The Assumption of Constitutionality*

Gross argues that emergency laws are based on the assumption that 'constitutional norms and legal rules control government responses to emergencies and terrorist threats'.[576] As stated earlier, this is the least developed of Gross's assumptions. We do know that he challenges the assumption on descriptive and normative grounds.[577] We know that his larger problem both with the assumption of constitutionality and the assumption of separation is that they produce an erosion of constitutional and rule of law values[578] in addition to other undesirable effects like normalisation.[579] Apart from this, we do not know how the assumption of constitutionality works. Is it unreflective or is more active engagement with constitutional and legal norms involved? In examining Gross's assumption of constitutionality, this chapter looked at constitutional power, representative democracy and liberty and at the rule of law. My findings are summarised below.

1 *Constitutional Power*

Both the Government and the Opposition took it for granted that the Dissolution Bills must be supported by a head or heads of power. That much is clear. However, politicians' views on constitutionality were not unreflective. The claims of the Dissolution Bills to constitutional power in their recitals and operative provisions were explicit. The Government's language of war and crisis can be viewed as having legal as well as political purposes. The Dissolution Bill [No 1] appears to have been crafted with the *Jehovah's Witnesses Case* in mind.[580] In addition, Government parliamentarians acknowledged the novel use that the Bills made of the defence power.

For their part, Opposition politicians expressed doubt about the robustness of the defence power. This scepticism was reflected in their rejection of the Government's insistence that a national emergency existed and in contributions

[576] Gross and Ní Aoláin, above n 127, 86.
[577] Gross, above n 128, 1023.
[578] Ibid.
[579] Ibid 1052.
[580] *Jehovah's Witnesses Case* (1943) 67 CLR 116.

to parliamentary debate made, in particular, by Evatt but also by McKenna. Evatt said the legislation would be unconstitutional without defence power and noted that Australia was experiencing a time of peace. McKenna and other speakers agreed. Further, the language of both Evatt and McKenna drew on the *Jehovah's Witnesses Case*[581] — sometimes just brief paraphrases from the judgments in that case — and suggested that the Bills lacked any connection to power. In Evatt's parliamentary speeches, the lessons he took from the decision in *Walsh v Johnson* can also be discerned.[582]

Nonetheless, Labor's position was to support the Bill in principle and press its amendments. The pull that constitutionality exercised on the party in its pursuit of these aims is visible in two ways. First, in its support of the Government's sunset clause. Second, in its proposed amendments, which would have provided for judicial oversight of both grounds of a declaration and, arguably, a more constitutionally robust base for the legislation.

Exploring the assumption of constitutionality opens up further questions about legislative process. First, is whether parliamentarians thought they should be involved in ventilating and pronouncing on constitutional matters. Government members who addressed this issue urged the Opposition to pass the Bill and leave the matter of validity to the *Constitution*'s guardian — the High Court. McKenna, the only Labor politician who spoke directly on this question, agreed. He referenced the *Jehovah's Witnesses* case. He raised the questions of whether a dissolved organisation could challenge the legislation and whether it would commit an offence in doing so. He warned the Government but emphasised that constitutional challenges were matters for others and the High Court. He said, 'I express no opinion on it [validity]. I merely say there is a doubt'.[583] McKenna's queries aside, the possibility of a constitutional challenge[584] from the Communist Party may have also confirmed opinions that legal action was the appropriate

[581] Ibid.
[582] *Walsh and Johnson* (1925) 37 CLR 36.
[583] Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 1950, 3317.
[584] Whether or when Evatt foresaw a constitutional challenge in which he might play a part is unclear. It may be noteworthy, however, that in late May 1950 it was revealed that Evatt had decided to resume private practice 'in two or three months' after an absence of 20 years in order to take a union brief in an unrelated matter — see 'Brief for Evatt. To Resume Private Practice', *The Sydney Morning Herald,* 20 May 1950, 1.

way to contest constitutional power. That Evatt advised Labor to pass the Bill because he was confident it would be overturned is a matter of disagreement amongst scholars.[585]

Second, is the issue of limits on politicians' ability to engage in constitutional interpretation. The Government's ranks included a number of KCs. They were assisted by a raft of outside counsel and government lawyers. Evatt's stature and McKenna's ability notwithstanding there were few lawyers in Labor's ranks. In addition, there were many constitutional issues raised by the Dissolution Bills — including the self-protective power and s 51(xxxi). It was not possible, in the press of parliamentary business, to consider them all. Labor instead focused on the defence power, which in Evatt's view was the basis on which the legislation would either survive or fall.

Third, is the issue of uncertainty. Case law relating to the self-protective power was undeveloped and the defence power had not been tested in circumstances like the Cold War. Further, said Nicholas McKenna, who spoke from experience,[586] in a federal system governed by a written constitution, the threat of invalidity 'always' loomed over the Commonwealth's legislative endeavours.[587]

Fourth, it is arguable that even had it been inclined to do so, focusing too heavily on the issue of constitutional power would not have been productive. Labor's aim was to incorporate fair process amendments into the legislation rather than to block the Bills outright. Blocking the Bills would also have raised further

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[585] Frank Bongiorno, 'Herbert Vere Evatt and British Justice: The Communist Party Referendum of 1951' (2013) 44(1) *Australian Historical Studies* 54, 59.

[586] McKenna had held ministerial portfolios in the 1940s, a period when the High Court had struck down a number of Labor Government legislative initiatives. In particular, he oversaw the drafting of the *Banking Act 1947* (Cth), which was overturned in the *Bank Nationalisation Case*. See Parliament of Australia, above n 326. Examples of the invalidated laws include *Attorney-General (Victoria); Ex rel Dale v Commonwealth* (1945) 71 CLR 231 ('*First Pharmaceutical Benefits Case*'); *City of Melbourne v Commonwealth* (1947) 74 CLR 31 ('*State Banking Case*'); *Bank of NSW v Commonwealth* (1948) 76 CLR 1 ('*Bank Nationalisation Case*'); *British Medical Association v Commonwealth* (1949) 79 CLR 201 ('*Second Pharmaceutical Benefits Case*'). In their study of the years 1903–2011, Smyth and Mishra calculate that the Curtin and Chifley Labor Governments of the 1940s experienced the second highest average annual challenges to their legislation and, excepting the period 1903–1913, 'the highest rate of invalidation of federal legislation' — Russell Smyth and Vinod Mishra, 'Judicial Review, Invalidation and Electoral Politics: A Quantitative Survey' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 18, 25.

[587] Commonwealth, *Parliamentary Debates*, Senate, 30 May 1950, 3317.

issues about Labor's anti-communist credentials. Of course, on one view, Labor's fair process amendments may have been intended to make the legislation practically unworkable.

In terms of constitutional power, Parliament and the Dissolution Bills, the assumption of constitutionality operated in the following ways. It was an important claim by the Government in terms of the text of the Bills and Government rhetoric. It was the subject of explicitly and implicitly expressed doubt by Labor. It was the subject of one amendment and proposed amendments that may have bolstered validity. However, for both sides of politics, it was regarded as a matter for the courts.

2 *Representative Democracy and Liberty*

The Bills' potential effects on democratic rights and personal liberties were controversial. They were addressed by the Government in four ways. First, by arguing that the Communist Party and communists constituted a criminal conspiracy not a *bona fide* political party. Second, by asserting that communists' liberties depended on their recognition of the state, its essential values and capitalism. Third, by taking a majoritarian position. Fourth, by contending that the system of representative and responsible government would protect liberty against any abuse of power.

Despite some reservations and unease, Labor agreed with the Government's proposals to ban the Communist Party and related organisations and declare communists. At the same time, in relation to 'innocent people', radicals and others, it condemned the Bills for their intrusions into freedom of expression, freedom of association, democratic rights, freedom of speech, and constitutional liberties and for their failure to protect minorities. Some in the party also castigated the Bills' effects on what they called the right to criticise, protest, hold unpopular beliefs, and dissent. Moreover, dire systemic effects were predicted by some Labor politicians — a descent into totalitarianism, the establishment of concentration camps, the creation of a police state.

Communists' liberties — such as political association and expression — were similarly dealt with by both the Government and the Opposition. The position of communists as 'outsiders' — categorised as criminals and misfits who had no allegiance to the institutions of state and church — meant they could be denied the freedoms usually enjoyed by Australian citizens. In the case of the idea that law should protect freedoms of political association and expression, both the Government and Labor regarded the Communist Party and communists as justifiable exceptions to this rule.

3 *The Rule of Law*

Gross argues that we assume legal as well as constitutional norms control government responses to emergencies. I have suggested that this proposition encompasses the rule of law.[588] A study of the Dissolution Bills reveals that, like the assumption of constitutionality, assumptions about the rule of law were more than mere 'taking for granted'.

Rule of law issues figured in a number of ways for the Government. The first relates to ordinary or fair process in civil and criminal proceedings. Thus, the Government argued that its model for declaration applications simply reflected the onus of proof in ordinary civil proceedings. Further, it emphasised that the onus was not reversed in the Bills' criminal offences.

Some in the Government's ranks did acknowledge that the Bill contained unpalatable provisions, negated British justice and contained unsatisfactorily imprecise definitions. More usually, Government members and senators argued that any reversal of the onus of proof, accorded with exceptions in regulatory offences and in a number of criminal offences. The latter included offences directed against other 'outsiders' such as vagrants and undocumented immigrants. In this regard, Government arguments reveal what Bronitt and McSherry identify as a long tradition in criminal law that often 'hedge[s]' its

[588] Gross and Ní Aoláin, above n 127, 2 — see the comment that violent emergencies challenge the tenets held by liberals that 'principles of generality, publicity and stability of legal norms form part of the bedrock of the rule of law'.

ideals 'with qualifications'.[589] Arguably, they also reflect Dyzenhaus's suggestion that exceptionality is a feature of law in ordinary times as well as exceptional ones — 'the executive is prone to carve out exceptions for itself … the barbarian is already within the gates'.[590]

In its criticisms of the Dissolution Bills Labor drew on terminology such as 'the rule of law', 'British justice' and 'natural justice' without necessarily distinguishing between them. For convenience, I labelled this a 'rule of law' approach. These labels were important — placing Labor's amendments within a British tradition. *Hansard* also reveals that Opposition politicians understood and referred to Dicey's first rule of law. Additionally, they imported into it an idea of fair process based on a criminal justice model — the option of a jury trial, no reverse onus of proof, a right of silence, and particularised allegations.

For the Opposition, this procedural focus was designed as a facially neutral way of ameliorating the most egregious features of the Dissolution Bills while deflecting allegations about Labor's pro-communist tendencies and managing the difficult issue of maintaining party unity. At the same time, rule of law principles that might have more directly exposed Labor to such allegations and internal ructions — generality, prospectivity, clarity, and the *nulla poena* principle — while they were adverted to, were not the subject of proposed amendments.

Rule of law issues were thus significant in a number of ways. They were a source of contestation between the Government and Opposition. They provided a claim of legitimacy for both the Government and Opposition. Most importantly, the assumption that certain procedural rule of law protections must apply to the Dissolution Bills meant that Labor refused to pass them, absent its own amendments, until it was finally directed to do so. As indicated above, however, deficits in clarity, prospectivity, generality and the breach of the *nulla poena* principle were not pursued.

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[589] Bronitt and McSherry, above n 381, 9–10.
[590] David Dyzenhaus, 'The Compulsion of Legality' in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008) 33, 55.

A further point can be made about the rule of law. Gross posits two models of Accommodation. The first is where 'emergency driven legal provisions' are inserted into 'existing ordinary rules and structures'.[591] The second is where 'replacement or supplementary *emergency* norms' are created that relate to a particular or a potential future emergency.[592] Parliamentary debate on the Dissolution Bills and the various proposals for their amendment suggests that the legislative process may operate in slightly different and more complex ways. *Hansard* reveals attempts to normalise an emergency law through the insertion of 'ordinary' legal norms. In the case of the Government, this was through the provision of limited appeal rights based loosely on civil process together with offences that largely did not reverse the onus of proof. In argument, it also pointed to the many ordinary exceptions that were and are found in Australia's criminal laws that reverse the onus of proof. For its part, the Opposition wanted to graft a modified criminal justice process — providing for contestation of allegations, the onus of proof on the Commonwealth in application proceedings and jury trials — onto an extraordinary law in an effort to make it palatable, defensible and to normalise it.

B *The Assumption of Separation*

Gross is clearer about the function of his other category of assumption — the assumption of separation. This assumption, he says, 'facilitates our acceptance of expansive governmental emergency powers and counter-terrorism measures'.[593] My conclusions about Gross's assumption of separation are discussed below.

1 *Temporality*

Gross argues that the idea of temporality 'reassures us that once the emergency is removed and terrorism is no longer a threat [emergency] powers and

[591] Gross and Ní Aoláin, above n 127, 67.
[592] Ibid 67 (emphasis in original).
[593] Ibid 12.

measures will also be terminated and a full return to normalcy ensured'.[594] On Gross's view, sunset clauses are a common way of providing this reassurance.

There was cross-party support for the insertion of a sunset clause in the Dissolution Bill [No 1] and expressions of concern about its absence. Sunsetting was regarded as appropriate for a number of reasons, some of which reflect Gross's view of the assumption of temporality. First, because it was envisaged as extraordinary in nature. Second, because it was regarded as special purpose legislation. Temporariness was also seen as fulfilling other functions. Some in Labor saw it as a safeguard against misuse by a future government.[595] In addition, Labor suggested that a sunset clause might protect the legislation against invalidity. The only disagreement, which seems to have been confined to the Government's ranks, was whether a date should be fixed or whether the legislation should be terminated by proclamation.

However, while Labor and some Government backbenchers supported a sunset clause it was not a focus of Parliament's attention. Nor was its insertion sufficient to secure the Opposition's support for the Bills, absent its own amendments.

2 *National Security*

Gross argues that courts and legislators accord a 'heightened level of deference' to the executive branch in matters of national security. This, he says, is because it is assumed that 'when the security and safety of the state are at stake, special rules must apply'.[596] The effect of the assumption relating to national security, according to Gross, is to make the acceptance of emergency laws more likely.

The Government's national security claims were manifested in a number of ways — in the text of the Dissolution Bills, in its assertions that the safety and defence of Australia were matters 'peculiarly within [its] knowledge',[597] in its demands for trust, in its references to a national emergency, in its descriptions of the plans

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[594] Ibid.
[595] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 May 1950, 2753 (Kim Beazley Snr, ALP).
[596] Gross and Ní Aoláin, above n 127, 214.
[597] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3958 (John Spicer, Attorney-General, Liberal).

of the Communist Party and communists. That matters of national security necessitated 'special rules' is also clear in the Government's defence of contentious provisions in the Dissolution Bills. Because 'solemn declaration[s]'[598] would be made by the Governor-General, said the Attorney-General, it was not unfair that applicants should bear the onus of proof. Because of the sensitivity of national security information, the issue of subversion could not be canvassed in court.

Labor's position on the question of national security was complex, divided and often inconsistent. However, its leadership and others — although not all — in the party did not defer to the Government's national security claims. Its recent period in office seems to have fuelled its scepticism and its conclusion that Australia was not facing an emergency. In September 1950, despite the conflict in Korea, Chifley continued to contest the idea that the nation was in grave danger.

In addition, national security deference did not extend to accepting provisions in the Dissolution Bills that exempted the issue of subversion from contest and judicial oversight in declaration proceedings. Further, there are hints of Labor's uncertainty about the new Director-General of Security and about the reliability of the network of agents and informers that it predicted would flourish under the legislation. Many in the party also believed that the Dissolution Bills were an attempt to provoke a double dissolution or split the party, or both, rather than the product of a national security crisis.

In summary, national security claims and demands for deference were an essential part of the Government's rhetoric. However Dissolution Bills are an example of the Government's national security claims being treated with scepticism. This lack of national security deference was an important reason for Labor's refusal to pass the Dissolution Bills with their 'special rules'[599] unless its amendments were incorporated.

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[598] Ibid.
[599] Gross and Ní Aoláin, above n 127, 214.

Gross contends that emergency powers are often 'directed against a clear enemy of "others". We are more willing, he says, to confer emergency powers on the government when the 'other' is 'well defined and clearly separable' from the community. Moreover, he suggests that the scope of emergency powers is proportional to the distinctiveness of the 'other' and the seriousness of the threat they pose.[600]

The theme of the 'other' is evident in the Menzies Government's Dissolution Bills — in their title and text — and in the Government's parliamentary rhetoric, which identified the Communist Party, communists and affiliated organisations as outsiders in a number of different ways. They were foreign in terms of their beliefs, behaviours and characteristics and, unlike ordinary citizens, they were dangerous. In turn, this justified incursions into liberty, the banning of a political party, the exclusion of declared communists from Commonwealth employment and from holding office in trade unions that were vital to the nation's defences. In short, the proposed legislation was a drastic remedy for drastic times.[601]

There were, nonetheless, inherent difficulties in defining 'communism' and 'communist'. And there was clear potential for the Bills to have wider impacts because of the way those terms were defined and because of the sweeping definition of 'unlawful association'. The temptation of goading Labor and suggesting that some of its politicians might be declared likely heightened concerns about how the legislation would be used. And the need to rein in the legislation somewhat in the face of criticism is reflected in a Government amendment, which removed membership of an unlawful association as a ground for declaration of an individual and substituted membership of the Communist Party.

Like the Government, Labor generally characterised the Communist Party and communists as 'evil' and foreign. For the sake of expediency and for political and ideological reasons, it supported a ban on the Communist Party and action against communists and communist organisations. It named 'guilty people'. It

[600] Ibid 220–1.
[601] Commonwealth, *Parliamentary Debates*, Senate, 8 June 1950, 3920 (James Guy, Liberal).

stressed that its amendments were only designed to protect 'innocent' groups and individuals. Nonetheless, the legislation's potentially wide effects — including on Labor's own constituencies — were of major concern. So, too, was the potential for abuse. Particularly influential here was Labor's concept of 'the other'. It did not include those who were simply militant trade unionists, radicals, dissidents or 'irrational or careless in their talk'.[602] Further, the Government amendment referred to above did not apparently convince it that the legislation was now sufficiently targeted and worthy of support.

Parliamentary debate on the Dissolution Bills bears out Gross's assumption of communal separation. Despite the Government's rhetoric and the title and text of the Dissolution Bills, Labor was not convinced that the Bills were appropriately specific. In addition, as Gross suggests, the severity of the Dissolution Bills was not regarded as proportional to the threat posed by the communist 'other'. This lack of proportionality meant that Labor refused over many months to pass the legislation unless fair process protections were included.

C *Other Matters*

Gross's assumptions go some way to explaining the drivers of Parliament's responses to the Dissolution Bills — the Government's position, Labor's amendments and its refusal to pass the Bill without its changes being inserted.

They do not, however, account for Labor's decision to withdraw its opposition to the Dissolution Bill [No 2] in October 1950. The possibility of a double dissolution on the issue of communism and the need to avoid a party split were among the likely causes of Labor's about-face. Another possible influence is worth mentioning. The communiqué issued by Labor in October stated that it would reinsert its own amendments into the legislation 'immediately upon its resumption of governmental office'. This statement had political purposes — given the criticism the party faced for not standing firm on those amendments. However it also speaks to the idea that in the Australian political system, which effectively operates on a two-party basis, the Opposition is the once-and-future

[602] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1950, 2996 (Ben Chifley, ALP).

government.[603] In other words, it is arguable that an important driver of Labor's eventual decision to allow the Dissolution Bill [No 2] to pass was its expectation of resuming office and being able to amend the Bill appropriately.

The once-and-future government effect is also evidenced in the scepticism of Labor's leadership group about the Government's national security claims. During debate on the Dissolution Bill [No 1] Labor drew on its recent occupation of the government benches to cast doubt on the Government's assertion that an emergency existed.

Exploring the assumptions of constitutionality and separation suggest other ways they may operate. As Gross suggests when writing about communal separation, the weight accorded to the assumptions of separation in any given case may influence the degree to which modification of constitutional and legal norms are tolerated. As an example, debate on the Dissolution Bills until October 1950 reveals that insufficient national security deference and incomplete communal division affected the degree to which Labor was prepared to tolerate the erosion of constitutional and legal norms.[604]

[603] Stanley Bach, *Platypus and Parliament. The Australian Senate in Theory and Practice* (Department of the Senate, 2003) 201–2.
[604] Gross and Ní Aoláin, above n 127, 220–1.

CHAPTER FOUR

POST-9/11 NATIONAL SECURITY LAWS

I INTRODUCTION

This chapter examines the making of two of the most important Australian national security laws enacted in the aftermath of the attacks on New York and Washington on 11 September 2001 ('9/11'). The Security Legislation Amendment (Terrorism) Bill 2002 [No 2] ('SLAT Bill') contained a raft of terrorism offences, enabled executive proscription of organisations and created derivative 'proscribed organisation' offences. It was enacted in June 2002. The Liberal-National Party Government's response to 9/11 also included proposals to endow Australia's domestic security agency with further and unprecedented special powers — the detention and coercive questioning of adults and children not suspected of any involvement in terrorism. The Government failed in its first attempt to do so. The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 ('ASIO (Terrorism) Bill [No 1]') was laid aside in December 2002. A reintroduced Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 2] ('ASIO (Terrorism) Bill [No 2]') finally passed the Parliament in June 2003. All three Bills were the subject of controversy, parliamentary inquiry, prolonged debate and amendment.

In this chapter, I use the three Bills to examine whether Gross's assumptions of constitutionality and separation acted as drivers of the Australian Parliament's legislative process. This is a long chapter. The SLAT Bill and the ASIO (Terrorism) Bills were all introduced as part of the Government's response to 9/11 and the 'War on Terror'. Considering them in the same chapter minimises repetition especially about background.

I begin with a brief summary of the wider political context into which the Bills were introduced in order to determine whether they were debated in a time of crisis. I then consider in turn the SLAT Bill, the ASIO (Terrorism) Bill [No 1] and the ASIO (Terrorism) Bill [No 2]. The format for my study of each Bill generally follows the same pattern. I examine parliamentary atmospherics and process and assess each Bill as introduced in order to establish its exceptionality. As I did in Chapter Three, I also sketch contemporary, potentially relevant constitutional

case law and legal norms. This material provides the basis for my assessment of whether Gross's assumptions of constitutionality and legality are drivers of parliamentary debate. I then apply Gross's assumptions of constitutionality and separation to Parliament's debates. Finally, I set out my conclusions about the usefulness of Gross's assumptions and about other factors that influenced parliamentary decision-making.

II CONTEXT

As is well known, on the morning of 11 September 2001 two hijacked commercial aircraft were flown into the North and South Towers of the World Trade Center in New York, resulting in the collapse of the buildings and almost 3,000 deaths.[1] The effects of 9/11 were profound and global. In the immediate aftermath of the attacks, the world's stock markets fell sharply.[2] In the United States, all non-emergency civilian planes were grounded, financial markets and borders were closed and large-scale arrests of non-citizens began.[3]

As stated in Chapter One, on 14 September, Australia's Prime Minister John Howard effectively likened the threat of terrorism to the threat of nuclear conflagration during the Cold War saying 'I think it is as bad as that and I don't think any of us should pretend otherwise'.[4] On the same day he announced that the mutual defence provisions of the ANZUS Treaty had been invoked.[5]

When the Australian Parliament met for the first time since 9/11, its proceedings were devoted to a condolence motion to which 59 members of the House of Representatives and 39 senators contributed. Speaking to the motion, the Prime Minister said:

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[1] National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report: Final Report of the Attacks upon the United States* (Norton, 2004) 311.
[2] International Monetary Fund, *World Economic Outlook. The Global Economy after September 11* (The Fund, December, 2001).
[3] National Commission on Terrorist Attacks upon the United States, above n 1.
[4] Michelle Grattan, 'The US has only to Ask for our Help: PM', *The Sydney Morning Herald,* 14 September 2001.
[5] Prime Minister (John Howard), 'ANZUS Treaty. Application of ANZUS Treaty to Terrorist Attacks on the United States' (Media Release, 14 September 2001). This signalled Australia's willingness to cooperate with any US response to the attacks.

> We have confronted significant moral and national challenges, but none matches in depth, scale and magnitude the consequences of what the world must now do in response to the terrible events in the United States last week.[6]

Mr Howard's views were echoed by the Leader of the Opposition who said the attacks were 'on all of us and all of ours.'[7]

For the remainder of 2001, the issue of terrorism — global and domestic — remained firmly in the spotlight. On 28 September, the United Nations Security Council ('Security Council'), apparently at the instigation of the US, issued resolution 1373 ('UNSC 1373'). This condemned the 9/11 attacks and categorised them as a threat to international peace and security. In an arguably 'novel' move the Security Council began legislating.[8] In brief, its resolution required member states to prevent, suppress and criminalise the financing of terrorism and establish terrorist acts as serious criminal offences.[9]

On 5 October, when he announced that a federal election would be held on 10 November, Prime Minister Howard said that Australia faced 'the greatest global security challenge in a generation' and called on the electorate to return his Government because it could provide 'certainty, stability and strength'.[10] And, in mid-October, Treasurer Peter Costello had declared that Australia was third — after the US and Britain — on 'the list of 'terror targets'.[11]

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[6] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 September 2001, 30739 (John Howard, Prime Minister, Liberal).
[7] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 September 2001, 30743 (Kim Beazley, Leader of the Opposition, ALP).
[8] José E Alvarez, 'Hegemonic International Law Revisited' (2003) 97(4) *American Journal of International Law* 873; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis. Emergency Powers in Theory and Practice* (Cambridge University Press, 2006) 400–2; Axel Marschik, 'The Security Council as World Legislator?: Theory, Practice & Consequences of an Expanding World Power' (International Law and Justice Working Paper No 18, Institute for International Law and Justice, New York University School of Law, 2005); Kent Roach, *The 9/11 Effect. Comparative Counter-Terrorism* (Cambridge University Press, 2011) 31–3; Kim Lane Scheppele, 'Global Security Law and the Challenge to Constitutionalism after 9/11' (2011) 2(April) *Public Law* 353; Paul C Szasz, 'The Security Council Starts Legislating' (2002) 96(4) *American Journal of International Law* 901; Stefan Talmon, 'The Security Council as World Legislature' (2005) 99(1) *American Journal of International Law* 175.
[9] SC Res 1373, UN Doc S/RES/1373 (28 September 2001).
[10] Prime Minister (John Howard), 'The Choice on November 10' (Media Release, 5 October 2001).
[11] Mark Beeson, 'Issues in Australian Foreign Policy' (2002) 48(2) *Australian Journal of Politics and History* 226, 233. Australian data published in the mid-2000s reveals that before 9/11 over 90% of respondents from the general community reported feeling 'very safe or fairly safe'. After

The employment of legislation as an anti-terrorism tool was in evidence early after the events of 9/11. On 26 September, the federal Attorney-General announced the appointment of a committee, chaired by the Secretary of his own department, to review the implications of the 9/11 attacks for Australia's 'security and counter-terrorism arrangements'.[12] This review included an examination of Commonwealth counter-terrorism laws. By 2 October 2001, Cabinet had approved the drafting of legislation for terrorism offences 'modelled largely' on the *Terrorism Act 2000* (UK). At this stage, new offences were regarded as adjuncts to existing criminal laws.[13] It had also agreed that Australia's domestic security organisation — ASIO — should be empowered under warrants issued by federal magistrates or legally qualified members of the Administrative Appeals Tribunal ('AAT') to question persons who might have information relevant to ASIO's investigations into politically motivated violence.[14]

From early October, the Government used its regulation-making powers under a number of existing Commonwealth statutes to prohibit financial dealings with, and freeze the assets of, suspected terrorists and terrorist organisations.[15] On 30 October, the Prime Minister announced that, if re-elected, his Government would convene a Leaders' Summit to develop a framework for dealing with transnational crime and terrorism. This proposal recognised potential deficits in Commonwealth constitutional power over terrorism.[16]

9/11, this had declined to 65%. However, it should be noted that few respondents (8.1%) felt 'very unsafe'. Mark Balnaves and Anne Aly, 'Media, 9/11 and Fear. A National Survey of Australian Community Responses to Images of Terror' (2007) 34(3) *Australian Journal of Communication* 101, 106.

[12] Attorney-General (Daryl Williams), 'Review of Counter-Terrorism Arrangements' (News Release, 26 September 2001). Representatives from other Government departments and agencies including the Department of Prime Minister and Cabinet, the Department of Defence, the Department of Foreign Affairs and Trade, the Department of Immigration and Multicultural Affairs, ASIO, the Office of National Assessments, the Australian Federal Police and the Australian Protective Service were invited to attend.

[13] Attorney-General (Daryl Williams), 'New Counter-Terrorism Measures' (News Release, 2 October 2001). The press release noted that many terrorist acts would already be caught by Commonwealth and state laws.

[14] Ibid.

[15] See, for example, the *Charter of the United Nations (Anti-terrorism Measures) Regulations 2001* (Cth) made on 8 October 2001.

[16] Prime Minister (John Howard), 'A Safer More Secure Australia' (Media Release, 30 October 2001).

The embrace of legislative measures to respond to 9/11 was not confined to the Coalition Government. By 6 October, likely with the election campaign in mind, the Labor Opposition had released its own program of national security reforms. These also included proposals for terrorism offences based on the *Terrorism Act 2000* (UK) and for ASIO and the police 'to detain suspected terrorists for periods of up to 48 hours under judicial warrants, with arrangements to ensure questioning of suspected terrorists'.[17]

From 7 October 2001, the US and Britain began military operations in Afghanistan, whose Taliban Government was accused of harbouring those responsible for the 9/11 attacks — Osama bin Laden and his al-Qaeda organisation. On 17 October 2001, the Prime Minister agreed to provide naval and air force support and an SAS detachment for 'Operation Enduring Freedom'[18] — initially war in Afghanistan. A contingent of Special Forces troops departed from Australia on 22 October.[19]

All this coalesced with and fed into a federal election campaign dominated by the politics of fear and threat around issues of refugees, race, terrorism and Australia's involvement in Afghanistan.[20] On 10 November, the Howard Government was returned to office. Nonetheless, it continued to be in a minority in the Senate both with respect to the existing upper house and after 30 June 2002 when new Senators took their seats.[21]

The politics of threat continued into the Christmas period with Attorney-General Williams issuing a press release on 24 December that 'unsubstantiated' and non-specific information had been received about the possibility of a terrorist act

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[17] Leader of the Opposition (Kim Beazley), 'Strengthening Australia's National Security' (Media Statement, 6 October 2001).
[18] David Marr and Marian Wilkinson, *Dark Victory* (Allen & Unwin, 2004).
[19] Nicole Brangwin and Ann Rann, 'Australia's Involvement in Afghanistan since 2001: A Chronology' (Department of Parliamentary Services, Parliamentary Library, Parliament of Australia, 2010). The Special Forces contingent was withdrawn in November 2002. Troops were not recommitted until August 2005.
[20] Marr and Wilkinson, above n 18.
[21] A government needs 39 votes to secure the passage of its legislation in the Senate. At the beginning of 2002, the composition of the Senate was 31 Liberal, 3 National Party, 1 Country National Party, (ie 35 Coalition Senators), 29 ALP, 9 Australian Democrats, 1 Greens, 1 One Nation, 1 Independent. From 1 July 2002, the figures were 31 Liberal, 3 National Party, 1 Country Liberal Party (35 Coalition Senators), 28 ALP, 8 Australian Democrats, 2 Greens, 1 One Nation, 2 Independents. See Stephen Barber and Sue Johnson, *Federal Election Results 1901–2014*, (Research Paper Series, Parliamentary Library, Parliament of Australia, 2014) 139.

occurring in Australia directed at United States or United Kingdom interests. The terrorist threat level was upgraded as a result.[22]

Having briefly sketched the climate of fear and uncertainty — global and domestic — that arose after the events of 9/11 and the beginning of Australia's involvement in war in Afghanistan and in the 'War on Terror' more generally, I next examine the SLAT Bill's reception in Parliament and its progress through the House of Representatives and Senate. My purpose is to assess whether parliamentarians' own reactions to the Bill and parliamentary processes more generally indicate that the Bill was exceptional in nature.

III SECURITY LEGISLATION AMENDMENT (TERRORISM) BILL 2002 [NO 2]

A *Atmospherics and Process*

A Security Legislation Amendment (Terrorism) Bill 2002 was introduced into the House of Representatives as part of a package of five counter-terrorism bills on 12 March 2002.[23] However, for technical reasons it was withdrawn and reintroduced on 13 March as the Security Legislation Amendment (Terrorism) Bill 2002 [No 2].[24] At the same time, the Government gave notice that, in the following sitting week, it would introduce a bill to enhance ASIO's powers.

After just over three hours of procedural time and debate in the House of Representatives, all the bills were passed with no divisions being called. Although the Labor Opposition supported much of the legislative package, it did criticise the rushed process in the lower chamber and signalled that it would ensure proper scrutiny of the legislation in the Senate.[25] In particular, Labor said,

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[22] Attorney-General (Daryl Williams), 'Possible Terrorist Threat' (News Release, 24 December 2001).

[23] The other bills were the Suppression of the Financing of Terrorism Bill 2002, the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, the Border Security Legislation Amendment Bill 2002 and the Telecommunications Interception Legislation Amendment Bill 2002.

[24] An inconsistency between the title of the bill and the title in the notice of presentation suggested that Standing Orders had been breached. Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1139 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration, Liberal).

[25] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1143 (Simon Crean, Leader of the Opposition, ALP).

it wanted the 'extraordinary' powers in the Bill — in particular, proscription — carefully examined.[26]

In the Senate, interest in the Bills was acute. The Selection of Bills Committee recommended immediate referral to the Senate Legal and Constitutional Legislation Committee ('Legislation Committee') for comprehensive scrutiny.[27] The Senate Scrutiny of Bills Committee that, in accordance with its mandate, drew the Senate's attention to provisions that adversely affected rights and liberties also examined the Bills.[28] The Legislation Committee's report contained four recommendations relating to the SLAT Bill, including a recommendation that its proscription provisions not be proceeded with in their original form.[29] It also recommended substantial changes to most of the Bill's offence provisions.[30]

The SLAT Bill's controversial character is also evidenced by the fact that Government backbenchers spoke out against it. Liberal Senator George Brandis wrote to Brisbane's *Courier-Mail* explaining his objections to executive proscription and noting that the Government's own backbench committee, of which he was a member, had made similar representations to the Attorney-General.[31] On 20 June 2002, Senator Brandis acknowledged that he and Coalition Senators Payne, Mason and Scullion had been critical of the Bill as introduced.[32]

For its part, the Government acknowledged the lack of a specific terrorist threat to Australia but argued that 'terrorist forces' were 'actively working to

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[26] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1146, 1148 (Simon Crean, Leader of the Opposition, ALP).

[27] Senate Selection of Bills Committee, Parliament of Australia, *Report No 2 of 2002* (2002). Among the matters of concern cited by the Committee were offences carrying penalties of life imprisonment, proscription and the expansion of executive power. The function of the Selection of Bills Committee is to decide whether bills should be referred to a standing or select committee.

[28] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 3 of 2002* (2002) and *Fourth Report of 2002* (2002).

[29] Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee. Security Legislation Amendment (Terrorism) Bill 2002 [No 2], Suppression of the Financing of Terrorism Bill 2002, Criminal Code Amendment (Suppression of Terrorist Bombings) Bills 2002, Border Security Legislation Amendment Bill 2002, Telecommunications Interception Legislation Amendment Bill 2002* (2002), recommendation 4.

[30] Ibid recommendation 3.

[31] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2349 (George Brandis, Liberal). And see George Brandis, 'Draconian Steps Futile in Australia's War Against Terrorism', *The Courier-Mail* (online), 21 May 2002. Senator Brandis objected to executive proscription on principle and because it would be ineffective.

[32] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2347 (George Brandis, Liberal). Senator Payne is, and Senator Mason was, a Liberal Party senator. Senator Scullion is a member of the Country Liberal Party.

undermine democracy and the rights of people throughout the world'.[33] The lesson to be drawn from 9/11 was that Australia was not safe from terrorism. So, in order to protect the nation and meet the challenges of the new environment,[34] Australia's resources 'including the might of the law' would be called into play.[35] In shaping law, both the existence of the threat and its nature were important. For Coalition politicians and at least some of their Labor colleagues, Australia was at war — in Afghanistan and more generally in a 'War against Terrorism'.[36] And it was mostly accepted by the major parties that the world had changed 'forever'.[37]

New techniques, said Liberal parliamentarians, were needed because terrorism was different from 'ordinary criminal activity'.[38] The 'War on Terror' was characterised as a conflict without a visible enemy, directed at civilians, carried out by 'isolated individuals' able to infiltrate the population and cause destruction and death.[39] So 'special legislation and special measures' were needed to protect 'innocent people' who might become terrorism's victims.[40] Further, the special characteristics of terrorism meant that normal criminal law rules could be waived.[41] The package of terrorism bills, in contrast, was described as providing 'strong modern offences and powers'.[42] At the same time as it trumpeted the Bills' strong powers, the Government argued that rights were respected. The Attorney-General referred to 'proper limitations and

[33] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1141, 1142 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration, Liberal).
[34] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1140 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration, Liberal) and 1207 (Daryl Williams, Attorney-General, Liberal).
[35] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1142 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration, Liberal).
[36] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2347 (George Brandis, Liberal); Commonwealth, *Parliamentary Debates*, 13 March 2002, 1195 (Kim Beazley, ALP).
[37] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2343 (Kate Lundy, ALP).
[38] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2445 (Chris Ellison, Minister for Justice and Customs, Liberal).
[39] Commonwealth, *Parliamentary Debates*, 20 June 2002, 2348 (George Brandis, Liberal).
[40] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1157 (Peter King, Liberal).
[41] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1158 (Peter King, Liberal).
[42] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1207 (Daryl Williams, Attorney-General, Liberal).

safeguards'[43] and his representative in the Senate, Chris Ellison, spoke of 'strong protections'.[44]

Labor MPs took a different view. They expressed concern that the package of bills might threaten 'the freedoms we cherish'[45] and contained 'unquestionably severe measures'.[46] A particular criticism of the SLAT Bill was that it reposed 'extraordinary new powers' in the Attorney-General.[47] The Leader of the Opposition in the Senate, John Faulkner, declared that '[h]istorically, proscription has been a tool of political repression, not law enforcement'.[48] Others described the legislation as 'nasty and brutish'.[49]

The minor parties were even more critical and contested the idea of a radically metamorphosed world.[50] For the Australian Democrats, the package of bills constituted 'an extraordinary set of measures … utterly inconsistent with core civil rights and the rule of law' as well as being 'unwarranted, unnecessary and undemocratic'.[51] The Greens contended that the legislation 'disempowers the parliament and gives mighty strong powers … to the executive'.[52] One Nation Senator, Len Harris, described the SLAT Bill as 'authoritarian' and signalled his opposition to proscription and derivative criminalisation.[53]

This section has suggested that the SLAT Bill contained a number of markers of exceptionality — in particular, the unusual public dissention in the Government's own ranks over proscription, the Government's acknowledgement of the Bill's 'special' character, the assessments of the Opposition and minor parties, the

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[43] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1207.
[44] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2629.
[45] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1152 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).
[46] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1159 (Robert McClelland, Shadow Attorney-General, ALP).
[47] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1146 (Simon Crean, Leader of the Opposition, ALP).
[48] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2337.
[49] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2371 (Steve Hutchins, ALP).
[50] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2355 (Brian Greig, Australian Democrats).
[51] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2404 (Natasha Stott Despoja, Democrats).
[52] Commonwealth, *Parliamentary Debates*, Senate, 27 June 2002, 2812 (Bob Brown, Greens). This assessment was made after the legislation had been amended in the Senate.
[53] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2398, 2400.

acute interest in Legislation Committee hearings, and the Committee's own recommendations. I now turn to an examination of the Bill itself.

B *SLAT Bill — A Summary*

The purpose of this section is to summarise and assess key provisions of the SLAT Bill. The Bill's primary purposes were to insert a definition of 'terrorist act' into the Commonwealth *Criminal Code* ('*Criminal Code*'), provide for terrorism offences, the proscription of organisations and proscribed organisation offences.

1 *The Definition of 'Terrorist Act'*

Central to the Bill was the term 'terrorist act'. It was defined as 'action or threat of action' made with the 'intention of advancing a political, ideological or religious cause'. It was not limited to action causing death or endangering life. Instead, it operated more widely — encompassing action that involved serious personal harm or serious property damage or that created a serious risk to public health or safety. More broadly again, it extended to action constituting serious interference with an electronic system such as a financial, telecommunications or transport system.[54]

'Lawful advocacy, protest or dissent' and 'industrial action'[55] were excluded from the definition. Nevertheless, the concept of 'terrorist act' on which terrorism offences carrying penalties of life imprisonment was based, was extremely wide. For instance, it potentially included unlawful but otherwise legitimate protests on behalf of refugees or by environmentalists that somehow 'involved' property damage that was 'serious'.[56]

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[54] Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth) ('SLAT Bill [No 2]') sch 1 item 3 proposed s 100.1 (definition of 'terrorist act').
[55] Ibid sch 1 item 3 proposed s 100.1 (definition of 'terrorist act').
[56] The word 'serious' was not defined. See, for example, Law Council of Australia, 'Submission No 251 to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill [No 2] and Related Bills*' (April 2002) 34–6.

2 *Terrorism Offences*

The SLAT Bill also provided for terrorism offences that were based upon the definition of 'terrorist act'. These were engaging in a terrorist act,[57] providing or receiving weapons training connected with a terrorist act;[58] directing the activities of an organisation that fostered, directly or indirectly, preparations for a terrorist act;[59] possessing things connected with preparations for a terrorist act; [60] collecting or making documents connected with preparations for a terrorist act;[61] and doing any act in preparation or planning for a terrorist act.[62] Except for the offence of engaging in a terrorist act, these vaguely worded offences could be committed even if a terrorist act never occurred. All offences were subject to a maximum penalty of life imprisonment.

The offences exhibited disturbing, unusual and perplexing features. First, because of the definition of 'terrorist act', terrorism offences potentially encompassed activity that would not normally be regarded as terrorist in nature but rather as legitimate, if unlawful, protest or dissent characteristic of a democratic polity. Second, the offences included an element of motive, generally regarded as foreign to the criminal law.[63] Third, they extended to conduct remote from behaviour deliberately or proximately related to terrorist activities. Fourth, through the operation of Pt 2.4 of the *Criminal Code* they grounded inchoate preparatory offences.[64] So, for example, it would be an offence to conspire or attempt to do any act in preparation for a terrorist act. This offence would attract the same penalty as the substantive offence.[65] As McCulloch and

[57] SLAT Bill [No 2] sch 1 item 4 proposed s 101.1.
[58] Ibid sch 1 item 4 proposed s 101.2.
[59] Ibid sch 1 item 4 proposed s 101.3.
[60] Ibid sch 1 item 4 proposed s 101.4.
[61] Ibid sch 1 item 4 proposed s 101.5.
[62] Ibid sch 1 item 4 proposed s 101.6.
[63] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Law Book Co, 3rd ed, 2010) 200.
[64] Bernadette McSherry, 'Terrorism Offences in the *Criminal Code*: Broadening the Boundaries of Australian Criminal Law' (2004) 27(2) *UNSW Law Journal* 354. The *Criminal Code*, ch 2, pt 2.4 deals with extensions of criminal responsibility such as attempt and conspiracy.
[65] *Criminal Code* (Cth) ss 11.1(1), 11.5(1).

Pickering suggest, the SLAT Bill encompassed not only pre-crime, but also '(pre) pre crime'.[66] Fifth, they included status offences.[67]

Sixth, and unusually, absolute liability applied to core physical elements of the offences. Taking one example, the physical elements of the offence of possessing a 'thing'[68] connected with a terrorist act were conduct (possessing a thing) and circumstance (connection with a terrorist act). Absolute liability applied to the latter. Seventh, in many of the terrorism offences, the burden of proof was reversed and the defendant's standard of proof altered from an evidential to a legal standard. So, in the case of the offence of possessing a 'thing', the accused could not plead a mistake of fact defence and the prosecution would not be required to prove fault in relation to the element of circumstance unless the accused first raised evidence to a legal standard — the balance of probabilities — that he or she had not been reckless about the 'thing's' connection to a terrorist act.

3 *Proscription*

Other significant provisions dealt with proscription. They empowered the Attorney-General, under a sweeping discretion, to ban organisations.[69] Under proposed s 102.2, this could occur if the Attorney was 'reasonably satisfied' that an organisation or a member acting on its behalf, had committed or was committing a Part 5.3 offence (ie a terrorism offence).[70] Thus, organisations engaged in unlawful protest activity that involved serious property damage could potentially be declared.

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[66] See, for example, Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism' (2009) 49(5) *British Journal of Criminology* 628, 633–4.
[67] McSherry, above n 64, 365–6.
[68] The concept of a 'thing' was itself problematic. As the Law Council of Australia pointed out, the offence could capture documents written by researchers and journalists who had no intention of assisting terrorists. Law Council of Australia, above n 56, 37.
[69] SLAT Bill [No 2] sch 1 item 4 proposed ss 102.2, 102.3. Proposed s 102.2(4) enabled the proscription-making power to be delegated to another Minister.
[70] There was no need for charges to have been laid or a conviction recorded for proscription to occur. Nor was there a requirement for a person to be an officeholder or even a formal member of the organisation. Membership extended to informal membership and to anyone who had taken steps to become a member.

Organisations could also be proscribed to give effect to a Security Council decision or if the organisation had endangered or was likely to endanger 'the security or integrity of the Commonwealth or another country' — an expression of indeterminate meaning.[71]

4 *Derivative Offences*

The proscription of organisations gave rise to proscribed organisation offences.[72] It would be an offence to direct such an organisation, directly or indirectly fund or receive funds from it, be a member of it, train or receive training from it. Severe penalties — maximums of 25 years — applied.

Strict liability[73] applied to the common and core element in all the offences — that the organisation was proscribed. In addition, the onus of proof was reversed and a legal burden placed on the accused. For example, in relation to the membership offence, it was a defence for an accused to prove to a legal standard that he or she had taken 'all reasonable steps' to cease to be a member as soon as practicable after the organisation was proscribed. These provisions placed heavy if not insuperable obstacles in the way of accused persons. Further, the term 'member' was vaguely defined to include informal members and persons who had taken steps to become a member of an organisation. How could such a person prove that he or she had taken 'all reasonable steps' to leave?

This section has noted some of the SLAT Bill's most contentious features. The following section sketches some of the legal norms and contemporary constitutional issues potentially relevant to the SLAT Bill. This material provides background information against which Gross's assumption of constitutionality will later be tested.

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[71] George Williams and Iain Gentle, Submission No 8 to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2], Suppression of the Financing of Terrorism Bill 2002, Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 and the Border Security Legislation Amendment Bill 2002* (3 April 2002).

[72] SLAT Bill [No 2] sch 1 item 4 proposed section 102.4.

[73] Strict liability applied to a physical element of an offence means that no fault element operates for that physical element (*Criminal Code* s 6.1(2)(a)). A defendant has a defence of reasonable mistake of fact (s 6.1(2)(b)). Other *Criminal Code* defences may also be available (s 6.1(3)).

C *The Assumption of Constitutionality*

1 *Aspects of the Constitutional Landscape*

Gross hypothesises that an assumption of constitutionality eases our acceptance of exceptional laws. In order to determine whether parliamentary debate on the SLAT Bill evidences this assumption, this section briefly describes constitutional case law that, in 2002, was relevant to the SLAT Bill. As a result, it does not canvass important later decisions. These include *Thomas v Mowbray*,[74] which considered the scope of the defence power in relation to terrorism; *Coleman v Power*,[75] which modified the second arm of the *Lange* test;[76] and cases that have reflected on an implied freedom of association.[77]

(a) Constitutional Power

The Commonwealth has no constitutional power over crime or terrorism.[78] In 2002, the sources and extent of its power to provide comprehensive coverage for the SLAT Bill were unclear. This is evidenced by the structure and content of proposed s 100.2 of the Bill as originally formulated. It contained a catch-all clause and together with a patchwork list of powers and sets of related circumstances in which an action or threat would ground an offence under the legislation. Three potential sources of power for the Bill are considered below — the external affairs (s 51(xxix)), defence (s 51(vi)) and referrals powers.[79]

(i) External Affairs Power

Over several decades, the High Court had sketched out several aspects of the external affairs power that were potentially relevant for the SLAT Bill. For example, in *New South Wales v Commonwealth*, Stephen J had concluded that the power encompassed conduct on behalf of the nation affecting relations with

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[74] *Thomas v Mowbray* (2007) 233 CLR 307.
[75] (2004) 200 CLR 1.
[76] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[77] For example, *Tajjour v NSW* (2014) 313 ALR 221.
[78] There are a variety of Commonwealth powers that support Commonwealth criminal laws including the express and implied incidental powers in combination with ss 51 and 61.
[79] *Constitution* ss 51(xxix), (vi), (xxxvii), respectively.

other nations.[80] High Court jurisprudence had also extended the power to matters external to Australia.[81] These aspects of s 51(xxix) likely underpinned several parts of the SLAT Bill. For example, the Bill defined 'terrorist act' to include relevant harms and risks to foreign populations and property; it enabled international terrorist organisations and organisations that threatened the security and integrity of a foreign country to be proscribed and it applied extended geographical jurisdiction 'D' to all the offences.[82]

The external affairs power also extends to the implementation of Australia's international obligations.[83] UNSC 1373 imposed an obligation on all states to take steps necessary to prevent the commission of terrorist acts and ensure that terrorist acts 'are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.' [84] However, measures taken to implement international obligations must be 'reasonably appropriate and adapted' or 'proportionate' to giving effect to an obligation.[85]

The nature of some of the conduct criminalised by the SLAT Bill raised questions about whether, in relation to UNSC 1373, it passed this test. For instance, potentially swept into the definition of 'terrorist act' were types of conduct not normally regarded as terrorist in nature — such as unlawful protests about abortion, the detention of refugees, the environment or US bases in Australia — that involved 'serious' property damage or 'serious harm to a person'. The Bill also enabled the Attorney-General to proscribe organisations that may have had no connection to terrorism.

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[80] *New South Wales v Commonwealth* (1975) 135 CLR 337, 450.
[81] Ibid; *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 528 (Mason CJ), 602 (Deane J), 641 (Dawson J), 695–6 (Gaudron J), 714 (McHugh J).
[82] Extended geographical jurisdiction D applies to anyone anywhere. There is no access to a foreign law defence (*Criminal Code* s 15.4). It is the widest form of criminal jurisdiction.
[83] *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 644 (Latham CJ), 687 (Evatt and McTiernan JJ); *Victoria v Commonwealth* (1996) 187 CLR 416, 483 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[84] SC Res 1373, UN Doc S/RES/1373 (28 September 2001).
[85] *Commonwealth v Tasmania* (1983) 158 CLR 1, 259 (Deane J); *Industrial Relations Act Case* (1996) 187 CLR 416, 486–7 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

(ii) Defence Power

It was also uncertain how far the Bill could be underpinned by the defence power. A number of matters are worth mentioning. The first relates to the power's characteristics — its elastic nature and its purposive character. Because the defence power is purposive, determining a law's validity depends on whether it is proportionate to purposes related to defence. In *Polyukhovich v Commonwealth*, Brennan J had remarked that '[w]hat is necessary and appropriate for the defence of the Commonwealth in times of war is different from what is necessary and appropriate in times of peace'.[86] During war, he said, laws may restrict freedoms in ways not permissible in peacetime.[87]

It was not clear whether the 'War on Terror' would bring the extended operation of the defence power into play. If the High Court were to regard the international situation as one of 'ostensible peace' as it had in the *Communist Party Case*[88] then, arguably, proportionality questions may have arisen about the means the SLAT Bill employed — including an overbroad definition of terrorism that encompassed political protest, the Attorney's wide proscription power and vaguely worded offences that reversed the onus of proof and, in some cases, dispensed with fault — to secure the nation by preventing and punishing terrorism.[89]

There was also a question of whom the defence power could be directed against. In the *Communist Party Case* Latham CJ, dissenting, revisited his earlier comments in the sedition cases[90] and the *Jehovah's Witnesses Case*,[91] and held that s 51(vi) and the express incidental power could be used against internal enemies such as spies and fifth-columnists acting on behalf of external foes.[92] Dixon J and Fullagar J, however, limited the power to protection from external

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[86] *War Crimes Act Case* (1991) 172 CLR 501, 593.
[87] Ibid 593.
[88] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 196, 202 (Dixon J); 207, 208 (McTiernan J), 227 (Williams J), 268 (Fullagar J).
[89] See Andrew Lynch, '*Thomas v Mowbray*: Australia's "War on Terror" Reaches the High Court' (2008) 32(3) *Melbourne University Law Review* 1182, 1191–2 for a discussion of the definition of 'terrorist act'.
[90] *Burns v Ransley* (1949) 79 CLR 101, 110.
[91] *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 132.
[92] *Communist Party Case* (1951) 83 CLR 1, 150–1.

enemies.[93] It was not clear whether the SLAT Bill's operation against internal terrorist threats unassociated with a foreign enemy would be supported by s 51(vi).

Further, there was the issue of whether the principle in the *Communist Party Case* [94] would be fatal to the Attorney's power of proscription and, consequentially, to the SLAT Bill's derivative offences. As noted in Chapter Three, in the *Communist Party Case*, by a 6:1 majority, the Court had struck down the *Dissolution Act*.[95] This was because, in proscribing the Communist Party and in empowering the Governor-General to declare organisations and persons, the Act had impermissibly attempted to determine conclusively the constitutional facts upon which validity depended.[96] In relation to the Governor-General, said the majority, this was because as either a matter of doctrine or statutory interpretation, his decisions were unreviewable.[97]

It was possible that this problem was avoided by the Bill. The advent of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') meant that the Minister's proscription decisions were subject to judicial review. Whether the limits to that review — it was not merit-based and access to reasons for decision would likely be curtailed on national security grounds — were constitutionally problematic was unclear.

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[93] Ibid 194 (Dixon J), 259 (Fullagar J).
[94] Ibid.
[95] Ibid. Invalidated by Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ. Latham CJ dissented.
[96] See, for example, McTiernan J who said that the Parliament could not conclusively '"recite itself" into power': ibid 206 and Fullagar J's famous stricture that 'a stream cannot rise higher than its source' (258).
[97] See, for example, Dixon J who remarked, 'The prerogative writs do not lie to the Governor-General. The good faith of any of his acts as representative of the Crown cannot be questioned in a court of law'. Ibid 179. See also 221–2 (Williams J); 257–8 (Fullagar J). Kitto J held that the fact that the *Dissolution Act* enabled review of the Governor-General's decision in relation to communist connections but not subversive tendency indicated that the latter was not subject to judicial oversight (279–80). Legal developments since 1951 mean that the Governor-General's decisions are now subject to judicial review and that ouster clauses are unconstitutional if they purport to exclude review for jurisdictional error.

(iii) Referrals Power

The *Constitution* enables the states to refer power to the Commonwealth. As noted earlier in this chapter, obtaining a referral of power over terrorism had been on the Government's agenda since October 2001. Its purpose was to cure any deficits in Commonwealth power. However, a referral does not resolve any limits, express or implied, on power. This is because Parliament's s 51 powers, including the referral power, are 'subject to [the] Constitution' and thus to express and implied constitutional limits.

(b) Constitutional Limitations

In this section, I briefly consider two issues potentially raised by the SLAT Bill — the implied freedom of political communication and breach of the separation of powers.

(i) Implied Freedom of Political Communication

In two cases decided in 1992, the High Court located an implied constitutional freedom of political communication in the *Constitution*.[98] In both cases, it struck down legislation for infringing the freedom. The Court's early decisions conceptualised the freedom in broad terms. In *Australian Capital Television Pty Ltd v Commonwealth* ('*ACTV*'), for example, Mason CJ asserted that, '[u]nlike the legislative powers of the Commonwealth Parliament, there are no limits to the range of matters that may be relevant to debate in the Commonwealth Parliament or to its workings'.[99] This broad view was maintained in *Theophanous v Herald & Weekly Times Ltd ('Theophanous')*. Here, Mason CJ, Toohey and Gaudron JJ, while preserving the distinction between the freedom and 'unlimited freedom of communication' said that given the interaction between Australia's tiers of government and 'the flow of political information, ideas and debate' between them, 'political discussion' was not limited to 'matters

[98] *Nationwide News v Willis* (1992) 177 CLR 1 ('*Nationwide News*') and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
[99] *ACTV* (1992) 177 CLR 106, 142. See the discussion in George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013).

relating to the government of the Commonwealth'.[100] Arguably, the scope of the freedom has not subsequently been narrowed.[101]

Nevertheless, from its earliest implied freedom cases, the High Court was careful to state that the freedom was not absolute.[102] Thus, Gaudron J suggested that the regulation of speech by the 'general law' including laws dealing with defamation, sedition, obscenity and offensive language indicated the kind of restrictions consistent with the freedom.[103]

In 1997, the High Court handed down a unanimous and important decision on the implied freedom, which provided further guidance. In *Lange v Australian Broadcasting Corporation,*[104] the Court held that the implied freedom protects communications relating to electoral choices, the conduct of the executive government and voting in constitutional referendums.[105] Nonetheless, the 'freedom to receive and disseminate information' remained broad and unconfined to election periods.[106] While at the core of the freedom were federal systems and issues,[107] the Court in *Lange* continued to recognise a broad interplay of federal, state and local government matters.[108]

Further, the Court also constructed a test of validity on implied freedom grounds. This involved two questions. The first question was whether 'the law effectively burden[s] freedom of communication about government or political matters … in its terms, operation or effect'. An affirmative answer prompts a second question. This is whether the law 'is reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed

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[100] *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 122.
[101] See George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams Australian Constitutional Law & Theory. Commentary & Materials* (Federation Press, 6th ed, 2014) 1286 citing *Levy v Victoria* (1997) 189 CLR 597, 622, footnote 148 (McHugh J). Contrast Williams and Hume, above n 99, 185.
[102] *ACTV* (1992) 177 CLR 106, 142 (Mason CJ), 169 (Deane and Toohey JJ), 217 (Gaudron J).
[103] Ibid 217.
[104] *Lange* (1997) 189 CLR 520.
[105] Ibid 560, 561 (the Court). And see Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668.
[106] *Lange* (1997) 189 CLR 520, 561 (the Court).
[107] Williams and Hume, above n 99.
[108] *Lange* (1997) 189 CLR 520, 571–2 (the Court).

[constitutional] amendment to the informed decision of the people'.[109] If the answers to the questions are 'yes' and 'no' respectively then the law is invalid for impermissibly burdening the freedom.[110]

High Court jurisprudence also established that the freedom extends to communicative action — an issue explored in *Levy v Victoria*.[111] Here the Court held that 'non-verbal conduct which is capable of communicating an idea about the government or politics of the Commonwealth and which is intended to do so may be immune from legislative or executive restriction'.[112] Thus, said Chief Justice Brennan, legislation that banned protests 'about an issue relevant to the government or politics of the Commonwealth would be as offensive to the constitutionally implied freedom as a law which banned political speech-making on the issue'.[113] However, there are also suggestions in *Levy* that communicative actions may be less readily protected than verbal communications. According to Brennan CJ, this is because speech is 'not inherently dangerous' or productive of 'tangible effect[s]' that need to be controlled in the public interest.[114] Thus, in *Levy* the regulations under challenge were upheld on personal and public safety grounds.[115]

In 2002, the High Court had also touched on but not grappled with the idea of implied freedoms of association and movement.[116] As Williams and Hume point out, these freedoms were referred to by Gaudron J and McHugh J in *ACTV*[117] and, variously, by Gaudron, McHugh and Toohey JJ in *Kruger v Commonwealth.*[118] In

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[109] Ibid 567 (the Court).
[110] Ibid 567–8 (the Court).
[111] *Levy* (1997) 189 CLR 597. This case involved an anti-duck shooting activist, Laurence Levy. Mr Levy sought a declaration that the *Wildlife (Game) (Hunting Season) Regulations 1994* (Vic) were invalid on freedom of political communication grounds because of the restrictions they placed on both his words and his actions. He also sought a declaration that charges brought against him under the Regulations were unlawful. The Court upheld the Regulations on the ground that they were reasonably appropriate and adapted to protection of persons and the public.
[112] Ibid 595 (Brennan CJ). See also 613 (Toohey and Gummow JJ), 622–3 (McHugh J), 641 (Kirby J).
[113] Ibid 595.
[114] Ibid.
[115] Ibid 597, 599 (Brennan CJ), 609 (Dawson J), 614–15 (Toohey and Gummow JJ), 619–20 (Gaudron J); 627–8 (McHugh J), 647–8 (Kirby J).
[116] Anthony Gray, 'Freedom of Association in the Australian *Constitution* and the Crime of Consorting' (2013) 32(2) *University of Tasmania Law Review* 149, 149.
[117] *ACTV* (1992) 177 CLR 106, 212 (Gaudron J); 232 (McHugh J) cited in Williams and Hume, above n 99, 215–16.
[118] *Kruger v Commonwealth* (1997) 190 CLR 1 ('*Kruger*').

Kruger, three judges recognised a constitutionally-based freedom of association. However, the status and operation of the freedom were unclear.

It is unclear what, if any, impact freedom of political communication and any constitutional freedom of association or movement that did exist might have had on the SLAT Bill's terrorism offences, proscription provisions and proscribed organisation offences.[119] The terrorism offences in the original SLAT Bill potentially burdened protected verbal and non-verbal political communication and political association.[120] For example, 'terrorist act' was defined to include actions or threats made to advance a '*political*, religious or *ideological* cause' — causes which could involve communication about the government of the Commonwealth. The definition also potentially burdened a wide range of unlawful advocacy, protest or dissent that could be constitutionally relevant communication.

If political communication is burdened, *Lange* requires a further question to be answered — is the law 'reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible' with Australia's constitutionally prescribed system of government? Early High Court jurisprudence on the implied freedom recognised that constitutionally legitimate ends may be served by laws for the preservation and maintenance of an 'ordered society'.[121] Further, as noted above, it suggests that laws that protect public safety[122] or prohibit conduct traditionally regarded as criminal will not infringe the freedom even if they prohibit political communication.[123]

However, it was uncertain whether some of the Div 101 offences were proportional to an end compatible with the constitutionally prescribed system of

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[119] A particularly useful exploration of constitutional issues associated with the SLAT Act, on which I have drawn, is Joo-Cheong Tham, 'Possible Constitutional Objections to the Powers to Ban "Terrorist Organisations"' (2004) 27(2) *UNSW Law Journal* 482.
[120] See the discussion in ibid.
[121] *ACTV* (1992) 177 CLR 106, 142 (Mason CJ); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 300 (Mason CJ), 363 (Dawson J).
[122] *Levy* (1997) 189 CLR 597, 599 (Brennan CJ), 609 (Dawson J), 614–15 (Toohey and Gummow JJ), 619–20 (Gaudron J), 627–8 (McHugh J), 647–8 (Kirby J).
[123] In *Nationwide News* (1992) 177 CLR 1, Deane and Toohey JJ said that 'a law prohibiting conduct traditionally seen as criminal (eg conspiring to commit, or inciting or procuring the commission of, a serious crime) will readily be seen not to infringe an implication of freedom of political discussion notwithstanding that its effect may be to prohibit a class of communications regardless of whether they do or do not relate to political matters' (77).

government. On the one hand, the SLAT Bill's purpose — to 'enhance the Commonwealth's ability to combat … terrorism'[124] — was a vital one. However, the potential impacts on protected speech, conduct and association through the application of broadly worded criminal offences that employed absolute liability, reversed the onus of proof and carried severe penalties may have meant that some of the Bill's provisions disproportionately burdened that end. Similar questions arose about the original proscription provisions in the SLAT Bill and the derivative offences.

(ii) Separation of Judicial Power

A further question was whether the SLAT Bill's proscription provisions constituted a Bill of Attainder, thereby breaching the separation of federal judicial power mandated by the text and structure of the *Constitution*. It was not until the decision in *Polyukhovich v Commonwealth* ('*War Crimes Act Case*')[125] that the High Court seriously turned its gaze to the issue of whether a Bill of Attainder would offend Chapter III of the *Constitution*.[126] However, what constituted a Bill of Attainder was not decided.

Wheeler contends that two approaches can be discerned in the case.[127] The first is Mason CJ's formalism, which requires the legislature to identify specific individuals, declare them guilty and punish them, thus usurping judicial power.[128] The second is a substantive approach referenced by Dawson J who noted that, on one view, a Bill of Attainder was a law designating:

> … the persons it seeks to penalise by means of some characteristic (such as membership of an organisation) that is independent of and

[124] SLAT Bill [No 2] long title.
[125] *War Crimes Act Case* (1991) 172 CLR 501.
[126] Ibid 535, 536 (Mason CJ), 612 (Deane J), 685–6 (Toohey J), 706–7 (Gaudron J), 721 (McHugh J) and possibly Dawson J (646–9). The argument that the Dissolution Act was a Bill of Attainder had been raised in argument before the High Court in the *Communist Party Case* (1951) 83 CLR 1 but obtained no traction.
[127] Fiona Wheeler, *The Separation of Federal Judicial Power. A Purposive Analysis* (PhD Thesis, Australian National University, 1999) 293–4, 298.
[128] *War Crimes Act Case* (1991) 172 CLR 501, 535–40.

> not equivalent to the criminal activity which it is the purpose of the law to prohibit or prevent.[129]

On a formalist view, the SLAT Bill's proscription provisions did not constitute a Bill of Attainder — a declaration did not name specific individuals, declare their guilt and punish them. A substantive approach may have produced different results. Writing after the commencement of the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth), which amended Part 5.3's terrorist organisation provisions, Tham suggested that some terrorist organisation offences might offend Chapter III.[130] Those provisions had undergone considerable change since the SLAT Bill's original incarnation. Nevertheless, the thrust of Tham's argument is relevant. As an example, under proposed s 102.2(1)(d), an organisation could be proscribed if the Minister determined that it was 'likely to endanger' the 'integrity' of the Commonwealth or a foreign country. This ground of proscription was so amorphous that a person convicted of being a member of such an organisation need have no involvement in criminal activity, which it is the purpose of the law to punish. On this view a Chapter III court's function is usurped because it is relegated to determining a question of status not criminal conduct. Alternatively, the membership offence might be constitutionally objectionable for involving a Chapter III court in a process repugnant to the exercise of judicial power.[131]

(c) The Rule of Law

In this section, I note three aspects of the rule of law with which the SLAT Bill potentially conflicted. The first is the requirement that legal rules are clear. The second is the right to a fair trial — a 'cardinal requirement of the rule of law'[132] — that is said to include the presumption of innocence and the requirement for

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[129] Ibid 647. As Tham points out, Dawson J did not come to a decision about what he said was the notion of an 'expanded notion of a bill of attainder' or whether it would offend the separation of judicial power because he held that the *War Crimes Act 1945* (Cth) was not such an instrument (648) — see Tham, above n 119, footnote 101, 501.
[130] Tham, above n 119.
[131] See ibid 499–504.
[132] Tom Bingham, *The Rule of Law* (Penguin Books Ltd, 2010) 90.

proof beyond reasonable doubt of an accused's wrongdoing.[133] Third, is the principle of *nulla poena,* which assumes that the law punishes criminal conduct not criminal types.[134]

(i) Clarity of Statutory Language

Dicey's first rule of law, expressed in relation to criminal law as the *nulla poena* principle, requires that legal rules are clear in order to limit and guide the actions of officials and citizens. Clarity is especially important for penal statutes.[135] As noted above, a number of the SLAT Bill's offence provisions and the Attorney's proscription power were not clearly defined.

(ii) The Right to a Fair Trial

In the late 20th century, Parliament codified the rules of criminal responsibility for Commonwealth offences.[136] These rules are contained in Chapter 2 of the *Criminal Code*, which reflects the presumption of innocence in a variety of ways. Chapter 2 generally requires that, to obtain a conviction, the prosecution must prove the physical and (any) fault elements of the offence. The basic rule is that the prosecution shoulders a legal burden — that is, proving the existence of a matter.[137] This burden 'must be discharged beyond reasonable doubt'.[138] Where a burden is placed on a defendant, the usual rule is that he or she has 'an evidential burden only'.[139] This involves pointing to evidence suggesting 'a reasonable possibility that [a] matter exists or does not exist'. If a legal burden —

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[133] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Law Book Co, 3rd ed, 2010).
[134] Ibid.
[135] Francis Allen, *The Habits of Legality — Criminal Justice and the Rule of Law* (Oxford University Press, 1996) 14–17.
[136] *Criminal Code* s 2.1. From 1 January 1997, the principles of criminal responsibility contained in Chapter 2 of the *Code* applied to all offences under the *Code*. From 1 January 2002, Chapter 2 applied to all other Commonwealth offences.
[137] Ibid s 13.1.
[138] Ibid s 13.2.
[139] Ibid s 13.3.

which must be discharged on the balance of probabilities — is placed on an accused this must be expressly stated.[140]

The *Code* looks to a defendant's subjective mental state.[141] The Attorney-General's Department produces guidelines to assist Commonwealth departments in framing offences and penalties. These note that the requirement for the prosecution to prove 'fault' reflects the view that it is 'generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness)'.[142]

The idea of subjective fault also suggests that there are varying levels of individual culpability. Chapter 2 therefore provides for three subjective fault elements — intention, knowledge and recklessness.[143] The importance of subjective fault is also reflected in the *Code's* provision for a default fault element for each physical element of an offence[144] and its stipulation that where strict or absolute liability is applied to an offence or one of its physical elements, there must be an express statement to this effect.[145]

Chapter 2 enables offences or physical elements of offences to attract absolute liability. It obviates the need for the prosecution to prove fault on the part of the accused and denies an accused a mistake of fact defence. Chapter 2 also provides for strict liability. Like absolute liability, strict liability means that the prosecution need not prove fault on the part of an accused. Unlike absolute liability, strict liability is subject to a mistake of fact defence.

In 2002, the Attorney-General's Department guidelines [146] advised Commonwealth departments that use of absolute and strict liability should occur

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[140] Ibid ss 13.4, 13.5.
[141] Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Penalties, Infringement Notices and Enforcement Powers* (3rd ed, 2011) 17, 21.
[142] Ibid 22.
[143] The objective fault element of negligence is not a default fault element. It requires conduct to be so 'greatly' short of the standard of care that would be exercised by a reasonable person that criminal punishment is warranted (s 5.6). The Attorney-General's Department guidelines state that, traditionally, negligence has not been used in offences carrying a custodial penalty. Ibid 21.
[144] *Criminal Code* s 5.6.
[145] Ibid ss 6.1, 6.2.
[146] The guidelines, which were not publicly available at this time, were referred to in Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Sixth Report of 2002.*

only in limited circumstances. For absolute liability, these exceptions were identified as the jurisdictional elements of offences, offences that did not attract custodial sentences or penalties exceeding 10 penalty units or where inadvertent errors based on a mistake of fact should be punished.[147] The guidelines recommended that strict liability should not be used in offences attracting custodial sentences or fines of more than 60 penalty units.[148]

It is also noteworthy that, since 1981, the Senate's own Scrutiny of Bills Committee has maintained a watching brief on rule of law and civil rights implications of bills introduced into Parliament. In doing so it has paid particular attention to strict and absolute liability and the onus of proof, recommending stringent criteria for their use. Additionally, it has often criticised the placing of evidential or legal burdens on a defendant as contrary to the presumption of innocence, commenting disapprovingly, in its report on the 39th Parliament, on an increasing trend for this to occur.[149]

The SLAT Bill's provisions were at odds with the rule of law's requirement for clarity. They also sat uncomfortably with the fair trial principles incorporated in the *Criminal Code*, the guidance produced by the Attorney-General's Department for their use and the Senate's own concerns about fair criminal process. They contained serious offences attracting very heavy penalties where the core element of the offences attracted absolute liability and where legal burdens were placed on the accused. They also included serious strict liability offences.

(iii) Status Offences

The principle of *nulla poena* implies that persons are punished on the basis of their conduct not their beliefs, characteristics or associations.[150] As noted

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Application of Absolute and Strict Liability Offences in Commonwealth Legislation (2002) 259. Since 2004, the guidelines have been published in full.

[147] In January 2002, a penalty unit equalled $110 — *Crimes Act* s 4AA.

[148] See Senate Standing Committee for the Scrutiny of Bills, above n 146, 259. In 2002, the Guidelines stated that, within these limits, strict liability could be used for regulatory offences, where a matter is difficult for the prosecution to prove because it is peculiarly within the defendant's knowledge or to overcome a 'knowledge of law' problem.

[149] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *The Work of the Committee during the 39th Parliament November 1998 – October 2001* (2002?) 31–32.

[150] Allen, above n 135, 15.

earlier in this chapter, proposed s 102.4(3) provided that it was an offence to be a member of a proscribed organisation. Criminal liability was not contingent on the organisation itself or the individual member being involved in criminal conduct, arguably breaching this important principle.

This section has sketched a number of constitutional and rule of law issues that were potentially relevant to Parliament's consideration of the SLAT Bill. In the next section I analyse *Hansard* and parliamentary committee reports that informed debate in order to determine whether the assumption of constitutionality drove the legislative process.

2 *Parliament and the Assumption of Constitutionality*

(a) Constitutional Power and Constitutional Limitations

The issue of constitutional power was a difficult one for both the Government and Opposition. The former clearly had concerns about whether proposed s 100.2, the constitutional nexus clause, was effective and about whether the proscription provisions were properly supported. It secured amendments linking s 100.2 to 'terrorist acts' rather than simply actions and threats in respect of which the Commonwealth could create offences.[151] Similarly, powers to declare organisations were more tightly connected to 'terrorist acts' over which the Commonwealth had constitutional power, as were derivative offences and terrorism offences.[152]

Adequacy of constitutional power was a subject raised in evidence before the Legislation Committee. It was told that, given the prevailing circumstances of 'relative peace', the Bill might not satisfy the 'reasonably appropriate and adapted' test demanded by the defence, external affairs and nationhood powers.[153] Nonetheless, the Committee did not focus on this issue. It noted instead that the Council of Australian Governments ('COAG') had agreed on

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[151] *Schedule of Senate Amendments* (10) Govt (9), (11) Govt (10) [Sheet DT 340].
[152] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2002, 2579 (Chris Ellison, Minister for Justice and Customs, Liberal).
[153] Senate Legal and Constitutional Legislation Committee, above n 29 citing George Williams and Iain Gentle, Submission No 8 to Senate Legal and Constitutional Legislation Committee, 3 April 2002.

5 April 2002 to refer power to the Commonwealth in order to 'plug any gaps'.[154] Although it would not be effective for over 12 months,[155] the COAG agreement was for the states to make both text and amendment references of power over terrorism to the Commonwealth under s 51(xxxvii) of the *Constitution*.[156]

In the Senate, Labor's Joe Ludwig referred to the Legislation Committee's 'struggle' with the issue of constitutional power. He suggested it had concluded that — with some exceptions — the Bill was reasonably appropriate and adapted to the threat facing Australia.[157] Proscription was the focus of Parliament's attention. In the House of Representatives, the Shadow Justice Minister suggested that proscription power could be challenged on both Chapter III and freedom of political communication grounds.[158] The major concern of the Shadow Attorney-General was whether the proscription provisions represented a usurpation of judicial power.[159] In the Senate, Robert Ray pressed the Government about the sufficiency of constitutional 'coverage' — possibly referring to heads of power issues — for its amendments to the proscription regime given the *Communist Party Case*. He also referred to doubts that had been expressed about validity on implied freedom of political communication grounds.[160]

Labor also demanded to see the Government's constitutional advice. In the House of Representatives, Robert McClelland called it an entitlement. His major concern was that the legislation was constitutionally robust enough to survive

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[154] Ibid 26 citing Attorney-General's Department, Submission No 383 to Senate Legal and Constitutional Legislation Committee, 7.

[155] By 2003, all states had legislated to refer power. No referrals by the self–governing territories were necessary because of the Commonwealth's plenary power (*Constitution* s 122) over those polities. The Northern Territory passed a *Terrorism (Northern Territory) Request Act 2003* (NT) but this was a matter of politics not law. The substantive provisions of Commonwealth legislation re-enacting terrorism offences and taking account of the references of power in order to plug any constitutional gaps commenced on 29 May 2003 — *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

[156] Council of Australian Governments, 'Commonwealth and States and Territories Agreement on Terrorism and Multi-Jurisdictional Crime' (5 April 2002). A meeting of the Standing Committee of Attorneys-General in November 2002 signed off on the details of the referrals — Attorney-General (Daryl Williams), 'Reference of Terrorism Power' (Media Release, 8 November 2002).

[157] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2365.

[158] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1153 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).

[159] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1195 (Robert McClelland, Shadow Attorney-General, ALP).

[160] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2631, 2633 (Robert Ray, ALP). Senator Ray referred in passing to *Theophanous* (1994) 182 CLR 104.

challenge by someone facing terrorism charges.[161] In the Senate, Robert Ray accepted that the Government's legal advice was not usually made public but argued that an exception should be made for constitutional questions.[162] This was important, said Ray, because it would assist politicians in their work as legislators.[163] When the Government had advice on legislation that Parliament was expected to pass, said Ray, 'we should see that legal advice'. [164]

The Government refused Senator Ray's request. Its only concession was to relay brief and unclear information from the Attorney-General via the Minister for Justice and Customs. This did not refer to the implied freedom question. Instead, the Minister advised that the proposed power to list 'terrorist organisations' was supported by the external affairs power.[165] In addition, he said that no 'Communist Party type issue' arose because, before a regulation was made declaring an organisation to be a 'terrorist organisation', the Minister would need to be satisfied on reasonable grounds that the organisation was involved in planning etc a 'terrorist act'. This meant that the Minister's opinion could be tested in court.[166] Of course, the extent to which it could be tested was open to doubt.

(b) Proscription Amendments

Senator Ray's concerns about proscription were expressed after the Government introduced amendments replacing the Bill's original clauses and their unpalatable terminology of 'proscription' and 'proscribed organisation'. The proposals defined 'terrorist organisation' as an organisation engaged in, preparing for or planning a terrorist act. They would have allowed an organisation to be declared a 'terrorist organisation' in the following ways. First, in the course of criminal proceedings. Second, by effectively retaining a regime of executive proscription via disallowable regulations. These regulations would be

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[161] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1195.
[162] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2631, 2633.
[163] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2726.
[164] Ibid.
[165] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2725 (Chris Ellison, Minister for Justice and Customs, Liberal).
[166] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2725.

based on the Minister's reasonable satisfaction that an organisation was engaged in or planning a terrorist act. Alternatively, a regulation could be made on the Minister's satisfaction both that the Security Council had identified the organisation as a terrorist organisation and that the organisation was engaged in or planning a terrorist act.[167]

However, although proscription was the most highly contested aspect of the SLAT Bill, it was one in which some outcome appeared assured. Labor considered that because terrorist organisation offences were essential some form of banning provision was necessary.[168] The compromise that was reached restricted the operation of the regime. It permitted a terrorist organisation to be identified in two ways. First, by a court in criminal proceedings. Second, by disallowable regulation based on a Security Council decision and the Attorney's reasonable satisfaction of connection to a 'terrorist act'. Additionally, the amendments placed two types of temporal limitation on regulations. First, they would not commence until the end of the disallowance period.[169] Second, they expired after two years — although they could be remade. [170]

Provision for a court-based process provided a more acceptable alternative to executive declarations. This, said Labor, which claimed credit for suggesting a court-based process, marked the end of executive proscription. Confining executive declarations to bodies listed by the Security Council was seen as protecting against politically partisan decisions.[171]

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[167] Commonwealth, *Journals of the Senate*, No 19, 25 June 2002, 469–71.
[168] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2002, 2597 (John Faulkner, Leader of the Opposition in the Senate, ALP).
[169] In 2002, disallowance was governed by the *Acts Interpretation Act 1901* (Cth). In broad terms, this required regulations to be tabled by the Government within 15 sitting days of being made. Normally, regulations were effective immediately. However, the Senate had 15 sitting days after tabling to move a motion of disallowance. If the motion was successful, the regulation ceased to have effect (s 48).
[170] *Schedule of Senate Amendments* (17) Govt (16) [Sheet DT340] as amended by Opp (4) and (5) [Sheet 2503].
[171] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2723 (John Faulkner, ALP).

(c) Parliament and the Rule of Law

(i) Introduction

In this section, I ask whether three rule of law principles influenced the legislative process in the case of the SLAT Bill. Parliament claimed that the rule of law was an important matter. For example, Labor argued that it was one of the values Parliament was required to protect.[172]

(ii) Clarity of Statutory Language

In this section, I focus on three issues — the definition of 'terrorist act', the offence of doing any act in preparation for a terrorist act, the definition of 'member' and a proposed and unsuccessful amendment proposed by Labor. It described the original definition of 'terrorist act' as too wide,[173] 'vague and unacceptable'; 'very sloppy'; and 'riddled with unintended consequences'.[174] It emphasised the need for 'precise criteria' in anti-terrorism legislation[175] so that the legislation only targeted terrorists.[176]

It appears that these and similar criticisms[177] led the Government to tighten the definition of 'terrorist act' in a number of ways. It attempted to distinguish terrorist acts from other types of criminal activity through a requirement that they involve either coercion or intimidation of governments or intimidation of the public or a section of the public.[178] It also moved other successful amendments relating to protest and dissent, which I consider later under the heading of liberties and rights.[179]

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[172] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1152 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).
[173] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1153 (Daryl Melham, ALP).
[174] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2346 (Kate Lundy, ALP); Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2335 (John Faulkner, ALP).
[175] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2343 (Kate Lundy, ALP) — referring to criteria suggested by the UN High Commissioner for Human Rights.
[176] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2335 (John Faulkner, ALP).
[177] Labor claimed credit for the change in definition. Commonwealth, *Parliamentary Debates*, Senate, 25 June 2002, 2568 (John Faulkner, ALP).
[178] *Schedule of Senate Amendments* (6) Govt (5) [Sheet DT 340].
[179] *Schedule of Senate Amendments* (9) Govt (8) [Sheet DT 340].

There were other concerns. For example, 'terrorist act' included conduct that 'involved' serious harm to a person or serious damage to property. As submissions to the Legislation Committee[180] and as Labor and the Democrats pointed out, the wording suggested that a person might be guilty of a 'terrorist act', irrespective of their own intentions or motives, if their actions resulted in a third party inflicting the serious harm or damage.[181] An ALP amendment, passed by the Senate and accepted by the Government, was designed to rectify this problem.[182]

However, the 'vague' language that had been criticised in the definition of 'terrorist act' was not subject to the same scrutiny in relation to the terrorism offences. There was only one exception. The Greens labelled the offence of 'doing any act in preparation for a terrorist act' as 'nebulous'. [183] They argued that 'criminal law should be based on specifically defined offences'.[184] Nonetheless, there was no discussion of Minister Ellison's equation of the proposed offence with conspiracy or his comment that it was 'nothing really unusual'. [185] The preparatory offence was simply confirmed by the Senate.

There were, however, concerns about the unclear definition of 'member'[186] of a terrorist organisation and, because of this, about the membership offence. These concerns were approached in two ways by Labor and the Senate. First, by its successful amendment limiting the membership offence to organisations that had been identified by the Security Council.[187] Second, by Labor's proposed offence of demonstrated willingness to assist a terrorist organisation, which would have applied to organisations identified by a court as terrorist

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[180] See, for example, Joo-Cheong Tham, Submission No 61 to Senate Legal and Constitutional Legislation Committee, *Inquiry into Security Legislation Amendment (Terrorism) Bill 2003, Suppression of the Financing of Terrorism Bill 2002, Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, Border Security Legislation Amendment Bill 2002, Telecommunications Interception Legislation Amendment Bill 2002* (2002), 6.
[181] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2480 (John Faulkner, ALP; Brian Greig, Democrats).
[182] *Schedule of Senate Amendments* (7) Opp (2) [Sheet 2503].
[183] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2002, 2592.
[184] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2002, 2593.
[185] Ibid.
[186] Included in the definition were informal members and persons who had taken steps to become a member of an organisation. SLAT Bill [No 2] sch 1 item 4 proposed s 102.1 (definition of 'member').
[187] Commonwealth, *Journals of the Senate*, No 20, 26 June 2002, 478.

organisations as well as those proscribed on the basis of a Security Council listing.[188] This proposed offence was designed to cover 'sleepers'. As the Greens explained, this potentially captured an even wider range of behaviours than the membership offence and was a dangerous excursion into pre-emption.[189] Although the Government was prepared to allow Labor's amendment to pass in order to have the SLAT Bill enacted as quickly as possible, the amendment was eventually withdrawn by Senator Faulkner who was persuaded by the Government that the conduct of 'sleepers' was already covered by the offence of providing support to a terrorist organisation.[190]

(iii) Fair Trial Principles

The need for a fair criminal process was acknowledged in Parliament. The Legislation Committee recommended that absolute liability provisions be removed from the SLAT Bill and replaced with offences containing the fault elements of knowledge and recklessness.[191] In the Senate, Bob Brown argued that the rule of law required a fair trial.[192] Labor's John Hogg contended that terrorism laws must approximate as much as possible to ordinary criminal law and procedure.[193] Senator Barney Cooney argued that the SLAT Bill should reflect the principles contained in the *Crimes Act* and *Criminal Code* and ensure due process, a right to silence and no punishment without intentional conduct.[194] Labor also gave notice that it would press for the removal of absolute liability provisions and the reverse onus of proof as well as for the insertion of fault elements into all the offences.[195]

However, for a number of reasons, the record was mixed. It is unlikely, for instance, that the original offences, so far removed from the Commonwealth's own codified principles of criminal responsibility, were intended as anything

[188] Commonwealth, *Journals of the Senate*, No 20, 26 June 2002, 499.
[189] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2730 (Bob Brown, Greens).
[190] Commonwealth, *Parliamentary Debates*, Senate, 26 June 1002, 2732 (Chris Ellison, Minister for Justice and Customs, Liberal; John Faulkner, Leader of the Opposition in the Senate, ALP).
[191] Senate Legal and Constitutional Legislation Committee, above n 29, recommendation 3, vii.
[192] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2401 citing the UN High Commissioner for Human Rights.
[193] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2378.
[194] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2454–5.
[195] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2368 (Michael Forshaw, ALP).

other than an opening gambit.[196] On 25 June 2002, the Government introduced amendments in the Senate that, as well as reducing penalties, recast and recalibrated all terrorism offences, inserted fault elements and removed absolute liability.[197] So, for example, providing or receiving training connected with a terrorist act attracted a penalty of 25 years imprisonment if committed with knowledge of the connection and a penalty of 15 years imprisonment if committed with recklessness about that physical element.[198]

However, there was little criticism about the preparatory nature of the offences, their new fault elements or any discussion of the idea that the fault element of intention should apply to the offences' core elements. The Greens' attempts to remove reckless terrorism and terrorist organisation offences[199] and then to omit entirely the offences of funding or supporting a terrorist organisation[200] were unsuccessful. Legal burdens remained on defendants charged with the offence of membership of a terrorist organisation. The specific defence applicable to the offence of funding a terrorist organisation had to be proved by the accused to a legal standard. Only the Government's attempts to insert negligent terrorism and terrorist organisation offences were debated, roundly criticised and defeated.[201]

In addition, the Government's amendments raised other issues that were not debated by the Senate. The amended terrorism training offence, originally confined to weapons training, was made more vague. As amended it applied to training of any sort[202] — potentially extending, for example, to administrative or first aid training. New burdens of proof were placed on accused persons. In relation to the offence of collecting or making documents connected with a

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[196] See also Greg Carne, 'Terror and the Ambit Claim: Security Legislation Amendment (Terrorism) Act 2002' (2003) 14(1) *Public Law Review* 13.
[197] *Schedule of Senate Amendments* (12) Govt (11), (14)–(15) Govt (13)–(14), (18) Govt (17) [Sheet DT340].
[198] *Schedule of Senate Amendments* (12) Govt (11) [Sheet DT340].
[199] Commonwealth, *Journals of the Senate*, No 19, 25 June 2002, 466; Commonwealth, *Journals of the Senate*, No 20, 26 June 2002, 482. The reckless terrorism offence was that of recklessly providing or receiving training connected with a terrorist act — new proposed s 101.2(2).
[200] Commonwealth, *Journals of the Senate*, No 20, 26 June 2002, 482.
[201] Commonwealth, *Journals of the Senate*, No 19, 25 June 2002, 466; Commonwealth, *Journals of the Senate*, No 20, 26 June 2002, 482. The negligent terrorism offence was new proposed s 101.2(3).
[202] *Schedule of Senate Amendments* (12) Govt (11) [Sheet DT 340] (as amended by Opp (3) [Sheet 2503]).

terrorist act, for example, Government amendments placed an evidential burden on a defendant to show that the thing or document was not *intended* to assist or facilitate a terrorist act.[203] Turning the fault element of intention, the most difficult in the hierarchy of fault elements to satisfy, into a defence related not to conduct but to circumstance was novel, likely burdensome and productive of unjust outcomes. The Democrats' efforts to provide that intention should be a fault element for the offences of possessing things and making documents connected with a terrorist act failed.[204] And the Minister's argument that the amendment was designed to prevent a person escaping conviction on a 'technicality' went unchallenged.[205]

(iv) Status Offences

As the Bill proceeded through Parliament, the terrorist organisation offences were tightened somewhat — by linking them to the amended definition of 'terrorist act' and through the application of fault elements. However, of particular concern to the Senate was the membership offence. In part, this was due to the vague definition of membership. It was also because the offence punished association rather than criminal conduct.[206] As stated earlier, Labor's amendments were successful in restricting the operation of the membership offence to organisations proscribed on the basis of a Security Council listing.[207] However, Government amendments that placed a legal burden on an accused to prove that he or she had taken all reasonable steps to leave the organisation after knowing it had been declared were not opposed by Labor.[208] Greens amendments to remove the membership offence entirely were, similarly, unsuccessful.[209]

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[203] *Schedule of Senate Amendments* (15) Govt (14) [Sheet DT 340].
[204] Commonwealth, *Journals of the Senate*, No 19, 25 June 2002, 469.
[205] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2002, 2590.
[206] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2002, 2594 (Brian Greig, Democrats); Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2642 (John Faulkner, Opposition Senate Leader, ALP).
[207] Commonwealth, *Journals of the Senate*, No 20, 26 June 2002, 482, 497–8.
[208] Commonwealth, *Journals of the Senate*, No 20, 26 June 2002, 498.
[209] Ibid.

(v) Liberties and Rights

One of the major criticisms of the SLAT Bill was its potential effects on rights and liberties. It is not clear from *Hansard* that, in referring to liberties and freedom, parliamentarians had the implied freedom of political communication in mind. The Government asserted that the Bill protected the rights of 'law-abiding Australians'[210] and that strong safeguards were provided.[211] Members of the ALP were concerned about the need to protect democratic principles of 'free speech, freedom of association and freedom of religion;[212] embedded civil liberties';[213] and 'inalienable' rights.[214] They spoke of the party's century-old championing of Australians' freedom 'from discrimination, freedom of information, freedom of association and freedom of speech'.[215] Others referred to rights' hierarchies. Labor MP and future Attorney-General Robert McClelland described security as 'the most fundamental human right' — an essential precondition for the enjoyment of other rights, such as the right to life and freedom from arbitrary detention and arbitrary violence.[216]

In this section, I look at the definition of 'terrorist act' and its potential effects on protest, industrial action and support for liberation movements. As noted earlier, a combination of Government and Opposition amendments to the definition of 'terrorist act'[217] exempted a wider range of advocacy, protest, and dissent. Protest was no longer required to be 'lawful' and was exempt so long as it was not intended to 'cause' certain types of physical harm to persons or create a serious risk to public health or safety.[218]

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[210] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1141 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration, Liberal).
[211] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1206 (Daryl Williams, Attorney-General, Liberal).
[212] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1201 (Warren Snowdon, ALP).
[213] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2358 (Robert Ray, ALP).
[214] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2369 (Steve Hutchins, ALP).
[215] Commonwealth, *Parliamentary Debates*, Senate, 27 June 2002, 2813 (John Faulkner, ALP).
[216] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1160.
[217] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2335–6 (John Faulkner, Opposition Senate Leader, ALP).
[218] *Schedule of Senate Amendments* (6), (8), (9) Govt (5), (7), (8) [Sheet DT340]; (7) Opp (2) [Sheet 2503].

These amendments were characterised by Labor as removing 'any possibility' that protest or industrial action could be prosecuted as a terrorism offence.[219] This was not the case, as the following examples illustrate. The first example was provided by the Greens, who suggested that hunger-striking asylum seekers[220] might be guilty of a 'terrorist act' given that under Government and Labor amendments[221] such actions could fall within subsection 2 of the definition of 'terrorist act' and not be excluded by subsection 2A.[222] When this issue was raised, Labor asked for a 'clear and unequivocal commitment' from Minister Ellison that terrorism charges could not be laid in such cases so that the debate could 'move on'.[223] Important, here, given Labor's own support of a model based on the *Terrorism Act 2000* (UK), was the Government's argument that the definition was based on the UK model. It also accepted the Minister's assurance that it was not the Government's intention that hunger strikers be prosecuted.[224]

In addition, it is arguable that protests intended to intimidate the public or a section of it[225] and that created a serious risk to public safety and that also caused serious property damage were still caught by the definition of 'terrorist act'. Action taken during a Maritime Union of Australia ('MUA') dispute with Patrick Stevedores in 1998 provides one example and also shows the blurred lines between protest and industrial action.[226] Further, it was not clear whether

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[219] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2336 (John Faulkner, ALP).
[220] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2477–8 (Bob Brown, Greens); Commonwealth, *Parliamentary Debates*, Senate, 25 June 2002, 2562 (Bob Brown, Greens).
[221] *Schedule of Senate Amendments* (8), (9) Govt (7), (8) [Sheet DT 340]; (7) Opp (2) [Sheet 2503].
[222] In other words, a hunger strike by asylum seekers could be viewed as political action designed to coerce or intimidate the public and as action intended to cause serious physical harm to a person (self-harm). On this argument, the exception for advocacy, protest or dissent would not apply. If, however, the action was regarded as action intended to endanger life, an exception for self-harm did exist. The Government had, not uncommonly, called such hunger strikes coercive. See, for example, Gillian Bradford, Interview with Philip Ruddock, Minister for Immigration (Television Interview, ABC Lateline, 'Woomera Detention Centre Faces Uncertain Future', 29 January 2002). Mr Ruddock had likened the hunger strikers to hijackers and said they wanted to coerce the Government.
[223] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2002, 2563 (John Faulkner, ALP).
[224] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2002, 2564 (Chris Ellison, Minister for Justice and Customs, Liberal).
[225] The words 'the public or a section of the public' included corporations. Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2482–4 (Chris Ellison, Minister for Justice and Customs, Liberal).
[226] During the dispute between Patrick Stevedores and the MUA, about 1000 people broke through barriers that had been erected to keep them away from the docks, ripping off fence panels as they went. The crowd was a mix of wharfies, members of other unions, political

the exemption for 'industrial action' included picketing.[227] Nor was it clear that 'industrial action' would never include advancing a political or ideological cause.[228]

Concluding comments about the influence of constitutional and legal norms on Parliament's consideration of the SLAT Bill are set out following my consideration of Gross's assumption of separation.

IV THE ASSUMPTION OF SEPARATION

A *Temporality*

Gross argues we assume that crises will be temporary and that sunset clauses, rarely effective, are an expression of that view. The insertion of a sunset clause in the SLAT Bill [No 2] was opposed by the Government. It maintained that the legislation was needed for the long-term, given the ongoing threat of terrorism.[229] It pointed instead to what might be called a modified form of sunset clause, achieved after amendments relating to the definition of 'terrorist organisation' were made. While renewals were possible, these amendments imposed a time limit of two years on proscription regulations. The Government also argued that sunsetting was unnecessary given the important safeguards that applied — the possibility of parliamentary disallowance of proscription regulations and judicial review of the Attorney's proscription decisions.[230]

In contrast, in the Senate, the Greens and the Democrats each moved unsuccessful amendments providing that the legislation would expire five years

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activists and others who may have been variously engaged in picketing and protest. Helen Trinca and Anne Davies, *Waterfront. The Battle that Changed Australia* (Doubleday, 2000), 213.

[227] Joo-Cheong Tham, Submission No 61 to Senate Legal and Constitutional Legislation Committee, above n 29, 8–10.

[228] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2476 (John Faulkner, Opposition Senate Leader, ALP). Senator Faulkner said, ignoring a history of union involvement in green bans and other political action, that industrial action was only ever for an economic or industrial cause.

[229] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2393 (Ian Campbell, Manager of Government Business in the Senate, Liberal).

[230] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2447 (Chris Ellison, Minister for Justice and Customs, Liberal).

after Royal Assent unless earlier repealed.[231] Chief among their concerns, notwithstanding amendments, were the Bill's proscription provisions, its vague statutory language, and its potential for executive abuse. They also questioned its necessity.[232] Sunsetting also had other imperatives for the minor parties. It would allay community fears. Combined with a review that post-dated sunsetting it would ensure strict scrutiny of the legislation.[233] It would also serve a political purpose. It was an attempt to ensure that any move to extend the legislation, amend it or make it permanent would require Senate approval and (optimistically) involve the minor parties themselves.[234]

Sunsetting appears to have served a different purpose for Labor. It appears that the Opposition may have threatened to support a sunset clause unless the definition of 'terrorist act' and the original proscription provisions were amended.[235] In general, however, the party's position was that appropriately balanced terrorism laws were needed to fill a statutory gap and comply with UNSC 1373. It also distinguished the package of Bills from the ASIO (Terrorism) Bill [No 1] where, it said, a sunset clause was necessary because that legislation ventured further into 'unknown territory'.[236]

As occurred with the ASIO (Terrorism) Bills, a different type of marker of exceptionality was the proposal for two legislative reviews. Government amendments tasked the Parliamentary Joint Committee on ASIO, ASIS and DSD ('PJC') with reviewing four of the five bills in the counter-terrorism legislative package as soon as possible after the third anniversary of the SLAT Bill's

[231] Greens (1). The amendment was negatived 12:49 with the Greens, Democrats, One Nation and Independent Senator Shayne Murphy voting in support — Commonwealth, *Journals of the Senate*, No 18, 24 June 2002, 446–7. Dem (1) [Sheet 2555] — Commonwealth, *Journals of the Senate*, No 20, 26 June 2002, 514.
[232] Commonwealth, *Parliamentary Debates*, Senate, 27 June 2002, 2812 (Bob Brown, Greens); 2816–7 (Brian Greig, Democrats).
[233] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2456 (Brian Greig, Democrats); 2458 (Bob Brown, Greens).
[234] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2458 (Bob Brown, Greens).
[235] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2458 (Robert Ray, ALP).
[236] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2457 (Robert Ray, ALP).

assent.[237] The review would address the 'operation, effectiveness and implications' of those statutes.

An additional mechanism of review, suggesting that Labor was uneasy about some of the SLAT Bill's provisions and perhaps about PJC review, was also inserted. ALP amendments supported by non-government senators, provided for an independent and public review of the 'operation, effectiveness and implications' of all five bills. The review panel's membership would include the Human Rights and Privacy Commissioners.[238] Further, the PJC review would be required to take the review panel's report into account. The amendment was opposed by the Government. It stressed that only the PJC had access to restricted national security information and established procedures and resources. As well, it forecast that the public review simply would duplicate the work of the PJC.[239] However, in order to secure the Bill's passage, it did not oppose the amendments.[240]

B *National Security*

Gross hypothesises that, in times of crisis, deference is accorded to the Executive Government easing the passage of emergency laws. Observing debates on the SLAT Bill [No 2] reveals that national security can influence decision-making in a variety of ways. It also shows that deference is not universally accorded to governments.

The Government relied on assertions that the package of terrorism bills was not the product of 'hysteria' but of a 'careful and considered review of Australia's security needs' necessitated by a 'fundamental shift' in the global security

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[237] *Schedule of Senate Amendments* (21) Govt (2) [Sheet DT 340]. The proposed Telecommunications Interception Legislation Amendment Act 2002 was not included in the Government amendments.

[238] *Schedule of Senate Amendments* (2) Opp (1) [Sheet 2503]. The review panel would be chaired by a retired judge. Its other members included another nominee of the Attorney-General; the Inspector-General of Intelligence and Security ('IGIS'), the Commonwealth Ombudsman and two nominees of the Law Council of Australia. Its terms of reference did not require a rights analysis of the legislation.

[239] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2747–8 (Chris Ellison, Minister for Justice and Customs, Liberal).

[240] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 2002, 4653 (Daryl Williams, Attorney-General, Liberal).

environment.[241] Australia's 'operational capabilities, infrastructure and legislative framework' needed to be able to respond to new security challenges that targeted the nation and its assets.[242] Government speakers referred to a time of 'national emergency' evidenced by Australia's involvement in Afghanistan and the global 'War on Terror'.[243] In addition, evidence provided by the Attorney-General's Department, ASIO and the Australian Federal Police ('AFP') to, and largely accepted by, the Legislation Committee was that laws were needed to prevent terrorism and punish terrorists as well as to fill statutory gaps.[244]

In contrast, the non-government parties in the Senate were largely skeptical that the package of bills would have prevented 9/11. Further, they alone suggested that the Government bore the onus of proving that the bills were necessary to meet existing and emerging threats.[245] Unconvinced by the Government's rhetoric, they remained opposed to the SLAT Bill and all but one of the other bills in the legislative package.

Labor's attitude to matters of national security was complex, as I indicate below. It can sometimes be described as deferential — submission to the Government's acknowledged superior claims and judgment.[246] For example, when he proposed an offence of 'demonstrated willingness' to assist a terrorist organisation to commit a terrorist act, Labor's John Faulkner asked the Minister for Justice whether, in the post-9/11 world, sleeper cells were a significant issue. In relying on the Minister's answer, Faulkner remarked that Labor did not have access 'to the level of briefing and material' available to the Government.[247] Labor politicians also described their attitude as one of trust, which is arguably a

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[241] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2444, 2446 (Chris Ellison, Minister for Justice and Customs, Liberal).
[242] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1141–2 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration, Liberal).
[243] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2347 (George Brandis, Liberal).
[244] Senate Legal and Constitutional Legislation Committee, above n 29, 29.
[245] See, for example, Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2400 (Len Harris, One Nation).
[246] Lesley Brown (ed), *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993).
[247] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2731.

matter of simple faith or confidence.[248] In the debates on the SLAT Bill, this 'trust' was described and demonstrated in a number of ways.

Trust in the Government, Labor argued, was the product of the tradition of bipartisanship in national security and defence matters, said to be essential for public safety.[249] For bipartisanship to work, said Robert Ray, less transparency was required of the executive. The Opposition and the public at large must invest a higher degree of trust in government than would normally be accorded.[250] Bipartisanship was, in turn, used to justify Labor's decision not to oppose the second reading of the SLAT Bill in the House of Representatives — allowing for criticism of legislative details[251] and, ideally, for constructive dialogue with the Government[252] but also signalling in-principle support and arguably preempting rejection. Trust and bipartisanship also appear to have been influential because of the importance of national security. Labor emphasised that security was the 'most important task of all governments'.[253] Rights and liberties were predicated on it; a 'strong state' was essential; Thomas Hobbes, was described as a 'modern human rights thinker'. [254]

Labor's emphasis on trust in national security matters may also have arisen for other reasons. Parliamentarians can ask the Government for national security briefings. [255] As Robert Ray explained these briefings necessitate confidentiality undertakings, breach of which can jeopardise future requests. [256] At times, therefore, Labor deliberately refused to be briefed so that its ability to comment

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[248] Brown, above n 246.
[249] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1225 (Graham Edwards, ALP); 1195 (Kim Beazley, ALP).
[250] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2450.
[251] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2450 (Robert Ray, ALP).
[252] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1143 (Simon Crean, Leader of the Opposition, ALP).
[253] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1142 (Simon Crean, Leader of the Opposition, ALP). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1159 (Robert McClelland, Shadow Attorney-General, ALP).
[254] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1160 (Robert McClelland, Shadow Attorney-General, ALP).
[255] For the minor parties these briefings are discretionary rather than statutorily based, unless an individual or minor party member serves on the PJC.
[256] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2632. Disclosure of security information obtained as a PJC member could also expose the person to criminal prosecution — *Intelligence Services Act 2001* (Cth) sch 1 pt 2 items 9, 12 ('*Intelligence Services Act*').

and criticise — based on other sources of information — was not compromised.[257]

The special demands of national security also coloured Labor's view of some amendments. For example, it was initially reluctant to support government proposals that allowed organisations to be proscribed via regulation. This was because it did not regard Parliament as either an appropriate or a properly equipped forum for making national security assessments.[258] Robert Ray claimed, for instance, that given the choice he preferred executive proscription to a parliamentary disallowance mechanism.[259]

On the other hand, Labor did not regard review of the package of bills by the PJC alone as adequate. Robert Ray argued that, while less transparency was needed in national security matters, trust was more 'meaningful' if appropriate accountability mechanisms were incorporated into legislation.[260] In this regard, Labor seems to have been unconvinced of the adequacy of PJC review. This may have been because of the statutory limits under which the Committee operated. For example, the Committee must meet in private unless the Attorney-General otherwise agrees. The Government can censor its tabled reports.[261] Nonetheless, the 'imperatives' of national security can be seen in Labor's own successful proposals for a public review of the package of bills. Its amendments stipulated that a copy of the review should be tabled in Parliament but empowered the Attorney-General to remove information if satisfied that it might endanger a person's safety, prejudice an investigation or prosecution or — in a wide exclusion — compromise the operational activities of Australia's intelligence services or the AFP.[262]

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[257] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2631, 2632.
[258] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2631 (Robert Ray, ALP).
[259] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2631.
[260] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2450.
[261] *Intelligence Services Act* sch 1 pt 3 item 20(2); sch 1 pt 1 items 6, 7.
[262] *Schedule of Senate Amendments* (2) Opp (1) [Sheet 2503] proposed cl 4(8). The phrase relating to 'operational activities or methodologies' was taken from the reporting provisions of the *Measures to Combat Serious and Organised Crime Act 2001* (Cth) sch 1 item 49 s 15UD(1); sch 2 item 1 s 15XUA. The Act empowered officers of agencies that included the AFP, ASIO and ASIS to adopt, be issued with and use assumed (ie false) identities. It also reworked *Crimes Act* provisions that permitted law enforcement officers to commit crimes as part of their investigation of serious offences. The original controlled operations provisions only prohibited

What seem to have been particularly important in relation to the SLAT Bill [No 2], however, were two matters. First, was the nature of the 9/11 attacks and Australia's participation in the 'War on Terror'. These things made it essential, said Senator Faulkner, to 'urgently recalibrate [Australia's] domestic security laws and capability'.[263] Second, was Labor's unquestioning support for the international security decisions made by the Security Council — a global executive body — given the global 'War on Terror'. Even if the threat to Australia was low, said Robert Ray, Australia had to 'do everything' it could to assist the international community.[264] It needed, he declared, to act 'comprehensively' on UNSC 1373.[265] It is likely, therefore, that Labor's support of the vaguely expressed terrorism offence provisions stemmed from the wording of UNSC 1373 itself. It required States Parties to criminalise the financing, planning, preparation or perpetration of, or support for, terrorist acts.[266] With some additions, the terrorism offences followed this formula.

Although the issue of what UNSC 1373 actually required by way of legislation was ventilated in hearings conducted by the Legislation Committee, it did not occupy the attention of the Senate — save for the minor parties. For example, the Greens regarded existing criminal and surveillance laws as already 'very strong'.[267] And Senator Harris queried whether UNSC 1373 required discrete terrorism laws to be enacted at all.[268]

Moreover, despite the fact that UNSC 1373 was imprecisely worded and that neither the Minister nor the Opposition was aware of how the Security Council would go about identifying an organisation as a terrorist organisation, Labor emphasised that being an 'international good citizen' meant that it would agree

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the inclusion of information in annual reports that might endanger a person's safety or prejudice an investigation or prosecution.

[263] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2334 (John Faulkner, Opposition Senate Leader, ALP).

[264] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2358 (Robert Ray, ALP).

[265] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1202 (Warren Snowdon, ALP); Commonwealth, *Parliamentary Debates*, Senate, 20 June 2363 (Joe Ludwig, ALP). Senator Ludwig added that there was also a 'broader obligation' than UNSC 1373 to act comprehensively against terrorism.

[266] SC Res 1373, UN Doc S/RES/1373 (28 September 2001).

[267] Commonwealth, *Parliamentary Debates*, Senate, 27 June 2002, 2812 (Bob Brown, Greens).

[268] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2399 (Len Harris, One Nation).

to proscribing organisations that had been nominated by the body.[269] There was no consideration of the appropriateness of the Security Council's role as global legislator. Only the Greens asked questions and expressed concern about the role of the Security Council and its decision-making processes.[270] Once the SLAT Bill was appropriately amended and the package of legislation passed, Labor argued, Australia would have fulfilled its obligations under UNSC 1373 and two terrorism conventions recently ratified by the Government.[271]

C *Communal Divisions*

Gross theorises that exceptional laws are more easily accepted if it is clear that they apply to others and not to ourselves. In this section, I assess what *Hansard* reveals about the influence of Gross's idea of communal divisions on the making of exceptional laws by the Australian Parliament.

The Government's rhetoric emphasised that the SLAT Bill [No 2] was about the 'other'. It stressed that the definition of 'terrorist act' was designed to capture 'suicide bombings, chemical or biological attacks, threats of violence and attacks on infrastructure'.[272] Australians were warned that terrorists were 'actively working to undermine democracy and the rights of people throughout the world'.[273] In particular, they were told that Australia itself could be attacked by

[269] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2642–3 (John Faulkner, Opposition Senate Leader, ALP).
[270] When Senator Brown asked how the Security Council determined which organisations were terrorist organisations and how affected bodies could contest those decisions, Senator Ellison was unable to answer — Commonwealth, *Parliamentary Debates*, Senate, 25 June 2002, 2604–6). After receiving advice, the Minister responded that, in relation to asset freezing, any country could nominate a person or organisation and any other country could object — with disagreements resolved through negotiation but without 'detailed procedural rules'. Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2629–30 (Chris Ellison, Minister for Justice and Customs, Liberal).
[271] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2627 (John Faulkner).
[272] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1140 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration, Liberal).
[273] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1142 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration, Liberal).

international terrorists, that innocent people would be targeted,[274] and that the legislation would assist 'our defence forces' fighting in overseas conflicts.[275]

This rhetoric separated Australia, its people and its institutions from the horrors of terrorism and the criminality of terrorists. As Gross suggests, this rhetoric, together with catastrophic imaginings, played on the 'hysteria, fear and xenophobia' that had been generated by the 9/11 attacks. Some politicians accused the Government of deliberately creating and exploiting fear in the community and operating from 'base political motives'.[276] In particular, Labor's Nick Bolkus referred to the fear and hysteria that had 'engulfed the world' since 9/11, infected domestic politics and made it difficult for the Opposition to pursue legislative amendments to counter-terrorism legislation.[277]

The wider context in which the SLAT Bill was introduced and debated was also significant. Australia's perceptions of asylum seekers and boat arrivals, its 2001 'khaki' election,[278] and its participation in the war in Afghanistan and the 'War on Terror' all assumed the existence of enemies and threats from without and within.

While there are no references in the parliamentary debates on the SLAT Bill to Islam,[279] there is little doubt that the subtext of the Government's terrorism bills was the threat from Islam and the conflation of that religion with Islamist extremism. In this regard, considerable concern had been expressed in evidence to the Senate Legislation Committee about the legislation's potential impact on Muslim and Arab communities both directly and indirectly through the fuelling

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[274] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1157, 1158 (Peter King, Liberal).
[275] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1158 (Peter King, Liberal).
[276] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2345 (Kate Lundy, ALP); Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2393, 2934 (Nick Bolkus, ALP).
[277] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2393, 2394, 2396.
[278] Gwynneth Singleton, 'Issues and Agendas: Howard in Control' in Chris Aulich and Roger Wettenhall (eds), *Howard's Second and Third Governments. Australian Commonwealth Administration 1998–2004* (UNSW Press, 2005) 3. The idea of a 'khaki' election is contested by John Warhurst, 'The Australian Federal Election of 10 November 2001' (2002) 37(1) *Australian Journal of Political Science* 153.
[279] The Government was careful in this regard. Speaking to his condolence motion on 17 September 2001, Prime Minister Howard noted that Australian Muslims were 'overwhelmingly as appalled about what happened [on 9/11] as I am' — see Commonwealth, *Parliamentary Debates*, House of Representatives, 17 September 2001, 30741.

of discrimination and vilification.[280] In addition, as Senator Bolkus pointed out, the Government's rhetoric on what was said to be a terrorism-related issue — Iraq — drew a distinction between the civilised world and others.[281]

At the same time, and as importantly, the package of counter-terrorism bills was promoted as protecting 'us'. The Government was careful to emphasise that 'our' rights — the rights of 'law-abiding Australians'[282] — would be shielded not diminished by the legislation. For both the Government and Labor, there was also a wider sense of 'us' — evidenced by the need to strengthen international peace and security,[283] safeguard 'democracy'[284] and thereby protect Australia from terrorist activity.[285]

Nevertheless, the language of the SLAT Bill as introduced did give rise to concerns that its impacts would not solely be felt by 'them'. The potential for unlawful protest or dissent to be caught as a 'terrorist act' is one example. The possible impact on 'us' — the constituencies of Labor and the minor parties — explains, in part, their criticisms of particular provisions. Labor, for example, said that changes to the original proscription provisions had been required because of the danger they would lead to politically partisan decisions. It cited the possibility that a militant union like the MUA could be declared.[286] Further, continued opposition to the amended proscription provisions by the minor parties, in particular, may suggest that their constituencies and their concept of 'us' included a wider range of dissenting voices and dissenting acts.

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[280] Senate Legal and Constitutional Legislation Committee, above n 29, 27–9. See also Andrew Lynch and Nicola McGarrity, 'Counter-Terrorism Laws. How Neutral Laws Create Fear and Anxiety in Australia's Muslim Communities' (2008) 33(4) *Alternative Law Journal* 225. Lynch and McGarrity argue that some facially neutral terrorist organisation offences — particularly the crime of financing a terrorist organisation — may impact disproportionately on Muslim communities given their religious obligation of charity.

[281] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2395 referring to Commonwealth, *Parliamentary Debates*, Senate, 19 June 2002, 2155 (Robert Hill, Minister for Defence, Liberal).

[282] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1140 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration, Liberal).

[283] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1139 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration, Liberal); Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1160 (Robert McClelland, Shadow Attorney-General, Labor).

[284] Commonwealth, *Parliamentary Debates*, 13 March 2002, 1142 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration, Liberal).

[285] Commonwealth, *Parliamentary Debates*, 13 March 2002, 1197 (Kim Beazley, ALP).

[286] Commonwealth, *Parliamentary Debates*, 26 June 2002, 2647 (John Faulkner, Opposition Senate Leader, ALP).

In addition, the issue of communal divisions may help explain Labor's unwillingness to press the Government about the Greens' concern that the definition of 'terrorist act' could encompass hunger-striking asylum seekers. Similarly marginal for most in Labor was the potential criminalisation of Australian citizens and residents who might support or finance liberation organisations such as the Kurdistan Workers' Party ('PKK'), the Free Papua Movement ('OPM') or the Tamil Tigers.[287] It did not support Greens amendments to omit the offences of financing or providing support to a terrorist organisation.[288] The Greens' amendments also go some way to explaining their idea of 'us'. Particular examples — their attempts to remove some terrorism and terrorist organisation offences and their efforts to omit the extraterritorial operation of the legislation[289] — evidence their concerns about asylum seeker protests and their focus on liberation movements and the Australians who supported them.

V CONCLUSION

On 27 June 2002, the SLAT Bill passed the Senate after 21 amendments had been made and one section was negatived. Of the other Bills in the counter-terrorism package, the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 was supported by the Australian Democrats but likely opposed by the Greens and One Nation.[290] The other Bills, including the SLAT Bill, were opposed by the Democrats, Greens, One Nation and Independent Senator Shayne Murphy.[291]

This part of Chapter Four has examined Parliament's response to the SLAT Bill in order to test Gross's hypothesis that acceptance of exceptional laws in times of

[287] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2641–2 (Bob Brown, Greens); Commonwealth, *Parliamentary Debates*, Senate, 25 June 2002, 2593 (Brian Greig, Democrats).
[288] Greens (15) and (18) [sheet 2512]. Commonwealth, *Journals of the Senate*, No 20, 26 June 2002, 482.
[289] In relation to extraterritoriality see Commonwealth, *Journals of the Senate*, No 19, 25 June 2002, 465.
[290] No division was called.
[291] Commonwealth, *Journals of the Senate*, No 21, 27 June 2002, 540. The Coalition parties, Labor and Independent Senator Brian Harradine voted in support.

crisis is driven by the assumptions of constitutionality and separation. My conclusions about the SLAT Bill are set out below.

A *Assumptions of Constitutionality and Separation*

1 *Constitutional Power and Constitutional Limitations*

In the case of the SLAT Bill, *Hansard* reveals little direct discussion of the adequacy of constitutional power. One reason for this was likely the anticipated referral of powers from the states — although it was likely this would not be effective for some time. Another was the refusal of the Government to engage with constitutional issues during the Legislation Committee's inquiry and in the Senate chamber. In addition, since 2001, Labor had supported the introduction of terrorism offences. Their disagreement with the Government was essentially on matters of detail.

What seems to have been more important for Parliament than heads of power issues were possible constraints on power arising from the implied freedom of political communication and Chapter III of the *Constitution*. As introduced, the SLAT Bill gave rise to legitimate concerns that the actions of protesters, picketing nurses, and protest organisers who lost control of demonstrators could be criminalised. Considerable unease was also expressed about the Attorney-General's power to proscribe given the limits of *ADJR Act* review. The Legislation Committee process, which fed into debate and amendments, recommended changes to the protest exemption and the Attorney-General's power to proscribe that were likely motivated by concerns about constitutional limitations upon power.

In Parliament, however, these concerns were not always clearly articulated. Like the heads of power question, Parliament's engagement with constitutional limitation questions was stymied by the Government. In addition, these questions overlapped with other more general concerns. In other words, it is not always clear when Parliament was engaging in constitutional critique or referencing other principles such as impacts on liberties in a democratic society. Proscription, in particular, had historical resonances for the Parliament and for

Labor. Labor's Senate Leader, John Faulkner, described it as 'a tool of political repression, not law enforcement … antidemocratic and inconsistent with Australian values'.[292] These concerns, together with constitutional anxieties wound back the Government's power to declare organisations — limiting executive proscription, via regulations, to organisations identified by the Security Council and allowing a terrorist organisation to be identified in criminal proceedings.

2 *The Rule of Law*

Hansard reveals Parliament's engagement with rule of law issues but also its limits. There were some improvements to clarity of statutory language — the definition of 'terrorist act' is a case in point. Absolute liability offences were removed, although it is difficult to imagine that the original offences were anything but an ambit claim by the Government. Following on from the Legislation Committee report, the fault elements of knowledge and recklessness were inserted into the SLAT Bill's offences. However, there was no consideration of whether, instead, the fault element of intention for the core elements of offences would have been more appropriate given the heavy penalties involved. Some legal burdens and some novel and troubling defences also remained raising fair trial issues. The reasons why this was so are explored below.

Criticisms from Labor and opposition from the Democrats and Greens had much to do with the legislation's potential to affect their sense of 'us' — that is, their political constituencies. This explains, in part, non-government criticisms of the Bill's original definition of 'terrorist act' and its potential to stifle dissent and activism,[293] and to catch certain types of union action such as picketing and protestors who committed minor offences such as trespass, nuisance, minor property damage.[294]

Amendments to the Attorney's proscription power were sufficient to persuade the Opposition that financing and support of terrorism offences were no longer

[292] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2337.
[293] Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2357 (Brian Greig, Democrats).
[294] Commonwealth, *Parliamentary Debates*, Senate 20 June 2002, 2335–6 (John Faulkner, Opposition Senate Leader, ALP).

problematic.[295] However, the possibility remained that, through a UN listing or criminal process, regional national liberation movements could be identified as 'terrorist organisations'. In the end, Labor claimed, inaccurately, that it had ensured that 'any possibility that legitimate protest or industrial action could be dealt with as terrorist offences has been removed'.[296] The Greens with arguably a more activist constituency were adamant in their opposition to these offences. As Bob Brown pointed out environmental activists might still be caught up by the legislation and hunger strikers in Australia's detention centres might be prosecuted on the basis that they intended to cause physical harm to themselves and intimidate or coerce the Government.[297]

3 *Temporality*

As Gross might have predicted, there was some interest in a sunset clause for the SLAT Bill. This was a driver for the Greens and Democrats who made two attempts to insert a termination clause into the SLAT Bill. They were not convinced that the Bill, in its original or amended form, was sufficiently protective of liberties, was necessary or was compliant with international obligations. The Democrats, in particular, considered that sunsetting would allay community fears and, combined with a review, ensure strict scrutiny of troubling legislation.

In contrast, the arguments of the major parties were three-fold. First, that it was impossible to predict an end to the 'War on Terror'. Second, that despite the existence of a multitude of potentially relevant offences at state and territory level, a legislative 'gap' existed that required filling. Third, was the 'imperative' of UNSC 1373, which is discussed below. Fourth, for Labor, was its assessment of the exceptionality of the amended Bill. To paraphrase Robert Ray the SLAT Bill, unlike the ASIO (Terrorism) Bill, was not such an excursion in the unknown. Fifth, the Government pointed to a modified form of sunsetting that applied to

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[295] Commonwealth, *Parliamentary Debates*, Senate, 27 June 2002, 4661–2 (Warren Snowdon, ALP). Mr Snowdon spoke about himself and friends who had raised money in Australia for and attempted to send medical supplies to the resistance in Timor L'Este.
[296] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 2002, House of Representatives, 4657 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).
[297] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2002, 2564.

proscription, the most contentious part of the Bill. It identified the two-year limit on a proscription regulation as an important safeguard.

An examination of *Hansard* also reveals more overtly 'political' drivers of sunset clauses. One reason for the Democrats' support of sunsetting was to ensure that any attempt to renew or extend the legislation would involve the Senate, the only chamber where they were represented and in which they might hold the balance of power. Similarly, it appears that Labor used the threat of support for sunsetting if its preferred amendments were rejected by the Government.

4 *National Security*

The most important drivers in the debates were, however, national and international security concerns. Evidence to the Legislation Committee was that legislation was needed to prevent terrorism and punish terrorists. The Government, as Gross would have anticipated, made claims for national security deference. The minor parties were not persuaded. Labor's position was different. It emphasised that, in matters of national security, trust was important. It stressed the tradition of bipartisanship. It said it deferred, as a good international citizen, to what it regarded as Australia's obligation to participate in the 'War on Terror'. Gross and Ní Aoláin maintain that UNSC 1373 dictated domestic responses to terrorism.[298] This view is borne out by Labor's position — it stressed the need to respect the decisions of a supranational executive — the Security Council. It is likely that the text of UNSC 1373 was critical in Labor's support of the SLAT Bill's terrorism offences. It was also used to bolster Labor's argument that terrorist organisation offences were required. The extent of deference to the Security Council was substantial. This extended to basing proscription decisions on the Security Council identifying terrorist organisations without, as the Greens pointed out, any understanding of how such processes operated or whether they were appropriate.

[298] Gross and Ní Aoláin, above n 8, 398.

5 *Communal Divisions*

The last of Gross's assumptions is that of communal division. Gross theorises that the more clearly laws distinguish between ourselves and others, the more likely they are to be accepted. The claim that the Government's strong laws targeted the 'other' appears in the title and text of the SLAT Bill. The Government also emphasised the need to protect 'innocent people' against the activities of terrorists. It further claimed that the rights of law-abiding Australians would be protected. And it painted a disturbing picture of the terrorist 'other' that, as Gross suggests, was used to bolster its arguments in support of the SLAT Bill.

However, when the Bill was introduced, its incomplete communal division was a substantial issue for the Opposition and minor parties. Particularly important was the operation of the original Bill on members of their own 'constituencies' — protesters, unionists and environmental activists. While Labor's concerns were largely removed as a result of amendments to the definition of 'terrorist act,' those of the minor parties remained. The amended definition did not quell the concerns of the Greens, for instance, about the Bill's impact on protesters and activists. Arguably, this contributed to their continued opposition to the Bill.

Gross also argues that the language of 'us' and 'them' facilitates expression of fear and provides targets for hostility in the face of perceived or actual crisis. This aspect of 'communal division' was important in shaping the Opposition's response to the SLAT Bill. Labor's Senator Nick Bolkus, for example, explained that there were limits on Labor's ability to press for amendments to the Bill because of the level of international and community anxiety.

B *Other Matters*

The response of Labor to the SLAT Bill was also affected by its role in Australia's two-party system of alternating periods in government. In part, Stanley Bach's study of the Australian Senate seeks to understand the role of the Opposition in

that chamber and in the legislative process.[299] Bach argues that an Opposition may choose not to oppose Government legislation or seek compromise because it is the 'Government-in-Waiting' or the once-and-future government.[300] In the case of the SLAT Bill, I prefer the latter term, which speaks to the Opposition's past experience as well as to its future expectations. The influence of these factors can be glimpsed in Labor's response to the Bill.

First, as explained by Robert Ray and suggested by Bach, bipartisanship is an insurance policy against the time when an Opposition returns to the government benches.[301] Second, for Labor, was contemplation of its own likely policy had it been in government. In the words of Labor's John Faulkner, the party had approached the package of legislation 'through the prism or perspective of what we might do as an alternative government … Clearly, there is a need for this parliament to deal with the issue of terrorism and to deal with it in relation to our domestic laws'.[302] This view was echoed by Kim Beazley. In June 2002, when the House of Representatives considered the Senate's amendments to the SLAT Bill, Mr Beazley noted that if the ALP had won the election 'something very similar to this legislation would have been before this House'. He commended John Faulkner's handling of the legislation in the Senate because Senator Faulkner had approached the legislation as he would have done as Home Affairs Minister in a Labor Government.[303] Mr Beazley noted as well that many provisions in the package of bills replicated the 10-Point Plan he had released as Opposition Leader shortly after 9/11.[304]

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[299] Stanley Bach, *Platypus and Parliament. The Australian Senate in Theory and Practice* (Department of the Senate, 2003). This role may also have explained Labor's trust in some of the Government's undertakings — for example, that it would not be seeking to prosecute protesting asylum seekers for terrorism offences.
[300] Ibid 201–2.
[301] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2450 (Robert Ray, ALP); ibid.
[302] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2452.
[303] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 2002, 4662.
[304] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 2002, 4662, 4663.

VI AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION LEGISLATION AMENDMENT (TERRORISM) BILL 2002

Section VI examines another important post-9/11 counter-terrorism initiative introduced by the Howard Government. This was the ASIO (Terrorism) Bill [No 1] that was introduced into the House of Representatives on 21 March 2002. Before considering whether and, if so, how Gross's assumptions account for the drivers of legislative process in relation to this Bill, I explore its credentials as an exceptional law. First, by examining parliamentarians' views and the legislative processes to which the Bill was subject. Second, by sketching the Bill's most important and extraordinary features.

A *Atmospherics and Process*

When he introduced the ASIO (Terrorism) Bill [No 1], Attorney-General Williams described it in a variety of ways. It was 'extraordinary' as well as balanced, 'transparent and subject to considerable safeguards'.[305]

The Opposition and the minor parties, however, were deeply concerned. Labor argued that the Bill failed to protect civil liberties; gave 'worrying new powers' to ASIO; went further than legislation in comparable nations; did not protect children; was unnecessary; and would not combat terrorism.[306] The Bill was also labelled 'draconian';[307] 'extraordinary';[308] as typical of a 'police state'[309] and, by Liberal Petro Georgiou, as 'unprecedented'.[310] It was criticised for giving ASIO

[305] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1932 (Daryl Williams, Attorney-General, Liberal).
[306] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6787 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).
[307] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7027 (Jill Hall, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, Senate, 17 October 2002, 5388 (Gavin Marshall, ALP).
[308] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7057 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).
[309] Commonwealth, *Parliamentary Debates*, Senate, 21 October 2002, 5466 (Bob Brown, Greens).
[310] Commonwealth, *Parliamentary Debates*, 19 September 2002, 6805 (Petro Georgiou, Liberal); 6810 (Kelly Hoare, ALP); Commonwealth, *Parliamentary Debates*, 17 October 2002, 5373 (Linda Kirk, ALP).

'virtually untrammelled power' in relation to 'ordinary Australians' as well as terrorists.[311]

Further evidence that the ASIO (Terrorism) Bill [No 1] was exceptional in character were the Government's tactics and the intensive scrutiny to which the Bill was subject by parliamentary committees and in the Senate. On the date of its introduction, the Government referred the Bill to the PJC for consideration and report.[312] The committee received over 150 submissions, obtained a private briefing from ASIO and held three public hearings.[313] The Committee described the Bill as 'one of the most controversial pieces of legislation considered by the Parliament in recent times'.[314] It concluded that the Bill 'in its original form, would undermine key legal rights and erode the civil liberties that make Australia a leading democracy'.[315] It made 15 substantial and unanimous recommendations for amendment. On 23 September, the Government introduced 57 House of Representatives amendments that responded in part to the PJC's report.[316]

Meanwhile, the Bill had been considered by the Senate's Scrutiny of Bills Committee [317] and also, very briefly, by its Legislation Committee. The Government's referral to the PJC effectively and deliberately gazumped the Senate's decision to refer the Bill to the Legislation Committee. Given the concurrent investigation being conducted by the PJC, the Legislation Committee confined itself to a brief report but reserved the right to reopen its inquiry into the Bill if the Government did not accept all the PJC's recommendations.[318]

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[311] Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5386 (Kerry Nettle, Greens).
[312] There were three Liberal, one National and three ALP members. Two of the ALP members, Mr Beazley and Senator Ray, had previously been Defence Ministers.
[313] Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) 11.
[314] Ibid vii.
[315] Ibid.
[316] The Government did not agree, for example, with the PJC's recommendation that the Bill not apply to children.
[317] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 4 of 2002* (2002). See also Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Twelfth Report of 2002* (2002).
[318] Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) 7.

With the amendments introduced by the Government, the Bill passed the House of Representatives on 24 September and was introduced into the Senate on 15 October. On 21 October, it was referred to the Senate Legal and Constitutional References Committee ('References Committee') for inquiry and report by 3 December.[319] The References Committee garnered 435 submissions, held six public hearings and made 27 largely unanimous recommendations for amendment.[320] It noted that despite the Government's House of Representatives amendments, the Bill remained 'highly controversial'.[321]

Detailed consideration of the Bill occurred in the Senate on 10–12 December, where the majority of amendments were proposed by the Opposition. Further demonstration of its extraordinary nature is seen in the Opposition's stance. When it was first debated in the House of Representatives, Labor indicated that even with the Government's amendments the Bill was 'unacceptable' and would not pass 'in anything remotely like its current or amended form'.[322] Further, in December on two occasions the House of Representatives agreed to some but rejected most Senate amendments. The Senate, however, refused to compromise. On 13 December 2002, the Bill was laid aside. It thus had the potential to become a double dissolution trigger — something that Oppositions were generally loath to precipitate.

In short, the Bill had a number of markers of exceptionality: the characterisations of politicians, the number of parliamentary committee inquiries, the hundreds of public submissions they attracted and evidence they collected, the substantial recommendations for amendment they produced and the refusal of the Senate to pass the Bill without major amendments.

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[319] Unlike Legislation Committees, References Committees had a non-government chair. The Senate Legal and Constitutional References Committee was chaired by a Labor Senator. Additionally, there were two Labor members, one Liberal, one Country-Liberal, and one Democrat member.

[320] Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002) 3.

[321] Ibid xix.

[322] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2002, 7116, 7117 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).

B *ASIO (Terrorism) Bill [No 1] — A Summary*

This section summarises the most important and contentious of the Bill's provisions at the date of its introduction. It enabled children and adults to be questioned, detained and strip-searched under an ASIO warrant.[323] Warrants could be for questioning only ('questioning warrant')[324] or authorise a person's immediate detention for questioning by a prescribed authority at an unspecified time ('detention warrant').[325]

The warrant process would be initiated by the ASIO's Director-General of Security seeking the Attorney-General's approval for an application to be made to a 'prescribed authority'. The application would include a draft warrant, the basis for the Director-General's request and a statement about any previous requests relating to the warrant's subject.

The Attorney-General could consent to the making of a warrant application if satisfied that issuing the warrant would 'substantially assist the collection of intelligence that is important in relation to a terrorism offence' and that 'relying on other methods of intelligence would be ineffective'.[326] A request for a detention warrant could be made if, additionally, the Attorney had reasonable grounds to believe that if the person was not detained he or she might alert a person involved in a terrorism offence, might not appear for questioning or might destroy or damage something they might be required to produce under the warrant.[327] The Bill thus applied both to suspects and to persons not suspected of any involvement in terrorism.

Prescribed authorities — federal magistrates and Administrative Appeals Tribunal ('AAT') Deputy Presidents and members — had the functions of issuing warrants and being present at questioning. In an attempt to shore up the Bill's constitutional foundations, federal magistrates would be appointed as prescribed authorities consensually and also in their personal capacities if they

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[323] Children under 10 years could not be strip-searched but were otherwise subject to the regime. Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth) sch 1 item 24 proposed s 34M(1)(e).
[324] A questioning warrant could require the person to appear before a 'prescribed authority' either immediately or at a specified time. Ibid sch 1 item 24 proposed s 34D(2)(a).
[325] Ibid sch 1 item 24 proposed s 34D(2)(b)(i).
[326] Ibid sch 1 item 24 proposed s 34C(3)(a), (b).
[327] Ibid sch 1 item 24 proposed s 34C(3)(c).

exercised a power or function that was neither judicial nor incidental to judicial powers or functions.[328]

A prescribed authority could issue a warrant if satisfied that formal requirements were met and that there were reasonable grounds for believing the warrant would substantially assist the collection of intelligence important to a 'terrorism offence'.[329] These offences ranged from mass casualty bombings to preparatory activity and status offences. If a person had been detained continuously for more than 48 hours and a new warrant would result in that person's detention for more than 96 hours, then an AAT Deputy President (a judge or lawyer) was required to issue the warrant.[330]

A person subject to a detention warrant could be held continuously for up to 48 hours. However, for three reasons, detention could be both continuous and indefinite[331] so long as the warrant application and issuing process were observed. First, although time started to run when the person appeared before the prescribed authority, there was no requirement to bring them before the prescribed authority immediately or within a nominated time. Second, a person could be subject to multiple warrants, including warrants issued while the person was still in custody. Third, there was no limit on the total amount of time that a person could be detained under multiple warrants.

While a warrant could permit a detained person to contact others, including a lawyer, the Bill envisaged incommunicado detention[332] — apart from contact with the Inspector-General of Intelligence and Security ('IGIS'), the Ombudsman and, if required, an interpreter.[333]

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[328] Ibid sch 1 item 24 proposed s 34B(2) & (5).
[329] Ibid sch 1 item 8 proposed s 4 (definition of 'terrorism offence'); sch 1 item 24 proposed s 34D(1). These included proposed offences under the SLAT Bill and the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002.
[330] Ibid sch 1 item 24 proposed s 34C(5). Presidential members of the AAT who were judges had tenure until the age of 70 years. Other deputy presidents could be appointed to the age of 70 years. Otherwise they could be appointed for up to seven years. Appointments could be renewed. *Administrative Appeals Tribunal Act 1975* (Cth) (as at 29 October 2001) s 8.
[331] Subject to the expiry of each warrant — up to 28 days. ASIO (Terrorism) Bill [No 1] sch 1 item 24 proposed s 34D(6)(b).
[332] Ibid sch 1 item 24 proposed ss 34D(2)(b)(ii), (4); 34F(8).
[333] Ibid sch 1 item 24 proposed s 34F(9). The *IGIS Act* empowers the IGIS to investigate complaints against security and intelligence agencies. Until 2006, the *Complaints (Australian*

The role of the prescribed authority during questioning was limited. When a person first appeared for questioning and only then, the prescribed authority was required to explain: the detention period (if any); what the warrant authorised ASIO to do; obligations to answer questions and produce documents; the consequences of non-compliance; the limited privilege against self-incrimination that applied; and the person's right to complain to the IGIS and Ombudsman.[334]

There were also important matters that the prescribed authority was not required to mention: the fact that facilities to contact the IGIS and Ombudsman had to be provided; that an interpreter could be made available; and that those exercising authority under the warrant were forbidden to treat the subject of a warrant cruelly or inhumanely. Further, the prescribed authority's powers were extremely confined. For example, any directions given by the prescribed authority to detain or release an individual or to allow them contact with a specified person were required to be consistent with the warrant or approved by the Attorney-General.[335]

Warrants could empower ASIO to require a person appearing before a prescribed authority to provide information, records or things that 'may be relevant to intelligence that is important in relation to a terrorism offence'.[336] Failure to do so was a crime.[337] If prosecuted, the accused bore an evidential burden to establish that they did not have the information, record or thing. Self-incrimination was not an excuse. Despite the compulsion to cooperate, information obtained directly and indirectly from questioning could be used to prosecute the person for a 'terrorism offence'. In the case of other criminal offences, a use immunity applied.[338]

There were no detailed rules for the treatment of warrant subjects or sanctions for mistreatment. However, the Bill did mandate that persons exercising

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Federal Police) Act 1981 (Cth) enabled the Ombudsman to investigate complaints against the Australian Federal Police.

[334] Ibid sch 1 item 24 proposed s 34E.

[335] Ibid sch 1 item 24 proposed s 34F(1), (2).

[336] Ibid sch 1 item 24 proposed ss 34D(5), 34G.

[337] Ibid sch 1 item 24 proposed s 34G. These offences were subject to a penalty of five years imprisonment.

[338] Ibid sch 1 item 24 proposed s 34G(9).

authority under a warrant must treat the warrant subject with humanity and respect for human dignity and not subject them to 'cruel, inhuman and degrading treatment'. And despite the exceptional powers proposed for ASIO, there was no provision for review of the legislation or a sunset clause. The Attorney-General stated that the legislation would be assessed by the PJC 12 months after commencement[339] but this was not a statutory requirement.

To summarise, the Bill empowered a secretive intelligence organisation to coercively question non-suspect and suspect adults and children and also detain them indefinitely and incommunicado. A person could be refused permission to contact a lawyer, family, friends or their employer. Failure to answer questions or produce records or things was subject to severe penalties and the privilege against self-incrimination was abrogated without any provision for immunity in relation to terrorism offences — enabling ASIO warrants to be used to engage in fishing expeditions for criminal prosecutions.

Speakers in parliamentary debates referred to the 'disappearing' of those subject to Division 3 warrants.[340] Such people stood virtually outside the law and were invisible to it.

C *The Assumption of Constitutionality*

1 *Aspects of the Constitutional Landscape*

In this section, I first consider some of the constitutional issues that consumed the attention of parliamentary committees and parliamentary debate. I do not include the heads of power question or the possible impact of the freedom of political communication on the Bill's detention provisions or disclosure

[339] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1931 (Daryl Williams, Attorney-General, Liberal).
[340] For example, Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6817 (Tanya Plibersek, ALP); Commonwealth, *Parliamentary Debates*, 23 September 2002, 7032 (Peter Andren, Independent); Commonwealth, *Parliamentary Debates*, 11 December 2002, 7689 (Brian Greig, Democrats).

offences.[341] Instead, I note that these matters were not a focus of parliamentary debate.

One of the most confused and contested issues relating to the ASIO (Terrorism) Bill [No 1] was whether it breached Chapter III of the *Constitution*. These questions were important in framing and reframing legislative amendments. They coincided with a time when Chapter III was jurisprudentially 'at constitutional centre stage'[342] and when, for that reason, governments and legislators may have had good reason to proceed cautiously.

A number of Chapter III principles were relevant to the Bill. The 'primary separation rule' stipulates that the judicial power of the Commonwealth may only be exercised by Chapter III courts.[343] The rule in *Boilermakers* holds that Chapter III courts can only exercise federal judicial power and non-judicial power incidental to judicial power.[344] As a result, questions arose about the Bill's authorisation of detention by administrative order (by an AAT member) rather than curial process. In addition, the Bill placed federal magistrates in constitutionally suspect roles — issuing warrants and attending at questioning. In the following sections I look at Chapter III case law that potentially impacted on Parliament's consideration of the ASIO (Terrorism) Bills. I do not consider cases handed down after 2002.

(a) Administrative Detention

In 1992, a High Court case about the aliens power — *Chu Kheng Lim v Minister for Immigration* ('*Lim*') — reflected on the nature of involuntary detention and

[341] See, particularly, for a discussion of the heads of power question, Greg Carne, 'Detaining Questions or Compromising Constitutionality? The *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth)' (2004) 27(2) *UNSW Law Journal* 524. The PJC recorded its concern that detention related to 'terrorism offences' could mean that people involved in 'largely conventional but unlawful political protest' might be subject to ASIO detention. This issue may have disappeared from view when the definition of 'terrorist act' in the SLAT Bill was amended. Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 313, 7.
[342] Fiona Wheeler, 'The Rise and Rise of Judicial Power under Chapter III of the Constitution: A Decade in Overview' (2001) 20(3) *Australian Bar Review* 282, 282.
[343] *New South Wales v Commonwealth* (1915) 20 CLR 54 and *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.
[344] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

the institutions and processes permissibly involved in its imposition.[345] In a joint judgment, with which Mason CJ agreed, Brennan, Deane and Dawson JJ had remarked:

> The involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[346]

They had further noted that Parliament's legislative power did not extend to investing the Executive with an arbitrary power to detain citizens 'notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt'.[347]

The application of these principles was, however, far from certain.[348] The joint judgment acknowledged the existence of exceptions to the rule — such as involuntary detention in cases of mental illness, infectious disease or where criminal suspects are remanded in custody pending trial. Further, other judges in *Lim* expressed different views to those of the joint majority. Gaudron J, for instance, approached the task by applying an 'appropriate and adapted' test to the relevant head of power rather than regarding the question as a Chapter III issue.[349] And, for his part, McHugh J suggested that the question was whether a law authorising detention, the purpose of which was non-punitive, 'goes beyond what is reasonably necessary to achieve the non-punitive object'.[350]

In 1996, *Kable v Director of Public Prosecutions (NSW)* ('*Kable*'), which will be described in more detail later in this chapter, was decided. As Greg Carne pointed out in his submission to the References Committee, this case invalidated

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[345] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 involved a challenge to the detention, under the *Migration Amendment Act 1992* (Cth), of Cambodian boat people who arrived in Australia between 1989 and 1990.
[346] Ibid 27.
[347] Ibid.
[348] See, for example, the discussions by James Stellios, *The Federal Judicature: Chapter III of the Constitution. Commentary and Cases* (LexisNexis Butterworths, 2010); Stephen McDonald, 'Involuntary Detention and the Separation of Judicial Power' (2007) 35(1) *Federal Law Review* 25; Jeffrey Steven Gordon, 'Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-Criminal Detention' (2012) 36(1) *Melbourne University Law Review* 41.
[349] *Lim* (1992) 176 CLR 1, 57.
[350] Ibid 71.

a legislative regime for preventive detention.[351] For Toohey J, this was because it involved preventive detention without adequate safeguards 'consequent upon or ancillary to the adjudication of guilt'.[352] *Kable* posed questions for the ASIO (Terrorism) Bill [No 1]. For example, one of the grounds on which the Bill enabled detention of non-suspects was that they might alert someone involved in a terrorism offence that the offence was being investigated. In other words, a court might regard detention as preventive with few protections for a warrant subject.[353]

The issue of involuntary detention was further considered in *Kruger v Commonwealth*.[354] This case involved the *Aboriginals Ordinance*, which gave the Northern Territory's Chief Protector of Aborigines the care, custody and control of Indigenous Australians.[355] In this matter, only Toohey, Gaudron and Gummow JJ addressed the Chapter III question in broad terms.[356] In separate judgments, Toohey J and Gummow J agreed with the principle enunciated by the joint majority in *Lim* but focused on the purpose of the impugned power. They concluded that, because the power in question had a welfare or protective purpose, Chapter III's operation was not engaged.[357] Furthermore, for Gummow J the categories of exception to involuntary detention, such as mental illness, were not closed.[358] Gaudron, on the other hand, pursued the line of thinking she had expressed in *Lim* and determined that 'subject to certain exceptions, a law authorising detention in custody, divorced from any breach of the law, is not a law on a topic with respect to which s 51 confers legislative power'.[359] However,

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[351] Greg Carne, 'Submission No 24 to Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth)*, 4 November 2002, 9.
[352] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 98.
[353] Carne, above n 351, 9.
[354] *Kruger* (1997) 190 CLR 1.
[355] The plaintiffs were Aboriginal people from the Northern Territory who, as children, had been removed from their families and communities by the Chief Protector and detained in institutions and reserves.
[356] Stellios, above n 348, 224. *Kruger* (1997) 190 CLR 1, 44 (Brennan CJ), 62 (Dawson J), 144 (McHugh J agreeing with Dawson J) concluded that Chapter III was not engaged by legislation based on s 122 of the *Constitution* (the territories power).
[357] *Kruger* (1997) 190 CLR 1, 85 (Toohey J), 162 (Gummow J).
[358] Ibid 162 (Gummow J).
[359] Ibid 111 (Gaudron J).

and with potential relevance to the ASIO (Terrorism) Bill [No 1], she repeated suggestions made in *Lim*[360] that '[t]he defence power may be an exception'.[361]

(b) The Use of Judicial Officers to Issue Warrants and Attend Interrogations

Further constitutional questions arose from the Government's original proposal that federal magistrates should be involved in the undifferentiated tasks of issuing warrants and being present during questioning in a role that was unclearly defined and potentially powerless.

From the 1970s, federal judicial officers had been increasingly appointed by the Commonwealth to perform non-judicial functions.[362] These appointments were upheld in case law of the 1970s and 1980s under the *persona designata* exception to the rule in *Boilermakers*.[363] In 1985, for example, in *Hilton v Wells*, a High Court majority affirmed a regime with a few similarities to that proposed in the ASIO (Terrorism) Bill [No 1]. In that case, the appointment of all Federal Court judges as issuers of law enforcement telecommunications interception warrants under the *Telecommunications (Interception) Act 1979* (Cth) ('*TI Act*') was affirmed.[364] A High Court majority concluded that the judges had been appointed *personae designatae* rather than as members of a court. At the same time, both the majority and minority acknowledged that functions prejudicial to judicial independence or that conflicted with the 'proper performance of judicial functions' would not be saved by this exception.[365]

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[360] *Lim* (1992) 176 CLR 1, 57.
[361] *Kruger* (1997) 190 CLR 1, 111. For a detailed discussion of this and other constitutional questions see Senate Legal and Constitutional References Committee, above n 320.
[362] A J Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21(1) *Federal Law Review* 48.
[363] In *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, Bowen CJ and Deane J jointly held that the *Constitution* did not prohibit the appointment of a federal judge in his or her personal capacity to perform an administrative function (583–4). Smithers J concurred (592).
[364] In broad terms, there are two categories of interception warrant under the *Telecommunications (Interception) Act 1979* (Cth) (now the *Telecommunications (Interception and Access) Act 1979* (Cth)). National security interception warrants are issued by the Attorney-General on the application of ASIO. Law enforcement interception warrants enable certain judges and, from 1997, legally qualified AAT members to issue warrants to law enforcement agencies such as the Australian Federal Police.
[365] *Hilton v Wells* (1985) 157 CLR 57, 72–4 (Gibbs CJ, Wilson and Dawson JJ), 83 (Mason and Deane JJ).

In 1995, the Chapter III implications of federal judges issuing telecommunications interception warrants made a reappearance in the High Court. By this time, amendments had been made to the *TI Act* taking into account earlier minority positions.[366] In *Grollo v Palmer*,[367] the Court built on views expressed in *Hilton v Wells.*[368] The joint majority also identified an 'incompatibility condition' and held that it could be activated for 'practical incompatibility', 'judicial integrity incompatibility' or 'public confidence incompatibility'.[369] And they endorsed the minority view in *Hilton v Wells* that non-judicial functions that were not incidental to the exercise of judicial power could only be conferred on federal judges consensually.[370]

Despite upholding the scheme, the joint majority in *Grollo* characterised it as 'troubling'.[371] They described the decision to issue an interception warrant as, effectively, 'an unreviewable in camera exercise of executive power to authorise a future clandestine gathering of information'.[372] They and Gummow J, who wrote a separate concurring judgment, were also mindful of the decision in *Mistretta v United States*, where the US Supreme Court had said:

> The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.[373]

Nevertheless, other factors were decisive for the Court. For the joint majority, the very essence of interception warrants — their 'intrusive and clandestine nature' — and their importance in the 'continuing battle against serious crime' mandated judicial involvement in the warrant issuing process. Important in this

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[366] The *TI Act* was amended to refer to 'eligible Judges'. These were judges who consented to their appointments as issuers of warrants and whose separation from the courts of which they were members was evidenced by conferring on them the same immunities as High Court judges (s 6D).
[367] *Grollo v Palmer* (1995) 184 CLR 348.
[368] *Hilton v Wells* (1985) 157 CLR 57, 72–4 (Gibbs CJ, Wilson and Dawson JJ); 83 (Mason and Deane JJ).
[369] *Grollo* (1995) 184 CLR 348, 364–5 (Brennan CJ, Deane, Dawson and Toohey JJ). The three short-hand descriptors are borrowed from Kristen Walker, 'Persona Designata, Incompatibility and the Separation of Powers' (1997) 8(3) *Public Law Review* 153.
[370] *Grollo* (1995) 184 CLR 348, 364–5 (Brennan CJ, Deane, Dawson and Toohey JJ).
[371] Ibid 366 (Brennan CJ, Deane, Dawson and Toohey JJ).
[372] Ibid 367 (Brennan CJ, Deane, Dawson and Toohey JJ).
[373] Ibid 366 (Brennan CJ, Deane, Dawson and Toohey JJ); 392 (Gummow J) — citing *Mistretta v United States* (1989) 488 US 361, 407.

regard were judges' attributes of impartiality, their ability to assess evidence, and their sensitivity to the protection of privacy and property. Their independent role in issuing warrants would, it was said, preserve rather than undermine 'public confidence in the judiciary as an institution'.[374]

Noteworthy, however, was the position of Gummow J and the strong and detailed dissent by Justice McHugh. Gummow J agreed with the joint majority's conclusion but only because he formed a different view to McHugh J concerning an 'eligible Judge's ability to disclose his or her involvement in warrant issuing in a related proceeding'. [375] Without this ability, said Justice Gummow, an eligible judge would have been unable properly to discharge his or her judicial functions.[376]

Like his colleagues, McHugh J applied a compatibility test to the warrant issuing power but concluded that its nature and its manner of exercise rendered it incompatible with the exercise of federal judicial power.[377] For Justice McHugh, the judiciary's involvement in the exercise of secret, *ex parte*, invasive executive processes for the purposes of criminal investigation stood in sharp contrast to the *Constitution's* requirement that holders of Commonwealth judicial office be independent of the other arms of government. It required them to exercise their discretion on very general grounds relating to the offences under investigation. In doing so, McHugh J argued, the *TI Act* placed judges in the shoes of the constabulary. It exposed them to criticism that they had preferred the interests of the police to those of ordinary citizens 'whose liberty and interests the separation of powers is designed to protect'.[378] And it offended the principle of 'open justice' — an essential element in the exercise of federal judicial power.[379]

In addition to his general concerns, McHugh drew attention to what he saw as the irremediable difficulties — practical, institutional and legal — that might attend the granting of a warrant should the issuing judge subsequently sit in

[374] Ibid 367 (Brennan CJ, Deane, Dawson and Toohey JJ).
[375] Ibid 398 (Gummow J).
[376] Ibid 395, 398 (Gummow J). His Honour stated that, save for his view that an 'eligible Judge' would be protected from criminal and civil liability when disclosing an involvement in issuing a warrant in a related case, he would have dissented.
[377] Ibid 378–9 (McHugh J).
[378] Ibid 378–9 (McHugh J).
[379] Ibid 379 (McHugh J).

related proceedings involving the subject of a warrant.[380] In this regard, he pointed to the increase in the number of warrants issued, the tiny number refused or withdrawn and the fact that 85% of Federal Court judges had consented to issuing them.[381] For McHugh J, these factors indicated, worryingly, that issuing interception warrants had become 'a routine part' of judges' work, inexorably involving them ever more closely into criminal investigation processes. [382]

The question for McHugh J crystallised not around federal judges' suitability for the task but around compatibility with the exercise of their judicial functions. And where the joint majority drew comparisons between the granting of interception warrants and other *persona designata* roles, such as issuing search warrants, Justice McHugh distinguished them — characterising the latter as more an open and accountable process that did not similarly enmesh the issuing judicial officer in investigative matters.[383]

Further questions about the use of judges arose when the High Court was asked to determine whether the appointment of Federal Court judge Jane Mathews in a non-judicial role failed for want of constitutional compatibility. Justice Mathews had been appointed to prepare a heritage protection report for the Minister under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('*Heritage Protection Act*'). The resulting case, *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,[384] is important for a number of reasons. It invalidated (6:1) a new non-judicial role for a Chapter III judge.[385] Additionally the joint majority noted, elliptically, that past practice had not invariably conformed with compatibility requirements — leaving open the

[380] Ibid 380–2 (McHugh J). The warrant in *Grollo*, issued against AD Flanagan as part of an Australian Federal Police investigation into property developer Bruno Grollo, was a case in point.
[381] Ibid 382, 384 (McHugh J).
[382] Ibid 380, 382 (McHugh J).
[383] Ibid 383 (McHugh J).
[384] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 ('*Wilson*').
[385] Ibid 20 (Brennan CJ, Dawson, Toohey, McHugh, Gummow JJ). Gaudron J issued a separate concurring judgment in which she held that the *Heritage Protection Act* apparently placed a reporter in the role of 'servant or agent of the Minister' (ibid 26). Kirby J dissented. His Honour focused on the similarities between the reporter's role and historical appointments of judges to report to the Executive Government, the public aspects of the reporting process, requirements for procedural fairness, and the suitability of judges for such roles given their 'independence and disinterestedness … neutrality and detachment … efficiency and skill' (ibid 48).

possibility that existing, as well as new, roles might be open to successful challenge.[386]

In deciding the question of constitutional compatibility, the joint majority held that a disputed role should be analysed functionally. If closely connected with or not performed independently of the executive or legislature, then incurable constitutional incompatibility will exist. However, independence alone is not determinative. It is fatal if an office holder, though independent, exercises their function on political grounds. A requirement to act without bias and according to the rules of procedural fairness may save a function from incompatibility but will not necessarily do so.[387] Further, the desirability of appointing a person with judicial skills was not decisive.[388] Separation of both institutions and personnel was necessary, said the joint majority, to protect judicial independence which, in turn, safeguarded liberty and promoted public confidence in the administration of justice.[389]

Given that the *ASIO (Terrorism) Act*, as eventually passed in 2003, enabled state judges to be appointed as 'prescribed authorities', it is useful to refer briefly to one more case. This is the decision in *Kable v Director of Public Prosecutions (NSW)*.[390] Here, a critical issue was whether Chapter III had implications for state courts. As Appleby and Williams point out, there is no 'clear or unified' approach in *Kable* in the four separate majority judgments.[391] However, their Honours did hold that the *Constitution* and, in particular, Chapter III creates an integrated judicial system for the exercise of Commonwealth judicial power.[392] In the words of McHugh J, this gives state courts 'a status and role that extends beyond their

[386] Ibid 20 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
[387] Ibid 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
[388] Ibid 9 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
[389] Ibid 11–12 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
[390] *Kable* (1996) 189 CLR 51. At issue was the *Community Protection Act 1994* (NSW), which enabled a nominated person — Gregory Wayne Kable — to be preventatively detained.
[391] Gabrielle Appleby and John Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40(1) *Federal Law Review* 1, 6.
[392] This is because s 77(iii) of the *Constitution* enables the Commonwealth Parliament to invest state courts with federal jurisdiction and s 73 empowers the High Court to hear appeals from courts exercising federal jurisdiction and state courts. For statements about the integrated judicial system see *Kable* (1996) 189 CLR 51, 102–3 (Gaudron J), 114–16 (McHugh J), 137–9 (Gummow J). Toohey J said that state courts invested with federal jurisdiction and federal courts exercised a 'common jurisdiction' (94).

status and role as part of the state judicial systems'.[393] In *Kable* the majority struck down the *Community Protection Act* determining that state courts could not be vested with non-judicial powers that enabled them to act in a manner incompatible with the integrity, independence and impartiality that Chapter III requires of courts invested with or exercising federal jurisdiction.

Kable is a decision about courts not *persona designata* appointments. Nevertheless, it is of interest because two judges referred in passing to appointments of state judges in their personal capacities. Gaudron J confined Chapter III's implications to 'powers and functions imposed on a state court, rather than its judges in their capacity as individuals'.[394] McHugh J suggested that nothing in Chapter III prevents a state law conferring executive functions on a state judge *persona designata* unless the appointment makes it appear that a state court is not independent of the executive government — thus falling foul of public confidence incompatibility.[395] Important in Justice McHugh's conclusion was the extensive historical use made by the NSW Government of state judges in executive capacities.[396] He thought that few such appointments would be invalid. Nonetheless, he noted:

> A necessary implication of the Constitution's plan of an Australian judicial system with State courts invested with federal jurisdiction [is] that *no government* can act in a way that might undermine public confidence in the impartial administration of the judicial functions of State courts.[397]

(c) Conclusion

In 2002, the constitutionality of a law providing for involuntary detention by executive order was in a state of some uncertainty. It was not further addressed

[393] Ibid 114 (McHugh J).
[394] Ibid 104 (Gaudron J).
[395] Ibid 117–18 (McHugh J).
[396] Justice McHugh cited the appointments of state judges as Lieutenant-Governors and Acting Governors in NSW. The example he gave of an appointment that, in his view, would clearly be invalid was appointment to state cabinet. Ibid 118.
[397] Ibid (McHugh J). Emphasis added.

by the High Court until 2004 and then not conclusively.[398] As a result, the existence, extent and nature of any constitutional immunity from administrative detention was unresolved. All the judges who had addressed the issue in *Lim* and in *Kruger*, had recognised that exceptions existed to the general rule expounded in that case. But were the exceptions closed and, if not, how would they be defined? What were the indicators of punitiveness? How should a law be assessed that had both punitive and non-punitive purposes? Did the advent of the 'War on Terror' mean that involuntary detention on national security grounds was likely to withstand constitutional challenge — either as an exception to the rule in *Lim* or on the basis of a defence power exception?[399] Might Gaudron's analysis hold sway enabling Chapter III issues to be avoided — assuming that a relevant head of power, such as the defence power, supported the legislation?[400]

Further, the federal Government was attempting to introduce laws that made novel use of federal judicial officers in the context of an ambiguous constitutional landscape. In this respect, the following should be noted. First, as High Court judges themselves acknowledged, decisions about incompatibility were difficult ones.[401] Although from *Hilton v Wells* onwards, High Court judges had applied incompatibility criteria they had differed as to the result. Second, the jurisprudence of constitutional incompatibility was still evolving. Third, as Kristen Walker suggests, High Court decisions are inconsistent. Comparing *Grollo* to *Wilson*, for instance, she argues that judicial qualities such as impartiality, ability to assess evidence and sensitivity to privacy issues as well as the adoption of appropriate practice helped ensure validity in the former but not the latter. In *Grollo* judicial qualities were, in fact, required given the 'troubling', secret, *ex parte* process involved in issuing interception warrants. Issuing interception

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[398] Stellios, above n 348, 232. In 2004, there were a number of challenges to the immigration detention provisions of the *Migration Act 1958* (Cth). Additionally, there was a challenge to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), which enabled the Queensland Supreme Court to order the continued detention of a person who had been convicted of, and was currently under sentence for, a serious sexual offence. None succeeded.

[399] See the discussion in Carne, above n 351.

[400] Commentators have largely criticised Gaudron's approach. See, for example, Gordon, above n 348; McDonald, above n 348.

[401] See, for example, *Wilson* (1996) 189 CLR 1, 13 (Brennan CJ, Dawson, Toohey, McHugh, Gaudron JJ).

warrants was regarded as akin to issuing search warrants in *Grollo* but the appointment of the reporter in *Wilson* was not saved despite the fair process adopted by the reporter and the historic use of judges to conduct royal commissions and other executive inquiries.[402] Fourth, was the decision in *Kable*. This became relevant when the Senate debated Opposition amendments enabling serving state judges to be appointed as 'prescribed authorities' — raising yet another unresolved constitutional question. Writing in 2000, Fiona Wheeler had observed that, after the decision in *Kable*:

> … the Commonwealth will not necessarily be able to look at state judges, even with the agreement of the state and judge concerned, to fill a quasi-legislative or executive post which *Grollo v Palmer* and *Wilson's Case* would deny a federal judge.[403]

Set in this context were the particular features of the ASIO (Terrorism) Bill [No 1]. First, was the warrant issuing process. Like the scheme in *Grollo*, it involved a Chapter III officer in a secret, *ex parte* and intrusive process on behalf of the executive government. However, the issuing of warrants and their consequences for warrant subjects arguably had few similarities with the issuing of search or telecommunications interception warrants. These were law enforcement warrants. Novelly, the ASIO (Terrorism) Bill [No 1] sought to involve judges in issuing national security warrants.[404] In addition, those warrants could subject non-suspect adults and children to strip searching, coercive questioning and unlimited incommunicado detention. Second, was the function of attending at questioning. In this role magistrates were, arguably, used to provide the appearance of fair process. They had few statutory functions in proceedings other than information-giving. Third, was the potential for a judicial

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[402] Walker, above n 369.

[403] Fiona Wheeler, 'Federal Judges as Holders of Non-Judicial Office' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 442, 468. See also Gerard Carney, 'Wilson and Kable: The Doctrine of Incompatibility — An Alternative to the Separation of Powers' (1997) 13 *Queensland University of Technology Law Journal* 175.

[404] In *Grollo* (1995) 184 CLR 348, 380, footnote 110 McHugh J refers to Garfield Barwick's statement that, in framing the *TI Act*'s forerunner — the *Telephonic Communications (Interception) Act 1960* (Cth) — he decided federal judges should not be empowered to issue ASIO interception warrants for two reasons. First, because it was an executive function. Second, because 'security and judicial work do not comfortably mix'. Justice McHugh quoted from Garfield Barwick, *A Radical Tory. Reflections and Recollections* (Federation Press, 1995) 137.

officer to issue a warrant and supervise questioning in the same matter. Could the adoption of appropriate practices by judicial officers ensure independence and prevent concerns about bias? Fourth, was the role of the prescribed authority in issuing warrants. Like the issuing process commented on by McHugh J in *Grollo*, this involved discretionary decisions about whether the issuing of a warrant would 'substantially assist' the collection of intelligence 'important' in relation to a terrorism offence — arguably placing a magistrate in the shoes of an intelligence agent. Fifth, the Bill potentially enmeshed magistrates — already empowered to issue interception warrants[405] — with yet more executive functions. Both the warrant issuing process and the prescribed authority function may have failed the tests of integrity and public confidence incompatibility.

However, it was also arguable that it was desirable to have experienced, impartial, tenured and independent judicial officers rather than, say, untenured AAT appointees, assessing executive government applications for warrants and being present at questioning — involvement that had been seen in *Grollo* as imperative given the nature of the powers involved.

Finally, while not a constitutional question, there was also the issue of workability. While federal magistrates had been empowered to issue interception warrants, the overwhelming number of warrants were issued by AAT members.[406] Would federal magistrates be inclined to play any greater part in the regime for ASIO warrants?

2 *Legal Norms*

In this section I consider three legal norms breached by the ASIO (Terrorism) Bill [No 1]. The first is the privilege against self-incrimination, which the Bill abrogated and, as a result, potentially exposed a person to a 'cruel trilemma'.[407]

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[405] *TI Act* ss 6D, 39, 45, 45A, 46, 46A.
[406] Attorney-General's Department (Cth), *Telecommunications (Interception) Act 1979. Report for the Year Ending 30 June 2002* (2003) 39–40. Nominated AAT members were appointed under the *TI Act* s 6DA.
[407] Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 206 quoting *Murphy v Waterfront Commission* 378 US 52 (1964) 55. The trilemma consists of 'self-accusation, perjury or contempt'.

The second is the right to legal representation, which was rendered ineffective. The third is the principle that special protections are owed to children because of their inexperience and vulnerability.

(a) The Privilege against Self-Incrimination

The privilege against self-incrimination is important for a number of reasons. It protects the individual against the might of the State. It is associated with the requirement, in an 'accusatorial system of criminal justice', that the prosecution must prove a defendant's guilt beyond reasonable doubt.[408] It is said to safeguard against the giving of unreliable evidence, to respect rights to dignity and privacy, and to avoid the unfairness of placing a person in a 'cruel trilemma'. It is also an aspect of fair trial safeguards contained in the ICCPR.[409]

In *Hammond v Commonwealth*, the privilege was regarded by Gibbs CJ as 'so important' that a clear expression of parliament's intent to override it was required.[410] In relation to criminal proceedings, his Honour regarded the privilege as a bulwark against interference in the administration of justice and prejudice to the accused. In the context of the investigation of Commonwealth criminal offences, the privilege is reflected in s 23S of the *Crimes Act,* which protects a person's right to refuse to answer questions or participate in an investigation unless required to do so under statute.

In the late 20th century, the High Court also noted that the privilege applied beyond criminal trials. *Sorby v Commonwealth* was a case involving a refusal, by witnesses before a royal commission, to answer questions on the grounds that it might tend to incriminate them. All the judges save for Brennan J acknowledged that the privilege, unless otherwise abrogated, applies to non-judicial proceedings.[411]

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[408] Queensland Law Reform Commission, *The Abrogation of the Privilege against Self-Incrimination* (Report No 59, 2004) 25–6.
[409] Article 14(3)(g).
[410] *Hammond v Commonwealth* (1982) 152 CLR 188, 197–8.
[411] *Sorby v Commonwealth* (1983) 152 CLR 281, 300–1 (Gibbs CJ), 309 (Mason, Wilson and Dawson JJ), 311 (Murphy J). Brennan J confined the privilege to judicial proceedings apart from 'constitutional or statutory extension' (321).

The privilege is not absolute and its abrogation may be justified on public interest grounds. However, where abrogation occurs the provision of immunity in relation to information directly or indirectly obtained from a person has traditionally been regarded as important. It mitigates the effect of abrogation on matters such as fairness, reliability, and the requirement that the prosecution prove a person's guilt.[412]

(b) Legal Representation

There is no constitutional right of legal representation in criminal trials in Australia. However, statutes provide that an accused can choose a person to be their legal representative at trial and, in general, can access legal advice after arrest during the investigation period.[413] The importance of these rights has been recognised in Australian case law. In *Dietrich v The Queen*, the High Court held that the right to counsel is a fair trial right, concluding that where an indigent accused charged with a serious offence could not afford legal representation a court should stay or postpone their trial.[414] The importance of legal representation pre-trial has also been recognised. In *Driscoll v The Queen*, for example, Gibbs J said it would be 'reprehensible' if the police had prevented a person held for questioning from seeing his solicitor'.[415]

(c) The Rights of Children

Australia is a party to international agreements bearing on its treatment of children. Underpinning both the International Convention on Civil and Political Rights ('ICCPR') and the Convention on the Rights of the Child ('CRC') is the principle that the best interests of the child is the primary consideration.[416] The CRC prohibits the inhuman or degrading treatment of minors and the arbitrary

[412] See the discussion in Queensland Law Reform Commission, above n 408.
[413] For example, *Judiciary Act 1903* (Cth) s 78; *Criminal Procedure Act 1986* (NSW) s 36. This does not include a right to legal representation at public expense. For legal advice during the investigation period see, for example, *Crimes Act* s 23G. Exceptions are set out in s 23L.
[414] *Dietrich v The Queen* (1992) 177 CLR 292, 311–12, 315 (Mason CJ and McHugh J), 337 (Deane J), 361–2 (Toohey J), 374–5 (Gaudron J).
[415] *Driscoll v The Queen* (1977) 137 CLR 517, 539–40 (Gibbs J), 543 (Mason J), (Jacobs J), (Murphy J, agreeing with Gibbs J).
[416] Australia ratified the ICCPR on 13 August 1980 and the CRC on 17 December 1990.

deprivation of their liberty. It requires their detention to be a 'measure of last resort' and for 'the shortest appropriate period of time'.[417] It stipulates that juvenile detainees should have access to legal advice and the right to challenge their detention and, 'save in exceptional circumstances', contact with their family.[418]

Similar considerations inform the UN General Assembly's Standard Minimum Rules for the Administration of Juvenile Justice, which states that detention should only occur in the case of very serious offending.[419] All these instruments recognise that special protection is required because of children's vulnerability, their inexperience and their level of emotional and intellectual maturity.[420] Similar considerations inform Australian domestic legislation which, among other things, mandates an age below which children are deemed not to be criminally responsible for their actions and ages at which the presumption of *doli incapax* applies.[421] It also provides special rules for children who are subject to police questioning.[422]

3 *Parliament and the Assumption of Constitutionality*

The following section reviews Parliament's consideration of constitutional issues in order to determine whether these were important influences in the legislative process. Because they were a vital source of constitutional information for chamber debates and amendments, the reports of three parliamentary committees that examined the ASIO (Terrorism) Bill [No 1] are also considered.[423]

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[417] Article 37(b).
[418] Article 37(d), (c), respectively.
[419] Adopted by General Assembly Resolution on 29 November 1985 (A/RES/40/33). Rule 17.1(c).
[420] Rob White, 'Concepts Shaping Juvenile Justice' (2008) 27(2) *Youth Studies Australia* 45, 45; Kelly Richards, 'What Makes Juvenile Offenders Different from Adult Offenders?' (2011) 409(February) *Trends & Issues in Crime and Criminal Justice* 1.
[421] Throughout Australia, no criminal responsibility applies to children under 10 years (see, for example, *Criminal Code* s 7.1). Further, there is a presumption against criminal responsibility for children from 10 to less than 14 years (see, for example, ibid s 7.2).
[422] See, for example, *Crimes Act* s 23C(4), 23K.
[423] The Scrutiny of Bills Committee also examined the Bill. See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest* above n 317, 6–10; Senate Standing Committee for the Scrutiny of Bills, *Twelfth Report* above n 317, 410–20.

(a) Constitutional Power

The reports of neither the PJC nor the Legislation Committee discussed the issue of constitutional power. However, the References Committee's brief included the question of whether the ASIO (Terrorism) Bill [No 1] in its original or amended form was 'constitutionally sound'.[424] It closely examined both heads of power and constitutional limitation questions.

The heads of power issue involved difficult constitutional terrain the exploration of which, despite the wealth of other information available to the committee, was hampered by two barriers erected by the Government.[425] The first was the 'limited information' supplied to the Committee by the Government. The second, as George Williams pointed out, was lack of information about the security imperatives of the legislation.[426]

The robustness of the Bill's constitutional foundations was not the focus of chamber debate.[427] This can be accounted for in a number of ways. First, were the barriers erected by the Government and noted in the preceding paragraph. Second, was the prospect of a referral of power. Third, was the complexity of the subject matter. Fourth, perhaps, was the attention devoted to more publicly controversial aspects of the legislation. Fifth, was the likely influence of the References Committee's assessment. After considering the views presented to it by the Government and legal scholars, the Committee gave a detailed account of the defence, external and implied incidental powers as well as the nationhood and referral powers. It did not reach any conclusions as to power. Instead, it noted that, while some submissions took a contrary view, the case 'for' constitutional support of the questioning and detention regime could also be made out.[428] This appears to have been the threshold test for legislators.

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[424] Senate Legal and Constitutional References Committee, above n 320, 1.
[425] The Government's position was that the Bill was indirectly supported by the constitutional underpinnings of the SLAT Bill's terrorism offences — such as the defence, external affairs and implied self-protective power — and would be bolstered by the referral of powers. Ibid 24.
[426] Ibid 23.
[427] Carne, above n 341.
[428] Senate Legal and Constitutional References Committee, above n 320, 32.

(b) Issuing Warrants and Attending Interrogations

A more critical issue for the Parliament and one, importantly, with implications for the operation of the legislation was that of the potential limitations on constitutional power imposed by Chapter III. This section examines the original ASIO (Terrorism) Bill [No 1] and its evolution in 2002 in relation to the issuing of warrants and supervision of interrogation.

Separation of powers questions are threaded through committee inquiries and parliamentary debates. They centred on detention, warrant issuing and supervision of interrogation. In this regard, Parliament had before it a wealth of information about Chapter III issues — in particular, the submissions and evidence collected by committee inquiries as well as their reports. In addition, the *Bills Digest* prepared by the Parliamentary Research Service to assist members and senators dealt with Chapter III questions as did the report of the References Committee.[429]

Different 'solutions' were proposed by the PJC and References Committees. The Government's position changed markedly as debates progressed. The Opposition sought its own constitutional advice. As a result, provisions relating to functions and personnel morphed. Contributing to Parliament's confusion and uncertainty was the Government's refusal, once again, to engage with constitutional issues or table its own constitutional advice.[430] Things were hampered further because debate occurred substantially in the Senate — where the Attorney-General did not sit and where his representative, Senator Chris Ellison, did not always exhibit a good understanding of either the Bill or the issues it involved.

The PJC reported in May 2002 on the original ASIO (Terrorism) Bill in which 'prescribed authorities' — federal magistrates and certain AAT members — had the undifferentiated roles of issuing warrants and being present during questioning. It took Chapter III issues seriously. It recommended that, in order to ensure independence from the Executive and promote public confidence, the

[429] Department of the Parliamentary Library (Cth), 'Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002', *Bills Digest* No 128 of 2001–2002, 1 May 2002) 28–30; Senate Legal and Constitutional References Committee, above n 320, 39–46.
[430] Senator Ellison referred to requests for the Government's constitutional advice as 'the usual chestnut' and would say little more than that the Bill was constitutionally valid. Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7615.

issuing of warrants should be confined to federal magistrates and judges. And, in a move to help ensure that members of the judiciary were not impermissibly endowed with constitutionally incompatible functions, it advised that the remainder of the prescribed authority's duties — ie overseeing interrogations — should be separated and performed by legally qualified AAT members. The Committee acknowledged, however, that separation of power uncertainties and workability issues remained.[431] As a result, it proposed a fall-back position — empowering the Attorney-General to issue regulations nominating other issuing authorities. [432]

The Legislation Committee issued its short report in June 2002. It noted the evidence of Professor Williams and Dr Carne that empowering AAT members to issue warrants and enabling federal magistrates to oversee questioning might offend Chapter III.[433] It acknowledged advice from the Attorney-General's Department that detention was non-punitive — its purpose being to gather intelligence not punish. The advice also argued that safeguards had been included, including the short period of detention. The Committee decided not to 'adjudicate' on the PJC's consideration of legal and constitutional issues.[434] It concluded, nevertheless, that the PJC's recommendations would help shore up the Bill's constitutional foundations.[435]

Among 57 amendments to the Bill introduced by Attorney-General Williams on 23 September 2002 were a number that responded to the PJC's recommendations. The functions of the office were split. That of issuing warrants was given to federal magistrates and judges acting consensually and, if constitutionally required, in their personal capacities ('issuing authorities').[436] Deputy Presidents and legally qualified AAT members would attend questioning

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[431] Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 313, 18–19, recommendation 1.
[432] Ibid recommendation 2. This suggestion went to workability but potentially undermined the Committee's other recommendations, which were designed to prevent issuing authorities being or being seen to be creatures of the Executive.
[433] Senate Legal and Constitutional Legislation Committee, above n 318.
[434] Ibid 3.
[435] Ibid 4.
[436] *Government House of Representatives Amendment* (11) inserting proposed s 34AB(1), (2). Judges or prescribed persons would act as issuing authorities where detention exceeded 96 hours (*Government House of Representatives Amendment* (22) inserting new proposed s 34C(5)).

as 'prescribed authorities' and have an expanded role in the questioning process.[437] The Attorney-General would also be empowered to issue regulations designating persons in a specified class and also classes of persons as issuing authorities.[438]

In December 2002, before the committee stage of the Bill was debated in the Senate, a substantial report by the References Committee focusing mainly on constitutional issues was tabled. This disagreed with the PJC. The References Committee recommended the use of retired judicial officers — a matter raised in evidence to it and which had also been flagged in *Grollo* by Justices McHugh and Gummow.[439] The Committee suggested that retired long-serving state and federal judges be appointed as prescribed authorities to oversee questioning.[440] The Committee also recommended the position of issuing authority be filled on the same basis. Appointments would be for a maximum three-year term. The Attorney-General's power to appoint, as issuing authorities, 'members of a class prescribed by regulation' would be removed.[441]

These recommendations aimed to provide the benefits of judicial experience and status as well as contribute to the perception and fact of independence from the Executive Government. They would 'minimise constitutional difficulties'.[442] They also went to workability, taking account of the reluctance of Federal Court judges to be involved in issuing warrants under the *TI Act*.[443]

Both before and after the Government's tranche of House of Representatives amendments, Labor and other non-government MPs and senators suggested that

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[437] *Government House of Representatives Amendment* (12) inserting new proposed s 34B.
[438] *Government House of Representatives Amendment* (11) inserting proposed s 34AB(3), (4).
[439] Senate Legal and Constitutional References Committee, above n 320, 45–6, 49–50, 101–3. In *Grollo* (1995) 184 CLR 348, 384, 391. McHugh J and, Gummow J, respectively, noted that retired judicial officers would be suited for exercising warrant issuing powers under the *TI Act*.
[440] Senate Legal and Constitutional References Committee, above n 320, recommendation 1. The criterion for appointment was 10 years service on the bench of a superior court.
[441] Ibid recommendation 2.
[442] Ibid xxi.
[443] After the decision in *Grollo*, most Federal Court judges advised the Attorney that they would no longer issue telecommunications interception warrants — see Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1997, 3480 (Daryl Williams). In 2001–2002, about 94% of warrants were issued by nominated AAT members, 6% by Family Court judges, 0.2% by Federal Court judges and 0.4% by federal magistrates. The situation was complicated because many 'eligible judges' had not formally withdrawn their consents to issue warrants. Commonwealth, above n 406, 39–40.

the Bill was, variously, constitutionally questionable[444] or massively flawed.[445] Its original provisions making serving judges 'prescribed authorities' were said to be 'almost certainly unconstitutional'[446] as were its detention provisions.[447] Independent MP Peter Andren suggested that involving judicial officers in issuing ASIO warrants threatened judicial integrity and would undermine public confidence in the judiciary.[448] In the Senate Linda Kirk, herself a constitutional lawyer, argued that placing judicial officers in this role might fail the incompatibility test central to *Grollo*.[449] There were also questions about giving the warrant-issuing power to administrative officers given the decision in *Lim.*[450]

In December 2002, in an attempt to reach a compromise with the Senate, the Government unsuccessfully proposed adding retired federal court or state Supreme Court judges to the ranks of issuing authorities and prescribed authorities.[451] Further Government amendments, recommended by the References Committee and important for Chapter III purposes, ensured that questioning could not occur before the retired judge who had issued the warrant.[452] Unconvinced, the Senate instead passed Opposition amendments. These abolished the position of 'issuing authority'. Instead prescribed authorities would both issue warrants and supervise questioning. Appointments would be restricted to retired federal, state or territory superior court judges.[453] All appointments would be limited to a single three-year term. Proposing these

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[444] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6808 (Kelly Hoare, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7013 (Simon Crean, Leader of the Opposition, ALP); 7018 (Sharon Grierson, ALP); 7021 (Gavan O'Connor, ALP); 7026–7 (Jill Hall, ALP); 7034 (Peter Andren, Independent); Commonwealth, *Parliamentary Debates*, Senate, 21 October 2002, 5460 (Nick Bolkus, ALP).
[445] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6823 (Bernie Ripoll, ALP).
[446] Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5382 (Robert Ray, ALP).
[447] Commonwealth, *Parliamentary Debates*, 24 September 2002, 7117 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).
[448] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7034.
[449] Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5371.
[450] *Lim* (1992) 176 CLR 1, 27. See references by Labor lawyers: Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6799 (Robert McClelland, Shadow Attorney-General, ALP); Commonwealth, *Parliamentary Debates*, 19 September 2002, 6812 (Duncan Kerr, ALP) and non-lawyers: Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7027 (Jill Hall, ALP); Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7930 (Len Harris, One Nation).
[451] Commonwealth, *Journals of the Senate*, No 58, 10 December 2002, 1291–2.
[452] Commonwealth, *Journals of the Senate*, No 59, 11 December 2002, 1306 (proposed s 34EA).
[453] Commonwealth, *Journals of the Senate*, No 58, 10 December 2002, 1292. The former judges included retired Supreme Court judges and retired District Court judges.

amendments, Senator Faulkner cited advice from constitutional lawyers George Williams and Stephen Donaghue and former Solicitor-General Gavan Griffith and argued that making serving judges issuing authorities was 'constitutionally suspect'.[454] Further, he criticised the Government for not making its advice available and effectively suggesting the Senate simply trust it.[455]

Limiting appointments to retired judges, said Senator Faulkner on 10 December, would fulfill multiple purposes. It would circumvent the constitutional question of whether federal judicial officers could issue warrants[456] and provide a workable 'constitutionally valid regime for questioning'.[457] The status and seniority of retired superior court judges — as opposed to the more junior federal magistracy — would protect the rights of those subject to warrants and promote 'community confidence in the accountability and integrity' of the regime.[458]

However, it was not clear whether a sufficient number of willing and qualified retired judges would be available.[459] The Government showed the ALP confidential legal advice interpreted by Senator Faulkner as indicating that 'the appointment of serving judges [as prescribed authorities] would withstand constitutional challenge'.[460] As a result, further Opposition Senate amendments inserted a tiered system of office holders. In the first tier, in an attempt to expand the pool of recruits, were former superior court judges with five years experience.[461] If there were insufficient numbers, the Attorney-General could appoint similarly experienced but serving state or territory Supreme or District

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[454] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7620 (John Faulkner, Opposition Senate Leader, ALP).
[455] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7621 (John Faulkner, ALP).
[456] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7622 (John Faulkner, ALP).
[457] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7861 (John Faulkner, ALP).
[458] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7622 (John Faulkner, ALP).
[459] Commonwealth, *Parliamentary Debates*, Senate, 12 December 202, 7861 (John Faulkner, ALP). This was an issue because Opposition amendments, based on the References Committee report, initially limited eligibility to retired superior court judges under 72 years of age with at least 10 years experience on the bench. Labor and the Government disagreed as to likely available numbers, with the Government unwilling to make inquiries.
[460] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7861–2.
[461] 'Superior courts' were the High Court, Federal Court, Family Court and state and territory Supreme Courts.

Court judges. Last, if there were insufficient numbers of category 1 and 2 appointees, then (legally qualified) presidential members of the AAT could be appointed. Once again, appointments would be limited to a single three-year term.[462]

At this point confusion — possibly stemming from different Government and Opposition understandings of the term 'prescribed authority' — returned.[463] Contrary to Senator Faulkner's claim, Senator Ellison maintained that government legal advice on 11 and 12 December had confirmed that the use of sitting judges — whether federal or state — as prescribed authorities carried a significant risk of constitutional invalidity for incompatibility.[464]

The Senate's amendments were a point of disagreement between the chambers when the legislation returned to the House of Representatives for the first time at nearly midnight on 12 December 2002 — scheduled to be the last day of the parliamentary sitting year. Attorney-General Williams asserted that the Government's 'unqualified legal advice' was that the use of sitting federal, state or territory judges as prescribed authorities would be constitutionally incompatible with their judicial functions.[465] Shortly after this, Labor tabled its own legal advice relating to prescribed authorities and challenged the Government to do the same. Labor's advice noted the practice of appointing serving state judges to non-judicial roles and maintained that the relevant clause could be severed in the case of invalidity leaving other appointments intact.[466]

Nevertheless, the Government reinserted its amendments: splitting the functions of issuing and prescribed authorities; providing that federal magistrates and judges could serve as issuing authorities; stipulating that legally qualified AAT members could be appointed as prescribed authorities; and affirming that consenting former federal and state Supreme Court judges could serve in either

[462] Commonwealth, *Journals of the Senate*, No 60, 12 December 2002, 1356–7.
[463] This was probably because Labor's model collapsed warrant issuing and questioning supervision functions into a single office called a 'prescribed authority'. The Government's model separated the functions with the 'prescribed authority' confined to supervising questioning.
[464] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7933.
[465] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10427.
[466] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10431 (Simon Crean, Leader of the Opposition, ALP).

but not both roles in relation to the same matter.[467] In its statement of reasons for disagreeing with the Senate's amendments it said, peculiarly, given the Bill's original provisions, that it was necessary to separate the functions of issuing warrants and presiding over questioning and that the best way to effect this was by a separation of roles.[468]

Shortly after 3:45am on 13 December, the Bill was returned for the first time from the House of Representatives. That chamber disagreed with the Senate's amendments. At this point, the Government tabled the letter from the Attorney-General to Senator Faulkner.[469] This simply paraphrased the Government's legal advice. Perplexingly, given the design of the original Bill,[470] it distinguished the warrant-issuing function upheld in *Grollo* from the prescribed authority function, noting that the latter would enmesh serving federal judicial officers in an interrogation process involving national security issues as well as in possible criminal charges. It contended that the trend of High Court jurisprudence was to contract rather than expand the constitutionally compatible functions that could be conferred on federal judicial officers. It stressed that similarly engaging serving state or territory judges was risky given the decision in *Kable*.[471]

The Senate, however, held fast with Labor declaring that 'Australia's leading constitutional experts' had endorsed its amendments. It demanded that the Government table its advice, not a paraphrased version.[472] In the House of Representatives, at 6:57am on 13 December 2002, the Attorney-General

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[467] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10440–1. *Government House of Representatives Amendments* (Govt (1)–(7), (9); *Government Senate Amendment* (31)).

[468] Commonwealth, *Votes and Proceedings*, No 69, House of Representatives, 12 December 2002, 674. This is not to suggest that splitting the roles was not a good idea, including for constitutional reasons.

[469] Commonwealth, *Parliamentary Debates*, Senate, 13 December 2002, 8090. The letter was tabled by Senator Ian Campbell (Parliamentary Secretary to the Treasurer, Liberal) on behalf of Senator Ellison who had returned to his home in Western Australia.

[470] Earlier, on the afternoon of 12 December, during Senate debate on the constitutionality of Labor's proposals, Senator Ellison had denied the roles of issuing and prescribed authority had originally been combined. His error was noted by Senators Faulkner and Nettle causing the former to advise him 'Don't give up your day job'. Senator Ellison later corrected the record. See Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7864, 7865, 7933 (Chris Ellison, Minister for Justice and Customs, Liberal); 7864, 7865 (John Faulkner, Opposition Senate Leader, ALP); 7865 (Kerry Nettle, Greens).

[471] Commonwealth, *Parliamentary Debates*, Senate, 13 December 2002, 8090–1.

[472] Commonwealth, *Parliamentary Debates*, Senate, 13 December 2002, 8092 (John Faulkner, Opposition Senate Leader, ALP).

executed a *volte face* — agreeing to the Senate's 'prescribed authorities' amendments relating to sitting state and territory judges and affirming the use of former federal and state judges.[473] The House of Representatives also agreed to restrict AAT prescribed authority appointments to legally qualified *presidential* members and to limit appointments to a single three-year term.[474] In relation to sitting judges, Mr Williams claimed to rely on ALP legal advice that this provision could be severed without jeopardising other prescribed authority appointments.[475] The House of Representatives insisted, however, that the functions of issuing and prescribed authorities should be split with consenting federal magistrates and judges performing the function of issuing authority together with (undefined) classes of person prescribed by regulation. This last (reinserted) provision once again opened up the possibility of government department, executive agency or private sector appointments being made on any terms and conditions, with Parliament's only recourse being to disallow the regulations.

(c) The Detention Regime

A constitutionally related question, which also had rule of law and human rights implications, was the detention regime proposed by the Government. The Government sought to divorce the regime from any suggestions of punitiveness and thus potential constitutional difficulty in a number of ways. The legislative regime, argued the Attorney somewhat implausibly, given the absence of derivative immunity from prosecution for compelled evidence, was for intelligence gathering and was not concerned with criminal investigation.[476] It was about preventing terrorism not punishing terrorists, said the Liberal's George Brandis.[477] Incommunicado detention was necessary, Minister Ellison

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[473] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10530 agreeing to *Senate Amendment* (7).
[474] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10530 agreeing to *Senate Amendment* (7).
[475] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10531.
[476] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7040; Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10427–8.
[477] Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5380. See also Commonwealth, *Parliamentary Debates*, Senate, 21 October 2002, 5469 (Chris Ellison, Minister

maintained, in order to prevent detainees tipping off their associates.[478] It was designed to address 'emergency situations'.[479]

Despite acknowledging that the original Bill allowed for indefinite detention, the PJC regarded detention as 'precautionary'[480] rather than punitive in nature. Nevertheless, it recommended a maximum period of 168 hours detention after which release or charge was mandated. It also advised that, in the case of a detention warrant, a person should be brought 'immediately' before a prescribed authority.[481] Government amendments, introduced on 23 September 2002, retained the detention warrant period of 48 hours and stipulated a maximum of 168 hours continuous detention under a series of warrants. This did not preclude further warrants being issued as soon as a person was released. The amendments did ensure, however, that there was no gap between taking a person into custody under a detention warrant and their appearance before a prescribed authority.[482]

These amendments did not satisfy the Senate. It turned to a model for a 'questioning' regime first suggested by the References Committee. This was based loosely on the investigation periods contained Part IC of the *Crimes Act 1914* (Cth) ('*Crimes Act*').[483] It included a more stringent test for the grant of second and subsequent warrants, a prohibition on the issuing of more than two warrants in a seven-day period, and in such a case, a moratorium on further warrants for the next week.[484]

Doubtless with these things in mind, the Opposition proposed and secured Senate amendments that sought to rebadge the statutory regime as one involving

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for Justice and Customs, Liberal); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10427 (Daryl Williams, Attorney-General, Liberal).

[478] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7631.

[479] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10429 (Daryl Williams, Attorney-General, Liberal).

[480] Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 313, 33.

[481] Ibid recommendations 3 and 5.

[482] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7044. *Government House of Representatives Amendments* (15), (17).

[483] As the *Crimes Act* stood in November 2002, this would have allowed up to four hours of questioning, extendable once by eight hours (ss 23C(4)(b) and 23D(5)). The initial investigation period for minors and Indigenous Australians was two hours (s 23C(4)(a)). 'Dead time' was not included (s 23C(7)).

[484] Senate Legal and Constitutional References Committee, above n 320. Recommendations 4–7.

questioning.[485] In addition to its political saleability, these amendments were designed to avoid constitutional problems and to provide a legitimate, non-punitive purpose for the regime combined with additional safeguards — thus avoiding the problem identified in *Lim*. They replicated the grounds on which a person could be taken into custody for questioning and replaced references in the Bill to 'detention' with references to 'custody'. They stipulated that a prescribed authority could only allow questioning to proceed if a person had not been questioned continuously for more than 20 hours or for more than a total of 20 hours in a seven-day period. A person would be released in one of two ways — the warrant could require their release once questioning was complete or provide that release would occur once the prescribed authority decided that ASIO had no more questions to ask.[486]

Under this model, there were still two types of warrant. The first required a person to appear before a prescribed authority for questioning. The second enabled a person to be taken into 'custody' for questioning. However, the amendments sought to further sever any links to 'detention' with its punitive connotations and proportionality deficits by limiting the original questioning period to four hours. Two extensions, in eight-hour blocks, were possible with each linked to the likelihood that relevant information would be elicited. The first was predicated on ASIO satisfying the prescribed authority that there were reasonable grounds to believe that further questioning would produce relevant information. The second and final extension was confined to exigent circumstances. It could only be granted if the prescribed authority was satisfied that the threat of an imminent '*terrorist act*' existed and that there were reasonable grounds to believe that further questioning would be likely to yield relevant information. This latter restriction was potentially important in restricting the use of lengthy detention and tying its use to emergency situations rather than to the obtaining of information relating to a range of imprecisely defined 'terrorism offences', some of which were arguably trivial in nature.

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[485] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7844 (John Faulkner, Opposition Senate Leader, ALP).
[486] Commonwealth, *Journals of the Senate*, No 60, 12 December 2002, 1347–8, 1349.

The ALP contrasted its regime with that of the Government, which it predicted would not survive constitutional challenge because it was 'detention for detention's sake' and 'not for the purpose of questioning to obtain intelligence to prevent a terrorist attack'.[487] Nevertheless, Labor's amendments still allowed for 20 hours questioning in custody plus possibly extensive downtime within a seven-day period. 'Any reasonable human being', said Labor's Kim Beazley, 'knows that 20 hours of questioning probably means, in practical terms, detention for two to three days, whether you choose to define this as a questioning regime or a detention regime'.[488] In addition, the first extension of the custodial period could be granted if likely to produce 'relevant information', an expression that was not defined.

The Government nevertheless rejected the Senate's amendments on the basis they would turn the regime into a questioning regime that would fail to serve the purpose of terrorism prevention through intelligence gathering.[489] It maintained that detention would occur 'in strictly limited circumstances'.[490] Further, it said, restricting the amount of questioning that could happen would be inconsistent with the Bill's purpose. This said Prime Minister Howard, misrepresenting the situation, was 'to question people in emergency terrorist situations … before people are hurt and killed'.[491]

When the Bill was laid aside on 13 December 2002, the House of Representatives and the Senate had failed to agree on the nature of the regime. The Government insisted on retaining amendments it had made to the original Bill, which enabled a person to be continuously detained for up to 168 hours, with each detention warrant lasting a maximum of 48 hours.

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[487] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10434 (Robert McClelland, Shadow Attorney-General, ALP).
[488] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10435.
[489] Reasons of the House of Representatives for Disagreeing to the Amendments of the Senate, Commonwealth, *Votes and Proceedings*, No 69, House of Representatives, 12 December 2002, 674.
[490] Ibid; Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7932 (Chris Ellison, Minister for Justice and Customs, Liberal).
[491] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10565.

(d) Legal Norms

(i) General Criticisms

For the UK's former senior Law Lord, Tom Bingham, a regime that flouts the rule of law is epitomised by features that include 'the midnight knock on the door, the sudden disappearance … the confession extracted by torture'.[492] The original ASIO (Terrorism) Bill gave cause for concern on all these grounds. It enabled indefinite, incommunicado detention and coercive questioning, raising the spectre of maltreatment of detainees. As indicated earlier, non-government politicians described the Bill as congruent with police state regimes[493] and Pinochet's Chile.[494] These were deep-seated anxieties. Some in Labor foreshadowed that even with amendments they would find it difficult[495] or even impossible[496] to support the legislation.

Not surprisingly then, concerns based on the rule of law and democratic and human rights appear regularly in *Hansard*. Parliamentarians argued that the legislation failed standards of good process, 'fundamental principles of equality, fairness and balance' and reflected a flawed and ineffective policy of endowing ASIO with further coercive powers.[497]

The detention of non-suspects was called 'a fundamental and unacceptable departure from established legal and human rights principles'.[498] The Bill was

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[492] Bingham, above n 132, 9.
[493] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7028 (Leo McLeay, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7032 (Peter Andren, Independent).
[494] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6810; Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10433 (Daryl Melham, ALP); Commonwealth, *Parliamentary Debates,* Senate, 17 October 2002, 5386 (Kerry Nettle, Greens). This analogy was drawn by Professor Williams — see, for example, Cynthia Banham, 'Canberra Attacked for Keeping ASIO Bill under Wraps', *The Sydney Morning Herald,* 14 August 2002; George Williams, 'ASIO Powers "Rotten at their Core"' (2002) (21 October) *Civil Liberties Australia* <http://www.cla.asn.au/News/asio-powers-rotten-at-their/>.
[495] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6808 (Kelly Hoare, ALP).
[496] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6820 (Tanya Plibersek, ALP); Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5386 (Kerry Nettle, Greens).
[497] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7012 (Simon Crean, Leader of the Opposition, ALP).
[498] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6790 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).

also said to offend the right to be left alone and to be free of arbitrary interference from government'.[499] It was criticised for repudiating criminal justice principles relating to the right to silence and the burden of proof.[500] It was attacked for breaching liberty rights derived from *Magna Carta* and habeas corpus.[501] More generally, it was condemned for eroding civil liberties, democratic rights, international human rights, individual freedoms and the rule of law.[502] It was denounced for contravening the prohibition on arbitrary detention contained in the ICCPR.[503] Of particular concern were the Bill's likely breaches of the CRC.[504]

This unease was reflected in the PJC's view of the purpose of its inquiry.[505] Disquiet was also evident in Labor's unsuccessful second reading amendment in the House of Representatives, which listed the party's concerns and referred to the Bill's 'serious compromises to civil liberties'.[506] Similarly, when the Senate sent the Bill to the References Committee its remit included consideration of an alternative police-based regime and, thanks to a Greens' amendment, the 'civil and political rights' implications of the Bill and any alternative proposals.[507]

It is not possible to discuss all the egregious provisions in the ASIO (Terrorism) Bill [No 1]. Instead, the remainder of this section focuses on three issues that

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[499] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6797 (Robert McClelland, Shadow Attorney-General, ALP).
[500] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6792 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).
[501] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6796–8 (Robert McClelland, Shadow Attorney-General, ALP).
[502] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7012 (Simon Crean, Leader of the Opposition, ALP) 7020; (Gavan O'Connor, ALP); 7037 (Warren Snowdon, ALP). Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5364 (Ursula Stephens, ALP); 5375 (Brian Greig, Democrats); 5386 (Kerry Nettle, Greens); 5388 (Gavin Marshall, ALP).
[503] Commonwealth, *Parliamentary Debates*, Senate, 21 October 2002, 5464 (Len Harris, One Nation); Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7629 (John Faulkner, Opposition Senate Leader, ALP).
[504] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7013 (Simon Crean, Leader of the Opposition, ALP); Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5372 (Linda Kirk, ALP).
[505] The PJC regarded its task as balancing the Bill's proposals with 'the need to ensure that … civil liberties and rights under the law … are not compromised.' Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 313, vii.
[506] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7011–7012.
[507] Senate Legal and Constitutional References Committee, above n 320, ix.

mattered to Parliament — the right to a lawyer, the privilege against self-incrimination and the legislation's application to children.

(ii) Legal Representation

The original ASIO (Terrorism) Bill [No 1] did not mandate access to a lawyer and was silent as to their role. As a result, non-government politicians and the PJC criticised the Bill[508] and noted its effects on a person's ability to hold officials and the Government to account. The PJC proposed that detainees have access to lawyers — possibly security-cleared — who were recommended by the Law Council of Australia. It recommended that they be present during questioning and at hearings where an extension of detention was considered. [509]

In response, the Government introduced House of Representatives amendments on 23 September 2002. These provided that detainees must be permitted to contact an 'approved [security-cleared] lawyer' and could be permitted to contact a lawyer of choice.[510] They also required a prescribed authority to explain at regular intervals that a person could seek a legal remedy in relation to the warrant or their treatment under it.[511]

The presence of a lawyer was seen by the non-government parties in the Senate as an important brake on the abuse of power and a 'fundamental principle'.[512] In an ambitious claim, it was said to be a 'right' traditionally protected by Parliament.[513] However, for the Government, the 'right to a lawyer', although important, could be misused[514] and provide a conduit for alerting terrorists. So,

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[508] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6789 (Daryl Melham, Shadow Minister for Justice and Customs, ALP); Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 313, 35.
[509] Ibid recommendation 3.
[510] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7043, 7044, 7045 — *Government House of Representatives Amendments* (10), (19), (30) inserting proposed ss 34AA, 34C(3B); new proposed s 34D(4).
[511] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7045 — *Government House of Representatives Amendment* (35) to insert proposed s 34E(1)(f).
[512] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10533 (Simon Crean, Leader of the Opposition, ALP).
[513] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7853 (John Faulkner, Opposition Senate Leader).
[514] Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5381 (George Brandis, Liberal).

in tandem with amendments providing for lawyers were provisions that greatly undermined their value for detainees.

An adult's access to a lawyer could be denied for 48 hours — the entire length of a single detention warrant[515] — essentially rendering useless their right to commence court proceedings. Despite Senator Brandis's claim that legal representation could only be refused to protect the community from 'imminent attack',[516] the amendments enabled access to a lawyer to be denied if a 'terrorism offence' with potentially serious consequences was being or was about to be committed. This meant that refusal of access to legal advice was not restricted to exigent circumstances. Because all terrorism offences, given the substantial penalties they attracted, were regarded as serious by the Government, it was difficult to see where a line would be drawn between offences with and without serious consequences. Further, as the ALP pointed out, while circumstances might mean that questioning should not be delayed until a lawyer was present, it should not result in denial of access.[517]

Additionally, while the amendments were said to protect legal professional privilege, contact between client and lawyer would be monitored, hampering the prospect of frank exchanges and effective advice.[518] There were also concerns about the independence of 'approved lawyers', who would be assessed by ASIO and approved at the Attorney-General's discretion. Further amendments prohibited lawyers from making unauthorised disclosures during a person's detention about their questioning or detention. The penalty was two years imprisonment.[519]

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[515] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7044 — *Government House of Representatives Amendment* (19) inserting proposed s 34C(3C).
[516] Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5381.
[517] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7852 (John Faulkner, Opposition Senate Leader, ALP).
[518] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7048 — *Government House of Representatives Amendment* (52) inserting proposed s 34U. This provided that any contact with a lawyer of choice or approved lawyer could be monitored and that the prescribed authority was to provide a 'reasonable opportunity' for breaks in questioning for legal advice. However, lawyers were prohibited from intervening in questioning and could be removed for disruptive behaviour.
[519] Communications could be authorised by the prescribed authority or by regulation. Communications with a court for the purpose of taking legal action in relation to a warrant or a person's treatment under it could not be refused by the prescribed authority. In addition, it was not an offence for a person's lawyer to communicate with the IGIS or Ombudsman.

Labor criticised the 48-hour time period in which a lawyer could be excluded as 'completely arbitrary'[520] and described the first 48 hours of detention as 'critical'.[521] Reflecting in part the References Committee's recommendations, the Senate amended the Bill in the following ways. First, by removing approved lawyers and substituting lawyers of choice.[522] Second, by enabling questioning to proceed in a lawyer's absence in an emergency.[523] Third, by providing that a lawyer of choice could be refused if ASIO satisfied the prescribed authority that the lawyer might prejudice an investigation. In this case, the prescribed authority would be required to find a replacement.[524]

In the face of Government opposition, the Senate passed those and the following amendments. A person's lawyer was given a greater, though still very circumscribed role in proceedings. The lawyer could still be removed for disruptive behaviour but a reasonable opportunity had to be provided for him or her to advise their client.[525] Additionally, two Democrat amendments relating to lawyers were passed. The first required the prescribed authority to inform a person of their right to contact a lawyer.[526] The second provided an exception to disclosure offences and usefully enabled a person or their lawyer to communicate with 'another legal adviser' in order to seek a remedy in relation to the warrant or their treatment under it.[527] So, for example, this would have enabled a solicitor to seek expert advice from another solicitor or a barrister.

However, while ALP Senate amendments made an extension of questioning under a warrant contingent on access to legal advice,[528] they did not fully

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Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7048–9 — *Government House of Representatives Amendment* (52) inserting proposed s 34U.

[520] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7852 (John Faulkner, Opposition Senate Leader, ALP).

[521] Commonwealth, *Parliamentary Debates*, 17 October 2002, 5372 (Linda Kirk, ALP).

[522] For example, *Schedule of Senate Amendments* (18) Opp (14) [Sheet 2764], (21) Opp (17) [Sheet 2764].

[523] *Schedule of Senate Amendments* (55) Opp (39) [Sheet 2764] as amended by Dem (5) [Sheet 2788].

[524] Ibid.

[525] Ibid. Although the Senate's replacement s 34U was headed 'Legal advice during questioning' it merely required the prescribed authority to give a person's legal adviser a reasonable opportunity to provide advice.

[526] *Schedule of Senate Amendments* (28) Dem (2) [Sheet 2779 revised].

[527] *Schedule of Senate Amendments* (55) Opp (39) [Sheet 2764] as amended by Dem (5) [Sheet 2788].

[528] *Schedule of Senate Amendments* (32) Opp (25) [Sheet 2764].

incorporate the PJC's recommendations. They did not provide that a person's lawyer should be able to represent them at hearings for an extension of questioning.[529] They did not require contact between lawyer and client to be monitored but neither did they mandate that it should be confidential.[530] In addition, as a 'trade-off',[531] temporally unlimited disclosure offences for warrant subjects and their lawyers subject to a penalty of five years imprisonment were inserted.[532] This was an extremely troubling amendment in terms of its potential impact on political communication and in entrenching a secret and largely opaque process.[533] Even the Government regarded these proposals as neither appropriate nor in the interests of security.[534] And, as Minister Ellison pointed out, offences in other legislation that Labor relied on as models for its amendments were generally limited to the duration of an investigation.[535]

All the Senate's amendments relating to lawyers were rejected by the House of Representatives on 12 December 2002 and again on 13 December after the Senate insisted on its changes.

(iii) The Right to Silence

As stated earlier, the original ASIO (Terrorism) Bill removed a person's right to silence. It criminalised refusal or failure to provide information, records or

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[529] Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 313 recommendation 6.
[530] The References Committee recommended that visual monitoring should be permitted but that communications 'must be confidential'. Senate Legal and Constitutional References Committee, above n 320. Recommendation 9.
[531] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10534 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).
[532] *Schedule of Senate Amendments* (37) Opp (30) [Sheet 2764] as amended by Dem (4) [Sheet 2788] prohibited those subject to a warrant and their lawyers from disclosing 'any information' about questioning or the production of records or things without the written permission of the prescribed authority.
[533] Labor's disclosure offences were said to be based on offences in the *Australian Crime Commission Act 2002* (Cth), the *National Crime Authority Act 1984* (Cth) and the *Independent Commission Against Corruption Act 1988* (NSW). See Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10534 (Daryl Melham, ALP).
[534] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7843 (Chris Ellison, Minister for Justice and Customs, Liberal).
[535] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7843. Under the *National Crime Authority Act 1984* (Cth) as it stood in 2002, non-disclosure notices could be issued with a summons to attend an NCA investigation. It was an offence, subject to exceptions, to breach such a notice. The penalties were lower than those proposed under the ASIO (Terrorism) Bill [No 1]. In addition, non-disclosure notices generally expired on the completion of an investigation or, at a maximum, five years after being issued (ss 29A, 29B).

things placing, in the process, an evidential burden on the accused. It provided no immunity for compelled testimony in relation to terrorism offences and only a use immunity in relation to other crimes — belying the idea that questioning was for the purposes of intelligence gathering.

As a result, the Bill was criticised in a number of fora. The Scrutiny of Bills Committee referred to 'long-standing protections of use and derivative use immunity' and suggested the provisions 'trespassed unduly on personal rights and liberties'.[536] Non-government parliamentarians were also critical.[537] They called the privilege against self-incrimination and the right to silence human rights 'designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them'.[538] Following on from the PJC inquiry, Government House of Representatives amendments made on 23 September extended the use immunity in proposed s 34G(9) to terrorism offences.[539] However, the Senate rejected Democrat amendments extending the immunity in proposed s 34G to derivative use immunity.[540] Labor amendments removed provisions stipulating that a person who failed to provide information or records must prove to an evidential standard that he or she did not have the information or record. All these amendments were rejected by the Government.[541]

The Scrutiny of Bills Committee did not resile from its concerns after the Government's amendments were introduced.[542] The change from the views that some in Labor had originally expressed about the removal of the right to silence may have stemmed in part from the report of the References Committee. It noted

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[536] Senate Standing Committee for the Scrutiny of Bills, *Twelfth Report* above n 317, 419–20.
[537] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6818 (Tanya Plibersek); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7033 (Peter Andren, Independent); Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5370 (Linda Kirk, ALP); Commonwealth, *Parliamentary Debates*, Senate, 11 December 2002, 7681 (Kerry Nettle, Greens); Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7842 (Brian Greig, Democrats).
[538] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7026 (Jill Hall) quoting *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 508 (Mason CJ and Toohey J) and citing *Sorby v Commonwealth* (1983) 152 CLR 281.
[539] *Government Amendment* (41).
[540] Commonwealth, *Journals of the Senate*, No 60, 12 December 2002, 1349. Dem (6) [Sheet 2779 revised].
[541] It is unclear whether removing the note would have had any effect.
[542] Senate Standing Committee for the Scrutiny of Bills, *Twelfth Report* above n 317, 420.

that abrogation of derivative use immunity was common in statutes for commissions of inquiry.[543] As a result, Labor politicians argued that the proposed questioning regime should be 'broadly consistent' with other questioning regimes employed by ad hoc and standing royal commissions and asked why ASIO should have 'weaker powers' in its fight against terrorism compared to anti-corruption and crime fighting bodies.[544] For its part, the Government portrayed coercive questioning as 'nothing new'.[545] Few politicians expressed concern about 'legislative creep'.[546]

(iv) The Rights of Children

The questioning and incommunicado detention of children provided for in the ASIO (Terrorism) Bill [No 1] was called a matter of 'grave concern'[547] and an 'appalling proposal' unfit for a 'humane and just society'.[548] According to numerous speakers, it was also a breach of Australia's CRC obligations.[549] The PJC recommended that no person under 18 should be subject to the legislation.[550]

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[543] Senate Legal and Constitutional References Committee, above n 320, 145.
[544] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7629 (John Faulkner, Opposition Senate Leader, ALP). Labor's Joe Ludwig acknowledged the powers of the Independent Commission Against Corruption and the Australian Securities Investments Commission but said, hyperbolically, that there were 'few examples' of compelled disclosure provisions in Commonwealth law. He argued that where they occurred they were usually accompanied by a right to a lawyer and protections against self-incrimination. Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5369 (Joe Ludwig, ALP).
[545] Commonwealth, *Parliamentary Debates*, 11 December 2002, 7687, 7690 (Chris Ellison, Minister for Justice and Customs, Liberal).
[546] An exception is Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6811–12 (Duncan Kerr, ALP). Mr Kerr was a former Labor Minister for Justice and Attorney-General. While he supported the gradual broadening of the NCA's powers, he noted that the original intention was not to do so. And he warned about the process of creating precedents and adding to them.
[547] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6818 (Tanya Plibersek, ALP).
[548] Commonwealth, *Parliamentary Debates*, 19 September 2002, 6790 (Daryl Melham) quoting Jenny Hocking, Submission No 140 to Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 313, 6.
[549] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6790 (Daryl Melham, Shadow Minister for Justice and Customs, ALP); Commonwealth, *Parliamentary Debates*, 23 September 2002, 7013 (Simon Crean, Leader of the Opposition, ALP); Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5372 (Linda Kirk, ALP); Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7631–2 (Bob Brown, Greens).
[550] Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 313, recommendation 10.

Included in the tranche of Government amendments introduced into the House of Representatives on 23 September 2002 were special rules for children aged 14 and over.[551] As the Government made clear, some of these amendments were appropriated or adapted from the criminal justice system. The age of criminal responsibility,[552] two-hour continuous questioning periods,[553] guaranteed access to a lawyer and contact with a parent, guardian and representative were examples. However, further confusing the 'purposes' of the legislation and resulting in new objections, the Bill's application to children was limited to terrorism offence suspects. This change further blurred the line between intelligence gathering and policing. It potentially added to the total investigation period children could be subject to — under the Bill and under the *Crimes Act* — in relation to terrorism offences. It raised the question of why child suspects were not simply subject to the criminal justice system, with its added protections for minors.[554] Its decontextualising was criticised. For example, it failed to provide a right to silence. And it failed to comply with general principles of juvenile justice,[555] which acknowledged the vulnerability of children and regarded their detention as a last resort. Further, the Government's arguments misrepresented the situation. While continuous questioning of children was limited to two-hour periods with breaks, they were still subject to the same total amount of continuous detention as adults.

Like the PJC, the References Committee, save for one dissent, recommended against the Bill's application to any child.[556] This was endorsed by the Senate. It was opposed by Government ministers who argued that the Government's amendments recognised the special needs of minors and gave ASIO the ability to

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[551] *Government Amendment* (45) inserting proposed s 34NA.
[552] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6802 (Steve Ciobo, Liberal); Commonwealth, *Parliamentary Debates*, 23 September 2002, 7055 (Daryl Williams, Attorney-General, Liberal).
[553] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7055 (Daryl Williams, Liberal).
[554] Commonwealth, *Parliamentary Debates*, Senate, 11 December 2002, 7691–2 (John Faulkner, Opposition Senate Leader).
[555] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6819–20 (Tanya Plibersek) quoting George Williams.
[556] Senate Legal and Constitutional References Committee, above n 320. Recommendation 27. Country Liberal Party Senator Nigel Scullion dissented.

prevent suicide attacks.[557] In December 2002, the Bill's application to children remained a matter of intractable disagreement between the two houses.

D *The Assumption of Separation*

In this section I examine the ASIO (Terrorism) Bill [No 1] in order to determine whether Gross's assumptions of temporality, national security and communal divisions operated as drivers of the legislative process.

1 *Temporality*

Two types of sunset clause were proposed by the non-government parties during debate on the ASIO (Terrorism) Bill [No 1]. The first was an Opposition amendment limiting prescribed authority appointments to single, three-year terms as a means of bolstering their independence from the Executive Government.

The second type of sunset clause is more familiar. This was a general clause. Given the highly 'controversial' nature [558] of the Bill, two parliamentary committees recommended the insertion of a termination provision.[559] It was supported by Labor, which introduced an amendment sunsetting the legislation three years after Royal Assent.[560] It was endorsed by the Greens, Democrats and One Nation.[561] The importance of the clause is evidenced by the Senate, which regarded it as non-negotiable and pressed for its inclusion in the face of House of Representatives disagreement in 2002.[562]

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[557] Commonwealth, *Parliamentary Debates*, Senate, 11 December 2002, 7694 (Chris Ellison, Minister for Justice and Customs, Liberal); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10429 (Daryl Williams, Attorney-General, Liberal).
[558] Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 313, vii.
[559] Ibid recommendation 12; Senate Legal and Constitutional References Committee, above n 320. Recommendation 26. Country Liberal Party Senator, Nigel Scullion, dissented from this recommendation.
[560] *Schedule of Senate Amendments* (1) Opp (1) [Sheet 2764].
[561] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7602 (Kerry Nettle, Greens); 7602 (Brian Greig, Democrats); 7608 (Len Harris, One Nation).
[562] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7601 (John Faulkner, Opposition Senate Leader, ALP); Commonwealth, *Parliamentary Debates*, Senate, 13 December 2002, 8092 (John Faulkner); 8097–8 (Brian Greig, Democrats). See also Commonwealth,

Sunsetting was a marker of exceptionality — in Robert Ray's assessment, the Bill ventured into 'unknown territory'.[563] It was also regarded as a signal that derogations from fundamental rights should not be permanent as a matter of principle and to avoid legislative creep.[564] Labor's Tanya Plibersek seemed to imply that the clause should be allowed to operate when she commended sunsetting as a precautionary measure — given that no one could predict how the legislation might be used in 50 or 100 years time.[565] However, there was less agreement on the clause's operation.

There were some suggestions that the legislation should be allowed to terminate. The Government would then be required to justify its reintroduction.[566] More common was the view that the purpose of a sunset clause combined with parliamentary committee review and annual reporting by ASIO was as a 'significant accountability mechanism'.[567] It was assumed that the Government would need to justify properly any proposal to renew the legislation or amend it to both Parliament and the people — thus ensuring continued parliamentary and public debate and scrutiny.[568] To achieve appropriate oversight, the review's timing was regarded as vital. Labor argued that a review three years after commencement would enable the legislation to be assessed adequately. Importantly, too, this would ensure that review occurred mid-election cycle — thus (supposedly) free of 'exigencies and hysteria'.[569]

Parliamentary Debates, House of Representatives, 12 December 2002, 10430 (Simon Crean, Leader of the Opposition, ALP).

[563] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2457.

[564] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6790 (Daryl Melham, Shadow Minister for Justice and Customs).

[565] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6817, 6820.

[566] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7031 (Leo McLeay, ALP); Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7601 (John Faulkner, Opposition Senate Leader, ALP); Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7930 (Len Harris, One Nation).

[567] Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5372 (Linda Kirk, ALP). See also Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7601 (John Faulkner, Opposition Senate Leader, ALP); Commonwealth, *Parliamentary Debates*, Senate, 21 October 2002, 5460 (Nick Bolkus, ALP).

[568] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7032 (Peter Andren, Independent); Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7601 (John Faulkner, Opposition Senate Leader); 7602 (Kerry Nettle, Greens).

[569] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7030 (Leo McLeay, ALP). See also Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7607 (Robert Ray, ALP).

Nevertheless, at least some politicians were sceptical. In Labor, the Left's Nick Bolkus supported sunsetting but predicted that 'the legislation will last forever'.[570] The Right's Robert Ray called the sunset clause 'a little inconvenient' but suggested that if the legislation was effective and its safeguards were working 'there will be very little difficulty in this parliament revalidating [it] posthaste' without the need for exhaustive inquiries.[571] He predicted that Labor, in these circumstances, would 'certainly give it [the legislation] a tick'.[572] And he suggested that if the legislation was renewed a further sunset clause might be unnecessary.[573]

The Senate inserted a sunset clause that applied to the ASIO (Terrorism) Bill [No 1] in its entirety. That is, it applied to questioning and detention warrants and also to ASIO's proposed new powers of seizure and personal search.[574] The latter, further blurring the lines between policing and intelligence, had been the subject of little debate. The clause was rejected by the House of Representatives at 12:52am on 13 December 2002 — the Government repeating its earlier contention that the international security environment had been permanently altered. Instead, the Attorney argued, PJC review of the legislation was a more sensible option that allowed for reconsideration 'without unnecessary and arbitrary time pressures'.[575]

Ultimately, however, when the Senate insisted on its amendment, the Government reversed its position. In the end, it agreed that a sunset clause plus a review was warranted given the 'extraordinary powers' contained in the Bill.[576] It is possible, however, that the issue of sunsetting had been a bargaining chip and that the Government's retreat involved minimal risk. Acceding to sunsetting also enabled the Government to argue that it had been willing to compromise to

[570] Commonwealth, *Parliamentary Debates*, Senate, 21 October 2002, 5461.
[571] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7607.
[572] Ibid.
[573] Commonwealth, *Parliamentary Debates*, Senate 21 October 2002, 7608.
[574] *Schedule of Senate Amendments* (1) Opp (1) [Sheet 2764].
[575] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10428.
[576] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 8153 (Ian Campbell, Parliamentary Secretary to the Treasurer, Liberal).

ensure that 'vital legislation' designed to protect the community would be passed before Christmas.[577]

2 *National Security*

Gross suggests that deference in national security matters is accorded to governments because it is accepted that special rules apply when the security of the State is at stake. *Hansard* shows that the Government made a number of national security claims about the ASIO (Terrorism) Bill [No 1], the role of the Executive, and the function of the law in safeguarding the nation. The Attorney-General's second reading speech for the Bill adjured politicians not to forget 'the catastrophic results that terrorism can produce'. He continued:

> We must be fully prepared to be able to prevent such attacks. We must direct all our available resources, including the might of the law, at protecting our community and ensuring that those responsible for threatening our security are brought to justice.[578]

In the Senate, the Minister for Defence criticised Labor for attempting to dictate the content of legislation when it was the responsibility of the Government to determine what was required for the 'safety and security of the Australian people'.[579] However, the Government's claims of national security necessity were contested, directly and indirectly, in a variety of ways.

In the Senate, the Democrats and Greens appeared unconvinced. They moved amendments to the Bill but were steadfast in their opposition to it. Labor's early rhetoric was similarly sceptical. It declared it would vote against the Bill partly because the measures were 'unnecessary'.[580] Some Opposition politicians rejected the idea that the threat of terrorism was so great as to justify extraordinary legislation that undermined fundamental rights.[581] The

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[577] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10531 (Daryl Williams, Attorney-General, Liberal).
[578] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1932.
[579] Commonwealth, *Parliamentary Debates*, Senate, 13 December 2002, 8155 (Robert Hill, Minister for Defence, Liberal); 8163 (George Brandis, Liberal).
[580] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6791 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).
[581] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7016 (Sharon Grierson, ALP); Senate Legal and Constitutional Legislation Committee, above n 318 —

Government's assertion that the Bill would give ASIO powers to prevent a terrorist attack did not, Labor argued, answer the question of why the agency should have 'unprecedented new powers' to secretly detain non-suspects.[582] Others criticised the Government for failing to provide any 'coherent statement … of the extent of the terrorist threat to Australia'.[583]

Additionally, opponents of the Bill cited an assessment made in March 2002 by ASIO's Director-General that there was no credible threat to Australia from international terrorists.[584] National security doubts were also pronounced in relation to particular provisions in the proposed legislation. Senator Robert Ray pointed out that, during the PJC inquiry, ASIO had been able to provide little evidence that children would likely be questioned or detained under the legislation.[585] Importantly, too, as Labor, the minor parties and Independents were aware [586] neither the UK nor US, both of which had experienced terrorist attacks, had powers similar to those proposed. This raised the question of how the legislation could be justified.[587]

The issue of national security necessity was also questioned given ASIO's other extensive, covert and intrusive powers.[588] As MPs and Senators pointed out[589] these enabled ASIO, under Ministerial warrant, to search premises, inspect and remove records and things and, in the process, to access computers and delete

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Report by Senator Barney Cooney (ALP) and Senator Bob Brown (Greens) 11–13. Senators Cooney and Brown recommended that the Bill should be rejected.

[582] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2002, 7115 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).

[583] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7021 (Gavan O'Connor, ALP).

[584] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2002, 7115 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).

[585] Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5383.

[586] See, for example, Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5372 (Linda Kirk, ALP); 5386 (Kerry Nettle, Greens).

[587] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6867 (Brendan O'Connor, ALP); Commonwealth, *Parliamentary Debates*, 23 September 2002, 7021 (Gavan O'Connor, ALP); Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7927 (Brian Grieg, Democrats).

[588] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2002, 7116 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).

[589] For example, Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6791 (Daryl Melham, ALP); Commonwealth, *Parliamentary Debates*, 23 September 2002, 7025 (Jill Hall, ALP); 7013 (Simon Crean, Leader of the Opposition, ALP).

and alter data.[590] They also empowered the agency to intercept telecommunications;[591] to obtain computer access warrants that authorised remote hacking of a target computer;[592] to install and use listening and tracking devices[593] and to inspect, open and copy articles carried by Australia Post and commercial couriers.[594]

However, detailed testing of the Government's national security claims was not pressed and would likely have been unproductive. Nor was the committee process that fed into the parliamentary debates particularly helpful in this regard. The PJC received a private briefing from ASIO. However, the purpose of its report was not to evaluate the security environment. It acknowledged that the Bill was 'the most controversial piece of legislation [it had] ever reviewed'.[595] It reported that most of the evidence before it called for the legislation to be 'abandoned in total or [for] key provisions [to be] removed'.[596] However, it described its task as one of finding 'solutions which would ameliorate major concerns'.[597]

Similarly, although the References Committee was tasked with developing an alternative regime for collecting intelligence, it concluded that 'there are occasions when the will of the elected Government to address perceived weaknesses in intelligence collection tools must be respected'. It could not, it said, 'second guess' the Executive in relation to the terrorist threat or the need for the legislation.[598] Instead, its goal was to 'review and adjust' the Bill for acceptability, compliance with international obligations and legal soundness.[599] Whether the objectives of the PJC or the References Committee were achievable was not explored.

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[590] *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*') ss 25(5) and (6). Footnotes 590–4 reflect legislation as it existed in January 2002.
[591] *TI Act* ss 9–11C.
[592] *ASIO Act* s 25A.
[593] Ibid ss 26, 26B, 26C.
[594] Ibid ss 27 and 27AA.
[595] Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 313, 1.
[596] Ibid 10.
[597] Ibid.
[598] Senate Legal and Constitutional References Committee, above n 320, 21–22.
[599] Ibid 22.

Labor's decision in December 2002 that ASIO should be given new powers to fill what the Government had regarded as a statutory gap[600] can be attributed to a number of factors. The References Committee's conclusions played a role as did its suggested model for what Labor sometimes called 'asking questions during interviews'.[601] Regional national security concerns may have been influential. The Government revealed that threats had been made against Australian diplomatic missions in Singapore and Timor L'Este.[602] Then the Bali bombings occurred on 12 October 2002, five days before the Senate began its second reading debate. The 'enhanced threat of terrorism in the wake of September 11 and the Bali bombings' was one of the reasons cited by Labor's John Faulkner in December 2002 for the ALP's decision to support an amended 'compulsory questioning' regime for ASIO.[603]

The bombings caused the largest single recorded loss of Australian lives in peacetime.[604] In a number of ways, they placed the issue of terrorism firmly in the spotlight once again. In a *Newspoll* for the *Daily Telegraph* newspaper in late October 2002, 66% of respondents said they were now more concerned about the risk of terrorist attacks within Australia.[605] Prime Minister Howard, too, suggested that terrorism was, in a sense 'sequential' — referring first to 9/11, then to Bali and finally telling Australians to 'disabuse' themselves of the notion that a terrorist attack could not happen at home.[606] He declared a National Day of

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[600] See, for example, Commonwealth, *Parliamentary Debates*, Senate, 21 October 2002, 5469 (Chris Ellison, Minister for Justice and Customs, Liberal). See also Commonwealth, *Parliamentary Debates*, Senate, 11 December 2002, 7794 (John Faulkner, Opposition Senate Leader, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10432 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).

[601] Commonwealth, *Parliamentary Debates*, Senate, 11 December 2002, 7794 (John Faulkner, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10432 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).

[602] Daryl Williams, 'The War Against Terrorism. National Security and the Constitution' (2002–03) (Summer) *Bar News. The Journal of the New South Wales Bar Association* 42, 42 (speech delivered on 3 October 2002). See also Commonwealth, *Parliamentary Debates*, Senate, 15 October 2002, 5148 (Eric Abetz, Special Minister of State, Liberal).

[603] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7925 (John Faulkner, ALP). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10564 (Simon Crean, Leader of the Opposition, ALP).

[604] John Howard, *Lazarus Rising. A Personal and Political Autobiography* (Harper Collins Publishers, 2010) 411. Two bombs were detonated in Kuta on the island of Bali, killing 202 people and injuring over 200 others. Eighty-eight Australians were among the dead. A third bomb, which exploded in Denpasar, did not result in any casualties.

[605] *Newspoll* for the *Daily Telegraph*, 18–20 October 2002.

[606] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 October 2002, 7499.

Mourning[607] and ordered a review of counter-terrorist legislation[608] — arguing that the 'War on Terror' must be fought in an 'uncompromising and unconditional fashion'.[609] Further, although there was no 'specific threat to Australia', the Government maintained that the nation's 'profile as a terrorist target [had] risen and we remain on heightened security alert'.[610] There were other national security anxieties. As the parliamentary sitting year drew to a close, an invasion of Iraq involving Australian forces looked increasingly likely. The Government later insisted that Australia's involvement in the Iraq War had not increased its exposure to terrorism.[611] Labor, however, was sceptical.

Additionally, the importance of national security divisions within Labor cannot be discounted. The Right's Kim Beazley and Robert Ray, both former Defence Ministers, both influential despite being outside the Shadow Ministry and both members of the ALP negotiating team,[612] were members of the PJC and had signed off on its report which, while criticising the original Bill, recommended its amendment rather than its rejection. Mr Beazley, as Opposition Leader, had proposed a compulsory questioning regime for ASIO in 2001. By the end of 2002, his rhetoric was even more overblown than that of the Government. On 13 December 2002, when the Government moved to lay the Bill aside, Mr Beazley warned that 'average' Australians were:

> [l]egitimate civilian and military targets. We may be killed at will … We may be killed here; we may be killed abroad … There are a whole variety of reasons why we are potentially to be killed. We are to be

[607] Prime Minister (John Howard), 'A National Day of Mourning' (Media Release, 17 October 2002).
[608] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 October 2002, 7499. On 24 October 2002, a new Intergovernmental Agreement on Australia's Counter-Terrorism Arrangements was negotiated. The Prime Minister, Premiers and Chief Ministers also agreed to the establishment of a National Counter-Terrorism Committee. See Prime Minister (John Howard), 'Meeting with Premiers and Chief Ministers' (Media Release, 24 October 2002).
[609] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 October 2002, 7499.
[610] Commonwealth, *Parliamentary Debates*, Senate, 15 October 2002, 5148 (Eric Abetz, Special Minister of State, Liberal).
[611] Cynthia Banham and Freya Petersen, 'Keelty Retreats on Terrorism Remarks', *The Sydney Morning Herald,* 17 March 2004.
[612] Robert Ray and Kim Beazley were members of the ALP Right. The other members of the team, from Labor's Left, were Daryl Melham and John Faulkner. See Mark Latham, *The Latham Diaries* (Melbourne University Press, 2006) 415–16.

> killed in our homes, we are to be killed in our clubs and we are to be killed in our public buildings.[613]

At the same time, there was also evidence of the bipartisan approach seen in debates on the SLAT Bill with Labor arguing that national security legislation should be above 'political point scoring'.[614]

Beyond this was Labor's own view of and familiarity with ASIO from its time in government; as a result of its continuing privileged access to national security agencies; and because of its acquaintance with the heads of those agencies. Speaking in June 2002 on the SLAT Bill, Robert Ray had described the IGIS and the heads of ASIO, ASIS, DSD and ONA as 'exemplary' appointments who 'would not conceive of … breaking the law or perverting Australian liberal democracy'.[615] And he had spoken of the fight that had engaged Labor — involving not only the Government but the 'stupidity' of the ALP's critics who had failed to understand the Bill's purpose.[616] This familiarity with security matters and security personnel was, of course, bolstered by Labor's past experience in Government and its future expectations. Senator Ray contended that Labor had approached the Bill 'as if we were in government … what would we do to deal with this particular issue' rather than with an 'oppositionist' mentality.[617]

3 *Communal Divisions*

Gross suggests that legislation is more acceptable if we believe it will apply to others and not to ourselves. In testing the effects of communal divisions on the ASIO (Terrorism) Bill [No 1], the legislation's wider context cannot be ignored. Speaking to the House of Representatives 9/11 condolence motion on

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[613] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10434–5.
[614] See, for example, Commonwealth, *Parliamentary Debates*, Senate, 13 December 2002, 8093 (John Faulkner, Opposition Senate Leader, ALP); 8097 (Robert Ray, ALP).
[615] However, Senator Ray conceded, in the case of the SLAT Bill that safeguards were needed because the quality of future heads of the intelligence services could not be guaranteed. Commonwealth, *Parliamentary Debates*, 20 June 2002, 2360. Nick Bolkus, from the Left faction, also spoke of his respect for ASIO, which stemmed from his contact with them during his time as Minister for Immigration and Ethnic Affairs. He was less confident, however, about ASIO's political masters. Commonwealth, *Parliamentary Debates*, Senate, 21 October 2002, 5458–9.
[616] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7606.
[617] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7605; Commonwealth, *Parliamentary Debates*, Senate, 13 December 2002, 8097.

17 September 2001, the Prime Minister referred to the 'evil minds' and 'moral outcasts of mankind' who planned the 9/11 attacks.[618] On 14 October 2002, in the aftermath of the Bali bombings, he spoke of the 'realities that confront Australia and the rest of the civilised world'; of the 'intrinsic evil' of terrorism; and of the 'indiscriminate and indescribable savagery' that had killed and injured 'young innocent Australians'.[619] Labor's Senate Leader, John Faulkner, contended that the Bali bombings exposed Australians' vulnerability.[620] And conjuring up threats involving both Asia and Islam, Labor's Kim Beazley referred to a South-East Asian jihad directed at Australians.[621]

The language of terrorism — in the Bill's title and, more particularly, as adopted by Government speakers in parliamentary debate — directed attention to 'the other' and sought to make a claim about the purposes and effects of the legislation: the prevention of terrorism, the punishment of terrorists and the protection of 'Australians and Australian interests'[622] from an extraordinary evil.[623] These representations were linked to the notion that the 'War on Terror' was a singular type of conflict — a battle against those who had 'no respect for basic and fundamental human values'[624] and did not play by the rules. The legislation was required, said the Government, to protect 'Australians and Australian kids'.[625]

Nonetheless, initial criticism of and opposition to the Bill and two of its most contentious impacts — on non-suspects and children — can be attributed partly to the Government's failures of communal divisions. Politicians' critiques of the Bill emphasised the potential for non-suspects,[626] 'ordinary Australians',[627] and

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[618] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 September 2001, 30740.
[619] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 October 2002, 7479.
[620] Commonwealth, *Parliamentary Debates*, Senate, 14 October 2002, 7497.
[621] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10434.
[622] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10427 (Daryl Williams, Attorney-General, Liberal).
[623] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1932 (Daryl Williams, Attorney-General, Liberal).
[624] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7046 (Warren Snowdon, ALP).
[625] Commonwealth, *Parliamentary Debates*, Senate, 13 December 2002, 8156 (Robert Hill, Minister for Defence, Liberal).
[626] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10433 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).

innocent Australians[628] to be detained and coercively questioned by ASIO. As a result, the Bill was said to affect 'the rights and civil liberties of all Australians'.[629] Second, and also problematic, was its application to children — themselves symbols of innocence and presumptively incapable of wrongdoing. Tellingly, in September 2002, Labor politicians spoke against the Bill as parents of adolescent children.[630]

In this context, Government amendments relating to children can be seen as designed to tie the Bill's application more closely to the 'other' — to suspects rather than non-suspects. Its spokespeople avoided references to 'children', preferring instead 'young people, 'people aged between 14 and 18' and juveniles.[631] It also linked provisions relating to children to suicide bombings.[632]

Also of note was the Bill's potential application to particular political constituencies and interest groups. The Greens, for example, appear to have thought that their own politicians might be targeted.[633] In addition, as a non-government party with activist constituencies and concerns, they were troubled by the Bill's implications for political activists as well as for journalists,[634] and those who supported national liberation movements.[635]

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[627] Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5386 (Kerry Nettle, Greens).
[628] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7929 (Len Harris, One Nation); 8157 (Bob Brown, Greens).
[629] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7927 (Brian Greig, Democrats).
[630] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6796 (Robert McClelland, Shadow Attorney-General, ALP); 6807 (Kelly Hoare, ALP).
[631] See, for example, Commonwealth, *Parliamentary Debates*, Senate, 11 December 2002, 7694 (Chris Ellison, Minister for Justice and Customs, Liberal).
[632] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10429 (Daryl Williams, Liberal); Commonwealth, *Parliamentary Debates*, 11 December 2002, 7694 (Chris Ellison, Minister for Justice and Customs, Liberal).
[633] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7929 (Kerry Nettle, Greens). Perhaps with himself and Senator Nettle in mind, Senator Bob Brown questioned the Bill's possible application to parliamentarians — especially to those who might hold the balance of power in the Senate. See Commonwealth, *Parliamentary Debates*, Senate, 11 December 2002, 7682–3.
[634] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7929 (Kerry Nettle, Greens).
[635] Commonwealth, *Parliamentary Debates*, Senate, 11 December 2002, 7702–3 (Kerry Nettle, Greens). Senator Nettle referred to supporters of West Papuan or Kurdish independence who might have information about OPM or PKK activities.

Finally, the Bill was spoken about in terms of its 'otherness' — as 'alien',[636] as the potential basis for a police state,[637] as turning ASIO into a secret police,[638] as enabling people to be 'snatched off the streets', [639] as fundamentally undemocratic[640] and eroding 'key legal rights'.[641]

While the Democrats, Greens and One Nation supported amendments to improve the Bill, their opposition to its third reading was closely linked to its application to children and its potential effects on ordinary Australians. The Democrats' Justice spokesman, Brian Greig, argued that 'the legislation does apply to all Australians, not just those suspected of involvement in terrorist activities. The scope of this bill is perhaps its most disturbing flaw'.[642] However, with the presentation of the References Committee report, Labor substantially shifted its position. It accepted that as a 'front line' organisation in the 'War on Terror',[643] ASIO needed powers to compel answers to questions if combined with substantial protections for 'Australian citizens'.[644] Nevertheless, important in Labor's decision to reject Government amendments in December 2002 was the Government's continued insistence that the Bill apply to children[645] and the inclusion of measures that adversely affected 'Australian citizens'.[646]

The following section deals with the ASIO (Terrorism) Bill [No 2]. To minimise repetition, it considers the major issues thrown up by the first ASIO (Terrorism) Bill. It then considers the assumptions of constitutionality and separation in the light of Parliament's engagement with both Bills.

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[636] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2002, 7117 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).
[637] Commonwealth, *Parliamentary Debates*, 23 September 2002, 7036 (Warren Snowdon, ALP).
[638] Commonwealth, *Parliamentary Debates*, Senate, 21 October 2002, 5466 (Bob Brown, Greens). Senator Brown quoted from an editorial in *The Sydney Morning Herald* of 16 September 2002.
[639] Commonwealth, *Parliamentary Debates*, 19 September 2002, 6817 (Tanya Plibersek, ALP).
[640] Commonwealth, *Parliamentary Debates*, 17 October 2002, 5386 (Kerry Nettle, Greens).
[641] Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5370 (Linda Kirk, ALP).
[642] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7927.
[643] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7925 (John Faulkner, Opposition Senate Leader, ALP).
[644] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10534 (Simon Crean, Leader of the Opposition, ALP).
[645] Aged 14 and over.
[646] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10534, 10564 (Simon Crean, Leader of the Opposition, ALP).

VII AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION LEGISLATION AMENDMENT (TERRORISM) BILL 2002 [NO 2]

A *Context and Process*

Through the summer of 2002–2003, Australians lived with warnings from both the Government and the Opposition that, without the passage of an ASIO (Terrorism) Bill in some form, their safety could not be guaranteed. After the Bill was laid aside, the Government made a series of announcements designed to keep national security at the front of public consciousness over Christmas — traditionally a 'news free' period. On 19 December 2002, the Prime Minister announced an expansion of Australia's Special Forces counter-terrorism capacity and the establishment of a new Special Operations Command in the Australian Defence Force ('ADF') to enhance ADF responsiveness to terrorists. He also asked the Chief of the Defence Force to explore the possibility of using reservists to assist in responding to domestic terrorism threats and incidents.[647]

On 27 December 2002 John Howard foreshadowed a three-month, $15 million National Security Public Education Campaign. This began two days later with newspaper and television advertisements. Its purpose, according to the Prime Minister, was 'to inform, re-assure and enlist the public in looking out for Australia in the heightened terrorist circumstances in which we now find ourselves'. Although Mr Howard emphasised that the campaign was not designed to alarm Australians or alter their 'fun-loving' and 'free' nature, he described the campaign as designed to encourage reporting of 'suspicious behaviour' to a hotline capable of handling a massive 1200–2000 calls per hour.[648]

On 23 January 2003, Mr Howard farewelled *HMAS Kanimbla* before it sailed to the Persian Gulf as part of a multinational interception force pre-positioned for possible military action against Iraq.[649] In February 2003, all Australian

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[647] Prime Minister (John Howard), 'Expansion of Special Forces Counter Terrorist Capability and New Special Operations Command' (Media Release, 19 December 2002).
[648] Prime Minister (John Howard), 'Transcript of Press Conference, Sydney' (27 December 2002) <http://www.pandora.nla.gov.au/pan/10052/20031121-0000/www.pm.gov.au/news/interviews/2002/interview2052.htm>.
[649] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 February 2003, 10646 (John Howard).

households received a National Security Campaign Booklet entitled *Let's Look Out for Australia*. *Protecting our Way of Life from a Possible Terrorist Threat.* The package also included a fridge magnet advising Australians to be 'Alert but not Alarmed' and providing National Security Hotline contact numbers.[650] On 18 March, the Prime Minister announced that Australian troops, already in the Gulf, would be sent into Iraq as part of 'coalition operations'.[651]

From 18–20 March, the House of Representatives debated a motion proposed by Mr Howard to affirm the decision, abhor Iraq's support of international terrorism and declare that its weapons of mass destruction constituted a 'real and unacceptable threat to international peace and security'.[652] On 20 March, the invasion of Iraq began. Immediately following the endorsement of the Prime Minister's motion on party lines, the ASIO (Terrorism) Bill [No 2] was introduced into the House of Representatives. This was the legislation that had left the lower house a final time on 13 December 2002, together with some deletions that had been made, probably for s 57 purposes.[653] The Bill's content and the timing of its introduction signalled the Government's willingness to use it as a double dissolution trigger.[654] The second reading debate commenced on 26 March, the day before Parliament rose for a six-week break. At this stage, Labor reiterated the fundamental principles on which it disagreed with the Government. In the words of its spokesperson, Daryl Melham, the Bill remained 'unacceptable' with issues of 'fundamental principle' dividing the Opposition and Government benches. These were 'the right to legal advice of choice and the right not to be detained without suspicion or charge'.[655] This meant access to a lawyer of choice throughout questioning and a 'questioning regime' said to be based on investigation provisions in the *Crimes Act* and other legislation.[656] Further, Labor

[650] Josh Fear, 'Under the Radar. Dog-Whistle Politics in Australia' (Discussion Paper Number 96, The Australia Institute, 2007) 28.
[651] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2003, 12505.
[652] Commonwealth, *Votes and Proceedings No 83*, House of Representatives, 20 March 2003, 806–7.
[653] Department of Parliamentary Services (Cth), 'Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 2]', *Bills Digest* No 133 of 2002–03, 26 March 2003.
[654] Ibid.
[655] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2003, 13594.
[656] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 2003, 13765 (Daryl Melham, Shadow Minister for Justice and Customs, ALP).

insisted that the Bill not apply to minors and that any children suspected of involvement in terrorism be dealt with by the criminal justice system.[657] It said that it would 'pursue' its amendments — possibly its 2002 amendments, though this was not clear — in the Senate.[658] At the same time, it again accepted that ASIO needed new powers to deal with terrorism.[659]

The Bill passed the House of Representatives without amendment after a little over 3¼ hours of debate. Opposing the legislation were Labor, Greens MP Michael Organ, and Independents Bob Katter, Andrew Wilkie and Tony Windsor.[660] The Bill was introduced into the Senate on 13 May 2003. Prior to this, however, a new ALP negotiating team had commenced talks with the Government.[661]

On 11 June 2003, the Government announced that it had, 'for the sake of community safety', offered the ALP a compromise deal said to address Labor's remaining sticking points.[662] By 17 June, following a meeting of the Labor caucus, the ALP had decided that it would move but not insist on its amendments. It made a public announcement to this effect.[663]

On 19 June, debate was suspended to allow for further negotiations between the Government and Labor on new detention warrants. After further amendments had been agreed between the major parties, the Bill passed the Senate on 25 June. On 26 June, the House of Representatives disagreed with nine of the Senate's amendments. However, the Bill passed the Parliament after the Senate failed to press its changes. It received Royal Assent on 22 July 2003.

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[657] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2003, 13595 (Daryl Melham, ALP).
[658] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2003, 13598 (Daryl Melham, ALP).
[659] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2003, 13606 (Arch Bevis, ALP); Commonwealth, *Parliamentary Debates*, Senate, 17 June 2003, 11669 (John Faulkner, Opposition Senate Leader, ALP).
[660] Commonwealth, *Votes and Proceedings,* No 87, House of Representatives, 27 March 2003, 844–5.
[661] Commonwealth, *Parliamentary Debates*, Senate, 18 June 2003, 11796 (Chris Ellison, Minister for Justice and Customs, Liberal). The team no longer included Kim Beazley — see Commonwealth, *Parliamentary Debates*, House of Representatives, 20 March 2003, 13176 (Kim Beazley, ALP).
[662] Attorney-General (Daryl Williams), 'Compromise for the Sake of National Security' (Media Release, 11 June 2003).
[663] Commonwealth, *Parliamentary Debates*, Senate, 17 June 2003, 11673 (John Faulkner, Opposition Senate Leader, ALP).

B *ASIO (Terrorism) Bill [No 2] — A Summary*

For the sake of completeness, this section explores debates on the ASIO (Terrorism) Bill [No 2] giving particular attention to the issues previously focused on in this chapter. These are the questions of who would issue warrants and supervise questioning, in addition to detention, lawyers and children. The removal of the evidential burden placed on defendants by proposed ss 34G(4) and (7) also remained a point of contention.

1 *Issuing Warrants and Supervising Questioning*

In 2002, an outstanding disagreement between the Government and the Senate was whether there should be a separate position of 'issuing authority' filled by consenting federal magistrates and judges appointed in their personal capacities together with persons appointed by regulation. In 2003, these issues — the involvement of federal judicial officers and (potentially) executive appointees in authorising warrants — disappeared from view.

This was likely due to the agreement reached with the Government in June 2003, which Labor regarded as establishing a questioning rather than a detention regime. In late June 2003, Labor's Senate Leader simply referred to the appointment of judicial officers as issuing authorities as one of the safeguards of the legislation and made no mention of persons appointed by regulation.[664]

The issue of who would be appointed as a 'prescribed authority' had, essentially, been agreed to by the Government and Opposition in 2002. This involved cascading classes of former superior court judges, serving state and territory judges and presidential AAT members appointed consensually and for a single, three-year term.[665] In 2003, however, Government amendments removed the single, three-year term requirement for appointees in a move that may have improved workability but reduced the appearance of independence from the

[664] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2003, 12594.
[665] Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth) sch 1 item 24 proposed s 34B.

Executive Government at least for retired judges and untenured AAT appointments.[666]

2 *Detention*

Three issues relating to detention were dealt with in 2003. First, was the question of detention itself. Senate amendments proposed by Labor in 2002 but rejected by the Government had provided for questioning in 'custody'. They also envisaged that questioning would occupy no more than 20 hours in a seven-day period. There would be an initial block of four hours, which could be extended twice in blocks of eight hours by the prescribed authority with some conditions for each extension. Second, was the issue of warrant length and length of continuous detention. In 2002, detention warrant length was set at 48 hours and the maximum amount of continuous detention under multiple warrants at 168 hours. Third, was the issue of warrant renewal. This had not been the subject of much attention. The PJC had recommended that after 168 hours of continuous detention a person should either be charged or released but not addressed the questions of new warrants or immunity from further warrants.[667] The Senate References Committee had recommended that if a person had been subject to two consecutive warrants, then no further warrants could be issued for the next seven days.[668]

On 19 June, the Government introduced amendments to the detention regime that were the result of its negotiations with Labor. These sought to replace 48-hour detention warrants and continuous detention of up to 168 hours under multiple warrants. Instead, a single warrant could authorise up to 168 hours continuous detention. Questioning could occur in three blocks of eight hours. Within each eight-hour block, protocols to be drawn up by the Government would set the maximum period of continuous questioning and allow for breaks. The prescribed authority could permit questioning to continue at the end of eight and 16 hours if satisfied that doing so would substantially assist the

[666] *Schedule of Senate Amendments* (10) Govt (10) [Sheet RA231].
[667] Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 313, recommendation 3.
[668] Senate Legal and Constitutional References Committee, above n 320. Recommendation 7.

collection of intelligence relevant to a terrorism offence (one of the grounds of a detention warrant) and that questioning had been conducted properly and without delay (borrowing from the extension of investigation provisions in Part IC of the *Crimes Act*). However, the decision to extend questioning could be made in the absence of the person, their lawyer and in the case of juveniles in the absence of their parent, guardian or other representative. Once a person had been questioned for 24 hours, excluding dead time, no further questioning could occur and the person would be released.[669] Labor abandoned its earlier proposals, including its insistence that an initial extension of questioning could not occur unless a detainee had a lawyer and that an extension of questioning beyond 12 hours should be contingent on the threat of an imminent terrorist act.

In relation to new warrants, Labor appears to have been under the impression in June 2003 that once a person had been subject to 168 hours continuous detention, they would either be released or charged and not be subject to further warrants.[670] It was only as a result of repeated questioning by the Greens that Labor realised that the Government's amendments neither precluded serial warrants nor stipulated additional criteria for them.[671] This was later described by the Opposition's Senate Leader as 'almost the last straw'.[672] As a result, consideration of the disputed clauses was suspended for six days while further private negotiations with Labor occurred.[673]

On 25 June, new Government amendments were introduced relating to new warrants. They required the Minister and the issuing authority to take account of a person's previous detention and only request or issue a new warrant if satisfied that it was justified by information additional to or materially different from that known to the Director-General of Security when the previous warrant

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[669] See the amendments moved by Senator Ellison and postponed — Commonwealth, *Journals of the Senate*, No 81, 19 June 2003, 1901–4. Most were later passed by the Senate — see, for example *Schedule of Senate Amendments* (25) Govt (21), (26) Govt (22), (35) Govt (28) [Sheet RA231].
[670] Commonwealth, *Parliamentary Debates*, Senate, 19 June 2003, 11976–9 (John Faulkner, Opposition Senate Leader). Senator Faulkner relied on the PJC's report (11977).
[671] Commonwealth, *Parliamentary Debates*, Senate, 19 June 2003, 11972, 11974, 11979 (Bob Brown, Greens).
[672] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2003, 12592 (John Faulkner, Opposition Senate Leader, ALP).
[673] Lincoln Hall, 'Deadlock over ASIO Powers', *The Canberra Times,* 25 June 2003.

had been sought.[674] However, there was no barrier to ASIO using information obtained from earlier questioning or for the information to be 'substantially' different to that already in the Director-General's possession.[675] And although an issuing authority could not issue a new warrant if the person was still being detained under the earlier warrant, the warrant application process could commence while the person was still in custody.[676] There was nothing to stop a person being detained again under a new warrant immediately after being released.

Labor argued that the changes should be supported for four reasons. First, on the basis that new material would be needed to support further warrants. Second, because of other safeguards in the Bill.[677] Third, by arguing that a person should not be able to 'effectively inoculate themselves from any further questioning'.[678] Fourth, because there would be no 'rolling warrants'[679] — the amendments would sever 'the nexus of continued detention'.[680] This apparently guaranteed nothing more than that a person would have 'time to check in with the family … time to make phone calls'.[681]

On 25 June, Labor's amendments to reduce the maximum period of continuous detention from 168 hours to 72 hours were passed by the Senate.[682] However, the ALP had already flagged that it would not insist on its changes in the face of Government opposition.

The Government's earlier proposal allowing rolling 168-hour warrants and its new amendments did, however, raise constitutional questions. In relation to the new amendments, this was because they enabled adults and certain child

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[674] *Schedule of Senate Amendments* (15) Govt (2), (19) Govt (3), (24) Govt (4) [Sheet RA241].
[675] The Law Council of Australia proposed a number of additional criteria for subsequent warrants. These were referred to by Senator Brown (Greens) — see Commonwealth, *Parliamentary Debates*, Senate, 25 June 2003, 12599–600 (Bob Brown, Greens).
[676] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2003, 12608 (Robert Ray, ALP; Chris Ellison, Minister for Justice and Customs, Liberal).
[677] These included the warrant application process, the availability of judicial review, the supervision of questioning by the prescribed authority, the presence of the IGIS during questioning and the sunset clause. Commonwealth, *Parliamentary Debates*, Senate, 25 June 2003, 12593–4 (John Faulkner, Opposition Senate Leader, ALP).
[678] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2003, 12593 (John Faulkner, ALP).
[679] Ibid.
[680] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2003, 12796.
[681] Commonwealth, *Parliamentary Debates*, Senate, 26 June 200 3, 12796 (John Faulkner, ALP).
[682] *Schedule of Senate Amendments* (16), (23), (37) Opp (1)–(3) [Sheet 2953].

suspects to be held on a single detention warrant lasting 168 hours without a high barrier to the issue of new warrants. This may have raised questions about punitiveness and about the potential involvement of executive appointees and federal judicial officers in issuing warrants. The Greens questioned the validity of the new amendments, claiming that earlier Government advice that detention warrants were on solid constitutional ground was based on the original short detention warrant period of 48 hours as well as other safeguards. They were interested in how recently the Government's constitutional advice had been updated. And they suggested that the Senate should insist on a 72-hour detention period as a way of bolstering constitutionality.[683]

Some mild interest in matters constitutional and a general call for the Government's legal advice was made by Labor.[684] However, the issue was not pressed when the Government asserted that its role was to tell the Senate the legislation was constitutional but not to table its advice.[685] At this stage, it is likely that the major parties had exhausted their interest in further negotiations and amendments.

3 *The Right to Silence*

The only point of contention that remained between the Government and Opposition on this issue was whether the evidential notes in proposed s 34G should be removed. However, Labor failed to insist on its amendments.

4 *Legal Representation*

The original ASIO (Terrorism) Bill [No 1] had not guaranteed a detainee access to either a lawyer of choice or a security-cleared lawyer. In 2002, however, the

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[683] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2003, 12784 (Kerry Nettle, Greens); 12786–7 (Bob Brown, Greens). This was likely a reference to the report of the Senate Legal and Constitutional Legislation Committee, above n 318, 3. The report quoted advice from the Attorney-General's Department referring to the length of the warrant period together with the warrant-issuing process, protections accorded to detainees and the intelligence-gathering purpose of warrants as evidence that they served legitimate, non-punitive purposes.
[684] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2003, 12792 (Robert Ray, ALP).
[685] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2003, 12784–5, 12787, 12792–3 (Chris Ellison, Minister for Justice and Customs, Liberal).

Senate's position had been, in general, to guarantee lawyer of choice except in exigent circumstances. Further, Senate amendments had provided that questioning could not continue after an initial four-hour period without the presence of a detainee's lawyer. These amendments had been rejected by the Government in 2002.

Access to a lawyer of choice remained the position of Labor and the minor parties when the ASIO (Terrorism) Bill [No 2] was introduced. In 2003, Government Senate amendments were introduced as the result of private negotiations with the Opposition. These removed references to 'approved lawyers'. They required detention warrants, but not questioning warrants, to allow a person to contact a 'single lawyer of the person's choice' subject to considerable exceptions[686] and without the safeguards the Senate had insisted upon in 2002.[687] The lawyer's role remained circumscribed.[688] Requests for extensions of questioning could be made in their absence.[689] Contact between them and a warrant subject could be monitored. Labor did introduce amendments, passed by the Senate, designed to narrow the grounds on which a detainee could be refused access to their lawyer.[690] However, it did not press them in the face of House of Representatives' disagreement. Additionally, as a result of negotiations with Labor and possibly in exchange for lawyer of choice amendments, the penalty for breach of non-disclosure requirements by lawyers was increased from two to five years imprisonment.[691]

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[686] *Schedule of Senate Amendments* (17), (29), (55) Govt (15), (25) (45) [RA231]. The amendments required a person to 'identify' a particular lawyer. ASIO could then object to that lawyer in a hearing that excluded both the person and their nominated legal adviser. A substitute lawyer could then be identified and the process repeated. Potentially, a detained person could be without a lawyer for their entire period of detention.

[687] For example, a guarantee of a lawyer of choice except in exigent circumstances, a requirement that questioning beyond four hours could not proceed in the absence of a detainee's lawyer, and a requirement that the prescribed authority assist in finding a replacement lawyer if ASIO established that the detainee's proposed lawyer was a security risk. Democrat amendments relating to lawyers were not supported by the Opposition.

[688] The lawyer's role was limited to providing advice during breaks in questioning and seeking clarification of ambiguous questions.

[689] *Schedule of Senate Amendments* (35) Govt (28) [Sheet RA231].

[690] *Schedule of Senate Amendments* (56)–(58) Opp (7)–(9) [Sheet 2953]. This was that there was a 'real possibility' that either the lawyer would alert someone involved in a terrorism offence that an offence was being investigated or that evidence would be destroyed.

[691] *Schedule of Senate Amendments* (65) Govt (52) [Sheet R321].

On 26 June 2003, the final day of debate on the ASIO (Terrorism) Bill [No 2] Labor's spokespersons claimed that the party had secured representation by a lawyer of choice.[692] More realistically, the ALP's Duncan Kerr called provisions relating to lawyers 'extraordinarily limited'.[693]

5 *Children*

In 2002, Labor, the minor parties and Independents had insisted that the ASIO (Terrorism) Bill [No 2] not apply to children. They regarded the Government's proposals as a breach of Australia's obligations under the CRC. They rejected Government amendments that would have limited the Bill's application to children over the age of 14 who were terrorism suspects. And they were not persuaded by Government amendments that afforded some recognition of vulnerability — for example, the limitation of continuous questioning of minors to two hours and provisions enabling them to contact a parent or guardian and be represented.

On 23 June 2003, the Government moved amendments supported by Labor but opposed by the Greens and Democrats that increased the age at which the ASIO (Terrorism) Bill [No 2] applied to child terrorism suspects to 16 years.[694] Attempts by the Greens to have the Government or Opposition explain how the changes accorded with CRC obligations were rejected.[695] The creation of a parallel criminal justice system for children, without the protections afforded by the *Crimes Act*, was described by Labor as a 'fair outcome … [and] a reasonable balance in the circumstances'. The Opposition also pointed to what it said were the 'massive' differences between the ASIO (Terrorism) Bill [No 2] and the

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[692] See, for example, the statements by Labor's Shadow Justice spokesperson and Shadow Attorney-General, respectively, at Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17676 (Daryl Melham); 17677 (Robert McClelland).
[693] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17684.
[694] *Schedule of Senate Amendments* (39)–(46), (48) Govt (30)–(37), (39).
[695] The Minister for Justice and Customs said that legal advice was not normally tabled and rejected the idea that the Bill breached the Convention. He noted the 'best interests' principle was not invariably paramount and argued that detention of children would not be arbitrary as the Bill was proportionate and reasonable in all the circumstances. See Commonwealth, *Parliamentary Debates*, Senate, 23 June 2003, 12185. Labor's John Faulkner referred to the improvements in the Bill, the range of views in the ALP and argued that 'in the absence of other information, the words uttered and views expressed by a minister … have some standing'. Commonwealth, *Parliamentary Debates*, Senate, 23 June 2003, 12187.

original ASIO (Terrorism) Bill [No 1][696] and noted that 16 was the age at which minors acquired certain freedoms and marked the age of consent.[697] At this stage, it was clear that the Opposition was uninterested in exploring the question of compliance with the CRC. It passed off Greens' questions to Senator Ellison, arguing that it was for the Executive Government to provide opinions and that 'the words uttered and views expressed by a minister … have some standing'.[698]

6 *The Legislation as Passed*

Before turning to an examination of the usefulness of Gross's assumptions as drivers of the legislative process, it is worthwhile briefly describing the ASIO (Terrorism) Bill [No 2] as it passed the Parliament on 26 June 2003 after the Senate voted not to insist on amendments rejected by the House of Representatives.[699]

The legislation contained safeguards not present when the first ASIO (Terrorism) Bill was introduced in March 2002. These included requirements relating to interpreters, protocols governing questioning, expanded annual reporting requirements on the legislation's operation and a statutory review. The IGIS's role was bolstered as was that of the prescribed authority. Additional grounds were required for the issuing of new warrants. The continuation of detention was more closely linked to questioning but, with allowance for 'dead time', still enabled detention to be lengthy.

However, fundamental and troubling problems remained. The legislation continued to apply to adults not suspected of involvement in any of the widely defined Commonwealth terrorism offences. It also applied to suspects more appropriately dealt with by the criminal justice system. Detainees could be unrepresented throughout their detention and the role of their lawyers was circumscribed. Children aged 16 and over who were criminal suspects could be

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[696] Commonwealth, *Parliamentary Debates*, Senate, 23 June 2003, 12186–7 (John Faulkner, Opposition Senate Leader, ALP).
[697] Ibid.
[698] Commonwealth, *Parliamentary Debates*, Senate, 23 June 2003, 12187 (John Faulkner, ALP).
[699] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2003, 12799. The Democrats, Greens, One Nation and Independents Meg Lees and Shayne Murphy effectively voted against the Bill by continuing to insist on the Senate's amendments.

detained. The possible length of detention under a single warrant had been increased by 3½ times. In allowing the warrant-issuing process to commence while a person was still being detained, the legislation potentially enabled a person to be 'picked up' and again detained almost immediately after being released. Many of the Senate's 2002 amendments, some of them important, had been abandoned. This was likely the result of bargaining between the Government and Opposition.

VIII CONCLUSION

This part of Chapter Four has examined parliamentary committee reports and *Hansard* to determine whether Parliament's response to the two ASIO (Terrorism) Bills can be explained in terms of Gross's assumptions of constitutionality and separation. In this section I consider the usefulness of those assumptions and ask whether other factors were influential.

A *The Assumption of Constitutionality*

1 *Constitutional Power*

Of the parliamentary committees that inquired into the ASIO (Terrorism) Bill [No 1], only the References Committee engaged closely with the issue of constitutional power. Its terms of reference included the question of whether the Bill was 'constitutionally sound'.[700] The Committee took this to include the heads of power question and gave it detailed consideration. However, given the extraordinary powers proposed for ASIO, this was uncertain and unexplored terrain. The Committee's inquiry was provided with little in the way of advice from the Government. It heard a diversity of opinion from the legal academy. It concluded that a case for constitutional power could be made out. Perhaps for this reason, the Senate did not pursue the heads of power question.

Three conclusions can be drawn. First, the References Committee did assume that the Bill needed appropriate constitutional foundations. Second, the

[700] Senate Legal and Constitutional References Committee, above n 320, ix.

threshold test for this issue was whether a case for validity on heads of power grounds could be made out. Third, the Government did not regard the question of constitutional power as a cooperative venture between it and Parliament.

2 *Constitutional Limitations*

The heads of power question was only one of the potential stumbling blocks for legislation as extraordinary as the ASIO (Terrorism) Bill [No 1]. Parliamentary committees and Parliament itself devoted particular attention to separation of powers issues — what the References Committee called the 'most obvious' constitutional questions.[701] Chapter III cases did not provide certain answers for the legislature. However, they did evince some useful principles, some potential lessons about workability and, perhaps as importantly, they spoke to the question of fair process involving independent decision-makers.

That Chapter III was an important driver of the legislative process in relation to the ASIO (Terrorism) Bill [No 1] is evidenced in a number of ways. First, it is seen in general statements about the legislature's role. Parliament, said Labor lawyer and senator Nick Bolkus, had deemed constitutionality 'a serious issue' that demanded its special attention. It was a matter about which Labor was not prepared simply to trust the Government.[702] Speaking about the decision in *Lim*, Labor's Robert McClelland asked how parliamentarians could be regarded as competent legislators if they did not have regard to the *Constitution*. Their role, as he saw it, was to pass laws that would withstand legal challenge.[703]

Second, was the close consideration given to Chapter III issues — relating to warrant issuing, supervision of questioning and detention — by parliamentary committees and by Parliament itself, especially the Senate. Third, were the protracted disputes between the Opposition and minor parties on one hand and the Government on the other that occurred throughout 2002. Fourth, was the Senate's demand that the Government produce its Chapter III advice — an

[701] Ibid 32.
[702] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7615.
[703] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6799.

important indication that Parliament regarded itself as a legitimate constitutional actor.

Fifth, Chapter III considerations fed into proposals for the redesign of ASIO's questioning and detention regime. The PJC made a number of recommendations on Chapter III-related matters that were the result of the submissions and evidence it garnered from legal experts. Some of its recommendations were reflected in the Government's House of Representative amendments in September 2002. What is also of interest is that the References Committee, not content with the PJC's conclusions, looked anew at Chapter III issues and produced different recommendations on warrant issuing, prescribed authorities and detention.

Sixth, the importance of its constitutional disagreement with the Government was such that Labor commissioned and tabled its own constitutional advice in December 2002.

Seventh, when Parliament rose for the year on 13 December 2002, constitutional issues were among the important 'sticking points' for both Government and non-government politicians. Seemingly intractable disagreement related to the use of serving federal magistrates and judges as issuing authorities, the need for separate offices of issuing and prescribed authorities and the question of detention. In other words, constitutional disagreements were among the matters that had the potential to provoke a double dissolution election.

In 2003, however, constitutional issues initially receded from view after talks occurred and an agreement was reached between Labor and the Government. In mid-June 2003, it was an issue with Chapter III implications — rolling warrants — that nearly derailed their accord and resulted in five days of private negotiations.

Hansard also reveals limits to Parliament's capacity to engage meaningfully with the Government on constitutional questions. These limits are revealed in the following ways. First, in the Government's refusal to make its constitutional advice available. It saw its role merely as assuring the Senate that the Bills were constitutional. It also trivialised the Senate's requests. It saw them as a stale joke

— 'the usual chestnut'[704] — and remarked that differing legal opinions were 'nothing unusual'.[705] These views created difficulties for both the Government and the Senate in their attempts at negotiating complex legal questions. Second, in the Government's belated provision in 2002 of the gist of its advice only. It was perhaps for this reason that so much confusion resulted in the Senate about the use of serving state and territory judges as prescribed authorities. Third, until the eleventh hour, this paraphrased advice was available only to the Opposition and on confidential terms. This limited the ability of the minor parties, also concerned with constitutionality, to play a meaningful role in the legislative process. That their contribution could be important was shown most clearly in 2003. It was the Greens who realised that the ASIO (Terrorism) Bill [No 2] allowed for rolling warrants.

Parliamentary debates also reveal the limits to Opposition interest in constitutional questions. The negotiations between the Government and Labor in 2003 resulted in a regime that was arguably less robust than Labor had insisted upon in 2002. In addition, some Chapter III questions remained after changes to repeat warrant provisions were made in late June 2003. These were not pursued by the Opposition. It is possible that the following factors may explain its disengagement — exhaustion of the negotiation process, and the desire to pass the legislation and dispense with an issue that had attracted ongoing public controversy and Government allegations of national security weakness.

3 *Legal Norms*

(a) The Right to a Lawyer

In 2002, the right to a lawyer was a focus of two parliamentary committee inquiries and recommendations. It was also pursued by the Senate. The Government's 'approved lawyer' proposals and its refusal to accept non-government party amendments relating to a detainee's lawyer of choice was an important 'sticking point' for the Senate in December 2002. While the role of the lawyer would have been limited, the amendments had some practical value. For

[704] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7615.
[705] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7616.

example, they would have required the prescribed authority to assist a person to find a lawyer if their nominated lawyer was rejected. In addition, the Senate's amendments relating to lawyers had important consequences in relation to the length of detention. Questioning could not extend beyond four hours unless a warrant subject had access to a lawyer. And it could only continue beyond 12 hours if an imminent terrorist attack was threatened.

Lawyer of choice amendments were pursued by the Opposition for some part of 2003 and by the minor parties throughout this time. Probably as a result of negotiations between the Government and Opposition in 2003, approved lawyer provisions were removed and the Senate's 2002 amendments not pressed. There were some (marginal) improvements — for instance, a lawyer was entitled to a copy of a detainee's warrant.[706] However, lawyer of choice provisions remained hemmed around with restrictions.

Labor's justification for its changed position — that it had secured lawyer of choice amendments — demonstrated the political importance of the claim that the right to legal representation had been upheld. It is clear, however, that Labor had conceded considerable ground. The reasons why this might have been so are explored below.

(b) The Right to Silence

The ASIO (Terrorism) Bill [No 1] was criticised by the Scrutiny of Bills Committee, the PJC, Labor, the minor parties and by some Government backbenchers for negating the right to silence and the privilege against self-incrimination.[707] In the face of these criticisms, the Government amended the Bill to provide a use immunity in relation to a warrant subject's compelled evidence in a prosecution for a terrorism offence.

Parliament's failure, save for the minor parties, to press for a derivative use immunity can likely be attributed to the influence of the References Committee.

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[706] *ASIO (Terrorism) Act* sch 1 item 24 s 34U(2A).

[707] See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6809 (Kelly Hoare, ALP), 6820 (Tanya Plibersek, ALP), 6805 (Petro Georgiou, Liberal); Commonwealth, *Parliamentary Debates*, Senate, 11 December 2002, 7681 (Kerry Nettle, Greens).

It noted that, in the previous decade, 'derivative use immunities [had] been largely abandoned' in Australian legislation governing ad hoc and standing royal commissions.[708] It acknowledged that, in its tendency to abolish derivative use immunity, Australia was out of step with comparable democratic nations.[709] Despite this, it did not recommend the inclusion of derivative use immunity in the ASIO (Terrorism) Bill [No 1] referring, instead, to the view of one submitter that derivative immunity was 'largely a lost argument'.[710] The Committee's conclusions were important for Labor and demonstrate the power of two important drivers for the party. These were decontextualising and the normalisation of exceptions.

(c) The Rights of Children

That children require special protections because of their age and vulnerability is recognised in Australian statutes and mandated by international treaties to which Australia is a party. The importance of these norms is reflected in the views of the PJC and References Committee. They were similarly influential when Parliament considered the ASIO (Terrorism) Bill [No 1] and rejected its application to children. This issue was an important 'sticking point' throughout 2002, despite Government amendments that inserted some protections for children and restricted the Bill's application to children aged 14 and above who were terrorism suspects.

In 2003, the minor parties continued to oppose the legislation's application to children. Likely as a result of negotiations with Labor, however, common ground was reached in 2003 with the Government that the legislation should apply to suspects aged 16–18. Some of the reasons for Labor's decision to compromise are explored below.

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[708] Senate Legal and Constitutional References Committee, above n 320, 62.
[709] Ibid 63–64.
[710] Ibid. The quote was from Dr Stephen Donaghue.

B *The Assumption of Separation*

1 *Temporality*

In this section, I assess the part that the assumption of temporality played in Parliament's responses to the ASIO (Terrorism) Bills. Gross argues that emergency laws are accepted because it is assumed that the emergency will end and exceptional laws will terminate.

The role played by sunsetting in debates around the ASIO (Terrorism) Bills was more complex than Gross suggests. The Government's position for much of 2002 was that a sunset clause was inappropriate because of the indefinite nature of the 'War on Terror'. Labor and the minor parties pressed hard for a sunset clause but, in doing so, were motivated by a variety of considerations. Sunsetting had symbolic functions. It indicated exceptionality. It signalled that derogations from fundamental rights should not be permanent. It acted as a warning against legislative creep. It reflected a precautionary approach because no one knew how the legislation might be used in the future. As importantly, its function was as an accountability mechanism combined with a review of the legislation. As the Democrats' Brian Greig remarked, it was intended so that Parliament could 'review, … reconsider and … reflect'.[711] Further, its 'mid-election cycle' timing was regarded as significant so that a review could occur at a distance from pre-election hype.

Beyond this, again, a sunset clause had other purposes, rhetorical and political. It was probably a bargaining chip for the Government that involved little real risk. For the Opposition, it had other uses. In 2002, some senior figures in Labor suggested that the legislation would likely become permanent[712] and that the review process was unlikely to be worrisome. However, in 2003, perhaps in an attempt to justify its support for the amended ASIO (Terrorism) Bill [No 2], Labor insisted that the sunset clause would be effective. In the Senate, John Faulkner implausibly asserted that the clause was 'the granddaddy of them all …

[711] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 8098.
[712] Labor's Kim Beazley, for instance, believed that the legislation would be renewed because the 'War on Terror' had no foreseeable end. This was because it was impossible to negotiate with al-Qaeda and because Australia was threatened 'by simply being who we are'. Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17679, 17680.

that will kick in after three years'.[713] Robert Ray, who had previously suggested that there would be few barriers to renewal of the legislation, argued it 'would go a long way towards keeping the government honest'. If the legislation was abused[714] or if it was ineffective,[715] he said, it would not be renewed. The Greens more realistically predicted that the chances of the legislation terminating were 'somewhere between zero and nought.[716]

Two additional issues relating to sunsetting are worth mentioning. In 2003, sunsetting briefly reemerged as a point of interest for the Senate. Government amendments were made to correct an error, which had applied the clause to the entire ASIO (Terrorism) Bill.[717] This change, supported by Labor, inadvertently meant that ASIO's new police-like search powers — further blurring the boundaries between intelligence and policing — were no longer subject to sunsetting. Drawn to the Senate's attention by the Greens,[718] flagged by the Government for consideration[719] and regarded as an important omission by Labor,[720] it nevertheless disappeared from view either through oversight, as a result of further negotiations between Labor and the Government or in the press to pass the Bill before the Winter Recess.

The Bill's other form of sunsetting as a temporal marker, designed to ensure prescribed authorities were independent from the Executive Government, in appearance and in realty, was likely either conceded as negotiations progressed in 2003 or simply forgotten. This was the Senate's important 2002 amendment limiting the appointment of a prescribed authority to a single three-year term. In this case, the existence of the general sunset clause, which few believed would

[713] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2003, 12594.
[714] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2003, 12598.
[715] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2003, 12792.
[716] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2003, 12794.
[717] Clause 4, ASIO (Terrorism) Bill [No 1] (as amended) and ASIO (Terrorism) Bill [No 2] as introduced.
[718] Commonwealth, *Parliamentary Debates*, Senate, 18 June 2003, 11793–4 (Kerry Nettle, Greens).
[719] Commonwealth, *Parliamentary Debates*, Senate, 18 June 2003, 11798 (Chris Ellison, Minister for Justice and Customs, Liberal).
[720] Commonwealth, *Parliamentary Debates*, Senate, 18 June 2003, 11830–1 (John Faulkner, Opposition Senate Leader, ALP).

ever operate, was used by the Government to argue successfully that the provision was otiose.[721]

2 *National Security*

Gross also argues that the passage of emergency laws is assisted because of the deference accorded to the Executive in national security matters. Again, an examination of the two ASIO (Terrorism) Bills reveals a complex situation.

In both 2002 and 2003, ambitious national security claims were an important Government rationale for the ASIO (Terrorism) Bills and the powers they contained. These claims operated in a variety of ways. First, as a general demand for deference. 'The government's got to make the calls about national security', said Liberal Senator George Brandis.[722] Second, as justifications for the legislation. In 2002, the Attorney-General argued that 'extraordinary' legislation was needed given the 'extraordinary … evil' of terrorism[723] and its 'catastrophic' effects.[724] In 2003, the Government asserted that there was a 'new threat and risk paradigm', involving small but powerful terrorist cells with potential access to 'weapons of mass destruction — weapons such as dirty nuclear bombs'.[725] The spectre of terrorism was 'omnipresent' according to the Attorney-General.[726]

Third, the Government argued that the legislation should be supported because of its capacity to protect the nation. It could be vital to the prevention of terrorist acts, might result in the capture of 'perpetrators of previous atrocities' and could used as a basis for travel advisories.[727]

Fourth, national security claims were used to defend particularly contentious provisions in the legislation. For example, in 2003, the Minister for Justice and

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[721] Commonwealth, *Parliamentary Debates*, Senate, 18 June 2003, 11920 (Chris Ellison, Minister for Justice and Customs, Liberal).
[722] Commonwealth, *Parliamentary Debates*, Senate, 13 December 2002, 8163.
[723] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1932 (Daryl Williams, Attorney-General, Liberal).
[724] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1932.
[725] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2003, 13614 (Steve Ciobo, Liberal).
[726] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 2003, 13762.
[727] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 2003, 13762 (Daryl Williams, Liberal).

Customs spoke of 'an emerging trend internationally of young people being involved in terrorism'.[728] And he rejected a seven-day immunity period for a person who had been subject to a detention warrant as 'red tape' that could impede urgent investigations, compromise public safety and immunise terrorists.[729]

Fifth, national security claims were used to pressure Labor to pass the legislation. In December 2002, the Prime Minister called the Opposition 'weak' on security and the Senate's amendments 'security vandalism'.[730] Defence Minister, Robert Hill, said Labor had effectively said 'damn the Australian people and damn the safety of Australian kids'.[731]

National security deference is also evident in the approaches of both the PJC and the References Committee to their inquiries. The References Committee, for example, conceded that it could not second-guess the Executive in relation to national security matters.

However, in the Senate, the Greens and Democrats were unwavering in their opposition to the legislation, despite amendments that were negotiated in 2002 and 2003 — suggesting that they viewed the Government's national security claims with scepticism.[732] In the House of Representatives, Greens MP Michael Organ called the ASIO (Terrorism) Bill [No 2] 'unacceptable, unnecessary and unbalanced' and argued that it should be opposed.[733] Independent Peter Andren MP spoke of his anger and frustration over the legislation — supporting it 'reluctantly' and only on the basis that the Senate would insist on its amendments.[734]

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[728] Commonwealth, *Parliamentary Debates*, Senate, 23 June 2003, 12135.
[729] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2003, 12589.
[730] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 2002, 10567. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7041 & 24 September 2002, 7114 (Daryl Williams, Attorney-General, Liberal).
[731] Commonwealth, *Parliamentary Debates*, Senate, 13 December 2002, 8155.
[732] They voted against the third reading of the ASIO (Terrorism) Bill [No 2] — see Commonwealth, *Journals of the Senate*, No 84, 25 June 2003, 2002. On the following day they, One Nation and Independents Lees and Murphy voted to insist on the Senate's amendments.
[733] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17688.
[734] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17690, 17691.

Labor's position on the Government's national security claims and on the question of national security deference was complicated. In 2002, in particular, it registered considerable doubts about national security imperatives. These were expressed in various ways. Labor said, for example, that it would oppose the ASIO (Terrorism) Bill [No 1], catalogued ASIO's already considerable powers, remarked on the absence of comparable regimes overseas and noted the use of national security as a political 'wedge'.

The party was not, however, united in its views. The Bali bombings were still fresh in the public's memory. And the situation was arguably rendered more problematic in 2003 by Australia's involvement in the Iraq War. Labor asked for a reassessment of Australia's threat level only to have the Government respond that this had not increased.[735] For some in the party, this suggested that the ASIO (Terrorism) Bill [No 2] was neither proportionate nor necessary.[736] However, others noted a growth in global and regional extremism and argued that there was an increased threat to Australia due to its involvement in Iraq.[737] Yet others, claiming Australian exceptionalism,[738] praised the Bill, as passed by the Parliament, for containing powers that the FBI 'could only dream about'.[739]

Further, the need for bipartisanship in matters of national security was also an underlying theme, especially in 2003 when Labor was explaining its decision to support the legislation.[740] Also important, in a time of fear and uncertainty, were perceptions that the party needed to demonstrate its own national security credentials. Throughout 2002 and 2003, the Government had called the Opposition weak on national security — this, said Labor, impugned the party's

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[735] Commonwealth, *Parliamentary Debates*, 26 March 2003, 13622 (Tanya Plibersek, ALP).
[736] Ibid.
[737] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2003, 12788 (John Faulkner, Opposition Senate Leader, ALP).
[738] For a discussion of selective internationalism see Greg Carne, 'Gathered Intelligence or Antipodean Exceptionalism?: Securing the Development of ASIO's Detention and Questioning Regime' (2006) 27(1) *Adelaide Law Review* 1.
[739] Commonwealth, *Parliamentary Debates*, 26 June 2003, 17678 (Kim Beazley, ALP).
[740] See Opposition Leader Simon Crean who asserted that Labor had refused to play politics with national security — Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17674 and John Faulkner who said that 'Labor's bottom line is that Australia's national security should be above party politics'. Commonwealth, *Parliamentary Debates*, Senate, 17 June 2003, 11673. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2003, 13598 (Daryl Melham, Shadow Minister for Justice and Customs); Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17687 (Michael Danby, ALP).

loyalty and integrity.[741] Quoting comments made by the Attorney-General, Robert Ray said that if Labor failed to pass the Bill, questions would be asked about whether the Opposition was 'really genuine about national security'.[742]

Additionally, the Opposition's own involvement with security agencies from its time in government, its relatively privileged position in relation to national security information and its PJC membership, was influential for some in the party. In late June 2003, Robert Ray justified Labor's decision to support the legislation's passage on the basis that ASIO's powers would not be abused. He argued that the Bill contained 'almost as many hurdles as the Grand National Steeplechase'. One of the safeguards he mentioned was ASIO's Director-General, Dennis Richardson, a person of great 'integrity'.[743] Another was the requirement, negotiated with the Government after the question of repeat warrants was raised in June 2003, that the IGIS report to Parliament on the issuing of such warrants.[744] In relation to concerns that material might be redacted from the IGIS's unclassified report, Ray argued that Parliament should trust the Executive. He reported that, during his six years as Defence Minister, he had never witnessed material in security agency reports being censored for political reasons. His discretionary access to both the classified and declassified reports as an Opposition member of the PJC had not changed his mind.[745] Labor was, of course, in a singular position about those reports given that the IGIS's unclassified reports are seen by the Leader of the Opposition.[746]

3 *Communal Divisions*

What of the notion that emergency laws are facilitated when they are clearly aimed at the 'other' and not at 'us'? Until mid-2003, continuing themes in opposition to the ASIO (Terrorism) Bills were their application to non-suspects — in short, to people not themselves suspected of any involvement in terrorism

[741] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2003, 12790 (Robert Ray, ALP).
[742] Ibid.
[743] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2003, 12596.
[744] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2003, 12597.
[745] Ibid. Section 35 of the *IGIS Act* enables the Prime Minister to delete material from the annual report tabled in Parliament that is considered prejudicial to matters such as security, defence, and international relations.
[746] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2003, 12596–7.

— and their application to children, generally regarded as both vulnerable and 'innocent'. The minor parties remained opposed to the legislation. At least three matters appear to have been crucial. The first was their conclusion that the legislation diminished the rights of 'all Australians'. The second was their view that the role of the non-government parties was to defend those rights.[747] The third was their concerns about the legislation's impact on particular sectors of the community — including 'journalists, unionists and community activists' — that they regarded as particularly important in a functioning democracy.[748]

Labor's decision to support the Bill in 2003 resulted in part from the Government's changes relating to children. These can be viewed as an attempt to limit the Bill's application to the 'other' — minors aged 16 years and over who were terrorism suspects. 'Young children'[749] — those who were most innocent — were thereby excluded.

There were other important lines of argument for Labor. It pointed to the 'safeguards' it had negotiated including special rules for children, saying that the legislation would stop terrorism without 'compromis[ing] *our* basic democratic rights and freedoms'.[750] However, it also argued that it had sought to protect 'all Australians' — those subject to ASIO warrants and everyone at risk of terrorist attacks.[751] Some in its ranks also maintained that the legislation was needed to guard against al-Qaeda's goal of establishing a 'worldwide Islamic caliphate' and that non-suspects could hold information capable of preventing bombs being detonated in Australian cities.[752]

To summarise, the idea of the 'other' was an important driver for Parliament and the Government. It framed the Government's description of the legislation's

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[747] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2003, 12794 (Bob Brown, Greens); Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2003, 13616 (Michael Organ, Greens).
[748] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 13616 (Michael Organ, Greens).
[749] Commonwealth, *Parliamentary Debates*, Senate, 17 June 2003, 11669, 11672 (John Faulkner, Opposition Senate Leader, ALP); Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17687 (Michael Danby, ALP).
[750] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17672 (Simon Crean, Leader of the Opposition, ALP). Emphasis added.
[751] Commonwealth, *Parliamentary Debates*, Senate, 18 June 2003, 11829 (John Faulkner, Opposition Senate Leader, ALP).
[752] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17678 (Kim Beazley, ALP).

necessity and purpose. The ASIO (Terrorism) Bills' application to non-suspects and children was an important contributor to opposition to the legislation in 2002. Changes relating to children in 2003 that enabled them to be more easily labelled as 'other' were likely important for Labor. On the other hand, an essential reason for the Greens' and Democrats' rejection of the Bills in 2002 and 2003 was because their provisions could apply to any Australian, continued to target children and could affect the minor parties' idea of 'us' — for example, activists and journalists.

C *Other Matters*

This brings me to a brief consideration of other drivers of the legislative process. As noted earlier in this chapter, Australia's two-party system of government means that the Opposition is, in the words of Stanley Bach, the once-and-future government.[753] Experience in government and familiarity with and respect for its institutions, including the security services, has been mentioned. In 2002, Labor had approached the SLAT Bill from the perspective of what it 'might do as an alternative government'.[754] Later that year, Robert Ray had argued that Labor had responded to the ASIO (Terrorism) Bill [No 1] 'as if we were in government … [not from an] oppositionist point of view'.[755]

In addition, Labor expected to return to Government and control of the legislative agenda. This, arguably, eased its decision to support the ASIO (Terrorism) Bill [No 2]. It undertook, on resuming office, to reinsert two amendments. The first would reduce the length of detention under a single warrant to 72 hours. The second would remove the evidential note in s 34G.[756] These undertakings also allowed Labor to attempt to assume a 'principled' position. Its argument that, if abused, the legislation would be repealed also speaks to Labor's expectation that it would resume the Government benches.

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[753] Bach, above n 299, 202.
[754] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2452 (John Faulkner, Opposition Senate Leader).
[755] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7605. See also Commonwealth, *Parliamentary Debates*, Senate, 13 December 2002, 8097 (John Faulkner, Opposition Senate Leader, ALP).
[756] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17674 (Simon Crean, Leader of the Opposition, ALP).

Labor's experience in Government and experience with security and intelligence agencies may also have given at least some in the party confidence that the *ASIO (Terrorism) Act* was unlikely to be abused.

The second important influence is the cooption and decontextualising of other legislative regimes to normalise legislative proposals. The influence and use of overseas models in Australian anti-terrorism law has been the subject of substantial critical analysis.[757] However, the following section looks at the use of Australian domestic laws and the roles of decontextualising and normalisation. The importance of decontextualising was noted by constitutional lawyer George Williams in relation to amendments relating to children, an issue discussed in more detail below.

In developing both rationales and amendments for the ASIO (Terrorism) Bills, the Government and Labor cited two classes of Australian statute. The first comprised Acts that empowered executive bodies to compel the provision of information and records and abrogate the privilege against self-incrimination — what Dyzenhaus would view as exceptions the Executive 'is prone to carve out' for itself even in normal times.[758] On 10 December 2002, when introducing Labor's amendments for a 'questioning regime', John Faulkner argued it was appropriate that such a regime be broadly consistent with those applying to standing and ad hoc royal commissions. He contended that if 'such powers were needed to prevent corporate crime or shenanigans going on in local government then we certainly need them to prevent terrorist attacks'.[759] This suggested that the powers of those agencies were almost unremarkable — a point made by the Minister for Justice and Customs who, after referring to the NCA's powers and penalties, described the ASIO (Terrorism) Bill [No 1]'s requirement to answer questions as 'nothing new'.[760] Reference to the powers of royal commissions and existing agencies also elided the differences between their functions and powers

[757] See, for example, Roach, above n 8. For an analysis of the development of the *ASIO (Terrorism) Act* in terms of 'selective internationalism' see Carne, above n 738.
[758] David Dyzenhaus, 'The Compulsion of Legality' in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008) 33, 55.
[759] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 8153–4.
[760] Commonwealth, *Parliamentary Debates*, Senate, 11 December 2002, 7687.

and those held by and proposed for ASIO as well as disparities relating to protections, penalties and accountability.[761]

Similarly attractive to Labor were extended disclosure offences, proposed as a trade-off for lawyer of choice provisions, which were based on, but not identical to, disclosure offences in the *National Crime Authority Act* and its successor statute, the *Australian Crime Commission Act 2002* (Cth).

A second important example of decontextualising and normalising was the use, by both the Government and Opposition, of Part IC of the *Crimes Act*. In 2002, for example, Labor relied on Part IC as a comparator for its questioning in detention regime. Non-suspects, it said, should not receive worse treatment than those suspected of committing serious crimes[762] — although both suspects and non-suspects under the final ASIO (Terrorism) Bill were being so treated. In 2002, its proposals for three blocks of questioning drew from but modified the provisions of Part IC. In the process they removed protections that existed in relation to police investigations. In 2003, when proposing a maximum length of detention under a warrant of 72 hours, Labor argued that this was consistent with 'established standards which apply to police investigations'.[763] A particular attraction for Labor was that the Part IC model with its maximum investigation period and allowance for 'dead time' enabled police to detain for the 'best part of a day or … even into a second day'.[764] Once again, the important differences between the two regimes in terms of who was detained and what protections were available were ignored by Labor.

Decontextualising was also evident in provisions relating to children. These also appropriated and recast the provisions of Part IC. As George Williams noted:

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[761] For example, as then Labor Attorney-General Gareth Evans explained when introducing the National Crime Authority Bill 1983, the task of a royal commission is generally to publicly inquire into and report on a matter of public concern or scandal. Because its role was to expose 'true facts', the privilege against self-incrimination was abrogated but use and derivative use immunity was provided (derivative use immunity has since been removed). On the other hand, the function of the NCA was to collect evidence for use in criminal proceedings. See Commonwealth, *Parliamentary Debates*, Senate, 10 November 1983, 2493.

[762] Commonwealth, *Parliamentary Debates*, Senate, 11 December 2002, 7795 (John Faulkner, Opposition Senate Leader, ALP).

[763] Commonwealth, *Parliamentary Debates*, Senate, 13 December 2002, 8092 (John Faulkner, ALP).

[764] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2003, 12601 (John Faulkner, ALP).

> Borrowing some of the criminal justice process protections for juveniles and placing them into a totally foreign system … may be superficially attractive but ignores underlying issues of principle and context which are part of the criminal justice system such as the general right to silence, restrictions on the use of detention purely for investigative purposes or the wider protective context of juvenile justice.[765]

Decontextualising fulfilled a number of important functions. In assuming an equivalence between the powers and purposes of standing and ad hoc royal commissions and those proposed for ASIO it diverted attention away from the important differences between them. It largely enabled the legislative history of the National Crime Authority and the problem of legislative creep to be ignored. Similarly, it elided the differences between the purposes and content of Part IC in regard to both adults and children and the ASIO regime. This decontextualising performed a role for both the Government and Opposition in justifying the legislation. Importantly, too, the adaption and appropriation of existing statutory models helped to normalise ASIO's new and extraordinary powers.

[765] Quoted in Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6820 (Tanya Plibersek, ALP).

CHAPTER FIVE

CONCLUSION

I INTRODUCTION

The aim of this thesis has been to explore whether a model developed by scholar Oren Gross is useful for explaining what drives legislative process when the Australian Parliament is presented with bills for exceptional national security laws. Gross theorises that certain assumptions — the assumption of constitutionality and the assumption of separation — are crucial in our acceptance of emergency laws. My thesis has involved a close analysis of *Hansard* and parliamentary committee reports to determine whether assumptions of constitutionality and separation were influential in Parliament's response to national security bills during two periods of crisis in recent Australian history.

This chapter contains an overview of my thesis and my conclusions.

Chapter Two fulfilled a number of purposes. It sketched some of the literature relating to law and crisis and highlighted some of the (contested) effects of their interaction. It then turned to the work of Oren Gross. It outlined his contributions to the theory and practice of emergency laws. And it described his assumptions of constitutionality and separation and their wider context — Gross's model of law's Accommodation to times of crisis.

Given that my elaboration and application of Gross's assumption of constitutionality involves legal analysis, Chapter Two also explained why the work of Parliament is an appropriate subject for legal scholarship. The chapter elaborated on why I had chosen particular bills for study. It dealt with issues of 'fit' between Gross's work, the selected bills, and lawmaking in the Australian Parliament. Last, Chapter Two outlined my methodology.

My study demonstrates that Gross's assumptions provide some useful insights into how Parliament deliberates when presented with exceptional national security bills during times of crisis. They open up other lines of inquiry. They also suggest that the creation of exceptional laws occurs in ways somewhat different to what Gross's model of 'Special Emergency Legislation' might suggest. In the following sections I outline my findings.

II GROSS'S ASSUMPTIONS

A *The Assumption of Constitutionality*

The assumption of constitutionality is the least developed of Gross's assumptions. In applying and testing the assumption of constitutionality for each of the Bills I examined, I sketched potentially relevant, contemporary case law and potentially relevant legal norms, such as the rule of law, before turning to *Hansard* and, where available, parliamentary committee reports, for evidence about whether and how these norms were reflected in the legislative process.

The record is varied. It also sheds light on Parliament's conception of itself as a constitutional actor and the limits to that role. Using the Dissolution Bills as one example, the Government's claims to constitutional power were evident in its rhetoric and explicit on the face of the Bill. That Labor doubted the proposed legislation's validity is also clear from its statements about the state of international relations and its comments about the adequacy of the defence power. In addition, the language of Evatt and McKenna reveals glimpses of their knowledge of High Court cases.

Despite the presence of highly competent lawyers on both sides of politics, Opposition and Government politicians nevertheless regarded their constitutional roles as limited. For the Government, this involved urging Labor to pass the dissolution legislation and leave the question of validity to the High Court. For the Opposition it meant simply warning the Government about its constitutional doubts.

In 2002–2003, Parliament lacked the legal luminaries of 1950. Nevertheless, it had substantially more sources of constitutional advice on which to rely — for example, the lawyers in its own ranks, the submissions and evidence provided to committee inquiries, legally qualified staffers, pro bono sources and the Parliamentary Research Service.

Attention to constitutional issues in the SLAT Bill was somewhat muted. Nevertheless, constitutional concerns resulted in two important Government amendments to the Bill. These narrowed the definition of 'terrorist act' in part because of implied freedom of political communication concerns about the

original definition. And they altered the proscription provisions — partly because of *Communist Party Case* concerns. Also significant in the debates was Parliament's claim to be taken seriously as a constitutional actor. This was in evidence when Labor asserted that it should be able to see the Government's constitutional advice.

The *Constitution* was centre stage in debates over the ASIO (Terrorism) Bills, perhaps because of the extreme and unprecedented nature of the proposed legislation. Constitutional issues were a focus of three committee reports and of parliamentary debate, especially in the Senate. From this material, a number of conclusions can be drawn. The test for Parliament's satisfaction on heads of power questions appears to be that a case 'for' power can be made out. Arguably, too, issues of constitutional power may be least amenable to parliamentary determination. Further, constitutional issues — in this case, Ch III issues — can be a major source of contest in the Parliament. Warrant issuing, the supervision of questioning and the proposed detention regime all raised separation of powers questions and were sticking points when the ASIO (Terrorism) Bill [No 1] was laid aside in 2002, setting in train a process that might have led to a double dissolution election. Similarly, in 2003, the accord negotiated between the major parties almost became unstuck over an issue with Ch III implications — repeat warrants. In addition, it is clear that once again Parliament regarded itself as a legitimate constitutional actor. It demanded to see the Government's legal advice. Labor commissioned and tabled its own legal opinion. Last, it is also evident that some politicians saw their role as producing laws that would withstand constitutional challenge.

Debates and committee inquiries in 2002 and 2003 also reveal the limits to Parliament's exploration of constitutional issues. The first limitation was the Government's refusal to engage meaningfully with parliamentary committees or to table its advice. Especially in relation to the ASIO (Terrorism) Bills, this created misunderstandings, limited debate, obstructed compromise, and hampered the development of alternative models for the proposed regime. Further, it prevented constitutionality from becoming a cooperative exercise. It also marginalised the minor parties, who took an active interest in Ch III issues.

There are other limits to Parliament's engagement with matters constitutional. Selection of issues to pursue is necessarily selective. In the case of the Dissolution Bills, the Opposition's focus on the defence power was likely the result of Evatt's assessment that this was the pivotal issue. In 2002, the Senate References Committee acknowledged that a variety of constitutional limitations on power might impact on the ASIO (Terrorism) Bill [No 1] but chose to address the most 'obvious' questions. There are clearly time-pressures on Parliament and limits on its resources.

Then there are political limitations — reflecting Lynch's idea of the 'untidy fusion' of the legal and the political' in lawmaking.[1] In 1950, for example, Labor's refusal to press the issue of constitutional validity may have served political purposes. A direct attack on validity may have been seen as pro-communist. In any event, Labor's position was to amend not reject the bill. And in 2003, late in the debate on the ASIO (Terrorism) Bill [No 2], there was little interest by the major parties in new doubts expressed by the Greens about validity. One explanation was that the negotiation process had been exhausted and that both the Government and Labor simply wished to 'move on'.

As it applies to the Australian Parliament, the assumption of constitutionality is thus multi-faceted. In 1950, the Opposition saw its role as expressing its opinion and warning the Government. With the exception of its judicial review amendments (which were explained as fair process changes), it generally viewed the issue as one for the Government and the High Court. In 2002–2003, in contrast and with better resources, the Senate took the issue of constitutionality seriously, attempted to redesign ASIO's questioning and detention regime, and argued that the Government should make its constitutional advice available.

Gross also argues that our assumption that crisis laws are bounded by legal rules and norms helps ensure our acceptance of those laws. He does not elaborate on what he means by these terms. I took the expression to include the rule of law in its formal and procedural guises. The first includes requirements for clarity, generality, and prospectivity. The latter encompasses fair trial requirements. In

[1] Andrew Lynch, 'Legislating with Urgency — The Enactment of the *Anti-Terrorism Act [No 1] 2005*' (2006) 30(3) *Melbourne University Law Review* 747, 776.

the case of the ASIO (Terrorism) Bills, I also included norms that recognise children's vulnerability and need for special protections. My case studies show that Parliament was able to identify rule of law defects in each of the national security bills I selected for study. However, there were limits to the corrective action it took as a result.

In 1950, the Opposition and to some extent the Government identified a number of rule of law deficits in the Dissolution Bills. These included unclear language and retrospectivity. Labor also criticised the Bills for failing the test of generality and for their inclusion of status offences. Nonetheless, these matters were not the subject of proposals for amendment. There were a number of possible reasons. First, the difficulties of defining key terms — such as 'communism' or 'communist'. Second, concentrating on attacking the Bills in relation to generality and status offences risked accusations of pro-communist sympathies, did not accord with party policy and would likely have increased internal discord. Instead, a focus on issues of fair process could be couched in more politically neutral terms.

References to legal rules were used in other ways by the Government, which pointed to 'ordinary' exceptions, in a raft of Commonwealth and state laws, to the rule that the prosecution bore the onus of proof in criminal proceedings. This was part of the Government's strategy to argue that placing the onus on an applicant in declaration proceedings was nothing unusual.

Similarly, concerns were expressed in debates over the SLAT Bill about clarity of statutory language, status offences and departures from Commonwealth principles of criminal responsibility. As a result, some clarifying amendments were made to the definition of 'terrorist act'. Most reversals of the onus of proof were removed. However, unclear language remained as did the offence of membership of a terrorist organisation. Accused persons were still likely to encounter difficulties in defending their cases. The legislation's preparatory offences were and are problematic. One likely explanation for Labor's ultimate decision to support the Bill was its desire to respond to UNSC 1373. The Bill's offence provisions mimicked the resolution's terminology.

In the case of the ASIO (Terrorism) Bills, there was criticism about the Bills' failure to guarantee access to legal advice, their abrogation of the right to silence and failure to protect the rights of children. The right to a lawyer was seemingly secured but not guaranteed in practice. Exceptions were used to justify the abrogation of the privilege against self-incrimination. The removal of the evidential note in s 34G was left for another day. And child suspects were said to be adequately protected through the use of a modified version of Part IC of the *Crimes Act* I discuss some reasons why this was so, in addition to Parliament's appropriation and decontextualising of legal norms, below.

B *The Assumption of Separation*

1 *Temporality*

Gross contends that crises, domestic and international, are generally regarded as 'brief intervals in the otherwise uninterrupted flow of normalcy'.[2] He regards the presence of sunset clauses in exceptional laws as evidence of this erroneous view.

Of the Bills considered by this thesis, only in the case of the Dissolution Bill [No 1] did Parliament view a sunset clause as a genuine temporal marker. However, the clause also had other functions. It was designed to protect against abuse of power by a future government. In addition, Labor suggested that sunsetting might act as a constitutional buttress. It was not, however, a focus of parliamentary debate.

Sunsetting was urged for a variety of reasons and conceived of in a variety of ways in the case of the post-9/11 laws reviewed in this thesis. Only the minor parties pressed for a termination provision in the SLAT Bill. The major parties opposed the idea on a number of grounds. They pointed to the indefinite nature of the 'War on Terror' and the need for national counter-terrorism laws. The Government noted safeguards in the legislation including the existence of a modified form of sunsetting — time limits on proscription regulations. In

[2] Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis. Emergency Powers in Theory and Practice* (Cambridge University Press, 2006) 175.

addition, Labor maintained that sunsetting was not justified because the legislation was insufficiently novel. Instead, it regarded an additional inquiry — a public review — as a more appropriate and useful marker of exceptionality.

In the case of the ASIO (Terrorism) Bill [No 1], however, Labor and the minor parties were in accord. Studying the debates on the first ASIO (Terrorism) Bill reveals that sunsetting fulfilled a variety of functions. It had symbolic value. To paraphrase Labor's Robert Ray, it was an acknowledgement that the legislation was a further step than the SLAT Bill into the unknown. Additionally, it was designed to operate in conjunction with a review that would allow for considered public and parliamentary debate about the legislation. Beyond this it was unclear what, if any, case the Government would need to mount to satisfy the Parliament that the legislation should continue to operate.

Sunsetting operated in two additional ways post-9/11. The first was as a negotiating tool. Labor appears to have threatened to support a sunset clause in the SLAT Bill if the Government did not agree to its proposed public review of the legislation. In the case of the ASIO (Terrorism) Bill [No 1], it is likely that sunsetting was a Government bargaining chip. It also operated as a political and rhetorical device. In 2003, in the midst of concerted criticism about its decision to support the ASIO (Terrorism) Bill [No 2], Labor argued that the legislation's greatest protection was a sunset clause that would operate after three years. As Gross would have foreseen, ASIO's powers to obtain questioning and detention warrants have been extended — most recently to 2018.[3] It remains highly unlikely that the legislation will be terminated in the foreseeable future.

2 *National Security*

Gross remarks that in relation to national security issues there is a 'heightened level of deference that courts and legislatures give to the decisions and acts of the executive branch' given that when the nation's safety is at stake 'special rules' apply.[4] At one level, Gross's view of national security is borne out by all the

[3] *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) sch 1 pt 1 item 33 amending *ASIO Act* s 34ZZ .
[4] Gross and Ní Aoláin, above n 2, 214.

Bills considered in this thesis. All were passed by the Parliament. However, the reality is more complex than Gross's hypothesis indicates. Taking the Bills in turn, my conclusions are as follows.

In each case, the Government clearly demanded deference from the Parliament on matters of national security. In the case of the Dissolution Bills, for example, it argued that its assessments about both the threats facing the nation and the issue of a person's or organisation's subversive tendencies, be taken on trust. Its national security claims were ramped up after the beginning of the conflict in Korea. However, despite the anti-communist fervour that engulfed Australia during the Cold War, Labor persisted in rejecting the Dissolution Bills, absent its own amendments, over many months. Even in September 1950, after Australian troops had been dispatched to Korea, Ben Chifley argued that Australia was in less danger than it had been at any time in the previous two decades.

There were various reasons for the party's ongoing opposition to the Dissolution Bills. In particular, many in its ranks believed that the Bills' real purpose was not to secure the nation but rather to split the party. In addition, Labor appears to have been wary about ASIO and, more generally, about the web of informers and pimps expected to flourish if the legislation was enacted. The decision to allow the Dissolution Bill [No 2] to pass was not the product of national security deference. It was taken to shore up party unity, to prevent a double dissolution election on the subject of communism and to 'give the lie' to damaging false and slanderous allegations against Labor[5] — that is, that it was weak or compromised on the issue of communism.

The case of the SLAT Bill is different again. It was introduced into a Parliament that, unlike the Parliament of 1950, contained minor parties. These parties — the Greens and Democrats — far from exhibiting national security deference, were unwavering in their opposition to both the SLAT Bill and the ASIO (Terrorism) Bills. Labor provided two explanations of its decision to support the SLAT Bill with amendments. The first, bearing out Gross's view, was that Oppositions reposed trust in governments on matters of national security. This allowed

[5] Commonwealth, *Parliamentary Debates*, Senate, 17 October 1950, 811 (Nicholas McKenna, ALP). Senator McKenna quoted from the statement issued by the party's Federal Executive on 16 October 1950.

bipartisanship to work. Second, and crucially, was by reference to the decisions of a supranational security executive. Labor emphasised that Australia's participation in the 'War on Terror', the requirements of UNSC 1373 and the need to be a 'good international citizen' meant it should support the SLAT Bill, including a modified form of proscription. Gross and Ní Aoláin would likely be unsurprised by Labor's position given their belief that UNSC 1373 has produced 'mandatory legislative accommodation'.[6] However, an even more heightened response to 9/11 is seen in Labor's support of a proscription regime partly based on Security Council decisions — although it had no knowledge of how the Security Council identified terrorist organisations and although proscription was not a requirement of UNSC 1373.

National security considerations played a substantial role in Parliament's response to the ASIO (Terrorism) Bills. A considerable amount of deference to the Government was displayed by two of the parliamentary committees that inquired into the first ASIO (Terrorism) Bill.[7] However, throughout 2002, Labor refused to support the Bill, absent its own amendments. It expressed some scepticism that the legislation was necessary, especially given the lack of similar regimes in comparable nations.

Factors that may have changed Labor's attitude included the Bali Bombings and Australia's participation in the Iraq war. These events meshed with other factors. One was Labor's perception that the Government was successfully wedging it over national security — the party complaining that the Government had impugned its loyalty and integrity[8] and branded it as 'weak'. These concerns were significant given that opinion polling post-Bali showed that Australians were fearful of a domestic terrorist attack[9] and that the ASIO (Terrorism) Bills had the potential to precipitate a double dissolution election on the subject of terrorism.

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[6] Gross and Ní Aoláin, above n 2, 403.
[7] Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) 10; Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002) 21, 22.
[8] Commonwealth, *Parliamentary Debates*, Senate 26 June 2003, 12790 (Robert Ray, ALP).
[9] Newspoll with *The Daily Telegraph*, '[Opinion Polling about the Bali Bombings]' (18–20 October 2002).

Third, it is arguable that Labor's attitude to ASIO had changed considerably since 1950. ASIO had become a more professional organisation. Its powers were codified. It was subject to some degree of independent scrutiny as a result of Labor initiatives that had established the PJC and the IGIS. Its declassified annual reports were tabled in Parliament. Debates on both the SLAT and ASIO (Terrorism) Bills demonstrate, for at least some senior figures in Labor, a familiarity and confidence with the heads of Australia's intelligence agencies. Some of this familiarity and confidence was associated with Labor's time in government. It also likely resulted from Labor's relatively privileged position as the official Opposition — the availability of regular briefings from ASIO and ASIS, its access to unclassified security agency reports, and the fact that it was consulted on the appointment of the heads of security agencies.[10] This is not to say that Labor was unmindful that a future government or a future head of ASIO might misuse the agency's extraordinary powers. However, as noted above, there was the idea that, for bipartisanship in national security matters to work, 'oppositions and the public at large must invest a higher degree of trust in government than would normally be accorded'.[11]

3 *Communal Divisions*

Gross maintains that in times of crisis, the language of 'us versus them' performs a range of functions. It allows fear and anger to be directed against the 'other'. Further, he says, the more clearly the 'other' is defined and the greater the threat they are said to pose, the greater the willingness 'to confer emergency powers on the government'.[12]

In each of the Bills I examined, the Government identified the legislation's target as alien and dangerous. This rhetoric was at its most vituperative in the case of the Dissolution Bills. In each case, however, the Government also encountered resistance due to its failures to draw clear lines between the 'other' and the

[10] For a different view of the adequacy of oversight mechanisms, written towards the end of his political career see John Faulkner, 'Eyes on the Watchmen', *The Australian Financial Review*, 24 October 2014.
[11] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2450–1 (Robert Ray, ALP).
[12] Gross and Ní Aoláin, above n 2, 220–1.

community as a whole or parts of it. So, in relation to the Dissolution Bills, the Government suggested that there were connections between Labor and the Communist Party. In addition were provisions in the Dissolution Bill [No 1] that allowed members of associations clearly unconnected to communism to be declared. The broad definitions of 'communism' and 'communist' were also regarded as problematic.

In turn, Labor focused on the Bills' potential effects on 'ordinary men and women', 'innocent people' and those falling within or associated with its own political traditions — dissenters, socialists and militant trade unionists. Government amendments that replaced membership of an unlawful association as a criterion for declaration with membership of the Communist Party were not sufficient to dissuade Labor from its opposition to the proposed legislation. In other words, in the case of the Dissolution Bills, failure to delineate clearly between 'us' and 'them' was an important factor in Labor's opposition to the Bills.

The Government's rhetoric surrounding both the SLAT Bill and the ASIO (Terrorism) Bills was similar. It spoke of the need to respond to an extraordinary evil[13] and distinguished between the 'savagery' of terrorism and the 'civilised world'.[14] It claimed that the proposed legislation would protect the nation and 'Australians and Australian kids'. Labor's concerns about the SLAT Bill were, to some degree, related to the Bill's potential application to protesters. It appears that amendments to the definition of 'terrorist act' were important to its change of view. It also appears that the climate of fear and uncertainty in which the SLAT Bill was debated made it more difficult for Labor to pursue all the amendments it would have liked to make to the Bill. Unlike Labor, the minor parties were not convinced that Government amendments to the SLAT Bill sufficiently protected their own constituencies and particular interest groups such as protesting asylum seekers. This was an important factor in their decision to oppose the SLAT Bill.

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[13] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2003, 1932 (Daryl Williams, Attorney-General, Liberal).
[14] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 October 2002, 7497, 7500 (John Howard, Prime Minister, Liberal).

Labor's initial opposition to the ASIO (Terrorism) Bill [No 1] centred on the Bill's application to people not suspected of any criminal activity and to the most innocent and vulnerable — that is, children. Its change of position can be attributed in part to amendments that limited the Bill's application to minors who were the 'other' — that is, suspects — and to children who were closer to adulthood and thus not presumptively blameless. Its early concerns that the proposed legislation extended to non-suspects failed to hold sway in 2003. National security issues were one reason. I discuss other factors below.

In contrast, the minor parties' continued opposition to the ASIO (Terrorism) Bills was, to some degree, because of concerns that 'ordinary Australians',[15] 'innocent Australian citizen[s]'[16] and 'all Australians'[17] could be caught up by the legislation. Once again, the Greens, in particular, focused on the Bills' potential effects on their own constituencies and on particular professionals, such as journalists, whose work they regarded as essential to the functioning of a healthy democracy.

III OTHER MATTERS

A *The Opposition as the Once-and-Future Government*[18]

My examination of *Hansard* reveals other factors that were important in Parliament's deliberations. In his examination of the Senate, Stanley Bach refers to the 'once-and-future' government phenomenon in Australia's two-party system of revolving government. He argues that this phenomenon may affect the Opposition's attitude to proposed legislation. He suggests, for instance, that it may be reluctant to block legislation for fear of encountering the same tactics when it returns to the Government benches.[19] My examination of *Hansard*

[15] Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002, 5386 (Kerry Nettle, Greens).
[16] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7930 (Len Harris, One Nation).
[17] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7927 (Brian Greig, Democrats).
[18] Stanley Bach, *Platypus and Parliament. The Australian Senate in Theory and Practice* (Department of the Senate, 2003) 202.
[19] Ibid.

provides no evidence for this suggestion. However, the 'once-and-future government' effect is evident in other ways.

In two cases — the Dissolution Bills and the ASIO (Terrorism) Bills — it arguably allowed the Labor Opposition to justify its decision to allow deeply controversial national security legislation to pass and to mollify its critics. In 1950, Labor promised that, 'immediately' on its return to government, it would insert its amendments into the *Dissolution Act*.[20] It gave a similar undertaking in relation to the *ASIO (Terrorism) Act*, promising to reinsert two Senate amendments when it was next elected. The first was to reduce detention time under a single warrant to 72 hours. The second was to remove the evidential burden on warrant subjects who were prosecuted for failing or refusing to answer questions.[21]

Labor's role as the 'once-and-future' government is revealed in other ways as well. In 2002, John Faulkner explained that Labor had approached the package of anti-terrorism bills from the perspective of what it 'might do as an alternative government'.[22] Similarly, former Opposition Leader Kim Beazley commended Faulkner's carriage of the bills in the Senate saying he had approached the task as he would have done as Home Affairs Minister in a Labor Government.[23]

In 2003, Robert Ray argued that Labor had responded to the ASIO (Terrorism) Bill [No 1] 'as if we were in government … [not from an] oppositionist point of view.[24] These statements speak to the pull of bipartisanship.[25] However, they also reflect Labor's experience in government, and its expectations about forming government and administering the proposed legislation. In this regard, it is also worth repeating that Labor had, itself, in 2001 campaigned on a platform of introducing legislation modelled on the *Terrorism Act 2000* (UK) as well as legislation for a compulsory questioning regime for ASIO.

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[20] Commonwealth, *Parliamentary Debates*, Senate, 17 October 1950, 811 (Nicholas McKenna, Deputy Leader of the Opposition in the Senate, ALP).
[21] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2003, 17674 (Simon Crean, Leader of the Opposition, ALP).
[22] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2452.
[23] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 2002, 4662.
[24] Commonwealth, *Parliamentary Debates*, Senate, 10 December 2002, 7605; Commonwealth, *Parliamentary Debates*, Senate, 13 December 2002, 8097 (John Faulkner, Opposition Senate Leader, ALP).
[25] Commonwealth, *Parliamentary Debates*, Senate, 13 December 2002, 8097 (John Faulkner, ALP).

Additionally, as noted in my discussion of national security factors, a further influence was Labor's familiarity with and confidence in Australia's intelligence services.[26] Although its context was Labor's decision in 2003 to pass the ASIO (Terrorism) Bill [No 2], there is little doubt that Robert Ray's confidence in ASIO's Director-General as a person of 'great integrity' was genuine.[27] This can be contrasted with Labor's position in 1950 — set against an historical backdrop of intelligence service spying on left wing and dissent groups, Labor's reluctance to establish ASIO,[28] and its apparent concerns about ASIO's new Director-General and about the network of pimps it considered would operate under the Dissolution Bill.

Finally, because of bipartisanship in relation to national security, the Opposition has a relatively privileged position in relation to intelligence and security information. It is effectively guaranteed membership on the PJC, is entitled to regular security briefings and can access ASIO's unclassified reports. These factors may have heightened its confidence in Australia's security agencies.

B *Models of Accommodation*

Gross suggests that there are two types of legislative accommodation that occur in times of crisis. The first occurs through the modification of existing 'ordinary' laws. However, it is likely that Gross would regard all the Bills studied in this thesis as falling within his second category of 'Special Emergency Legislation'. My thesis reveals that this model does not adequately account for or describe some of Australia's exceptional national security legislation. Important here is the insertion or attempted insertion into such laws of adapted 'ordinary' legal

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[26] He was, admittedly, somewhat less confident about ASIO's political masters. At one stage, Senator Ray expressed concern about the possibility that proscription powers might, in some future reassignment of portfolio responsibilities, be delegated to then Workplace Relations Minister Abbott, who he described as 'a workplace relations arsonist'. Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2459.

[27] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2003, 12596. Richardson had been an adviser to Labor Prime Minister Bob Hawke and a senior public servant under Labor. See Melissa Sweet, 'Profile: Dennis Richardson. Our Man in Washington' (2006) (Winter) *Sydney Alumni Magazine* 16.

[28] Jenny Hocking, *Terror Laws. ASIO, Counter-Terrorism and the Threat to Democracy* (UNSW Press, 2004) 24.

norms. As George Williams has pointed out, this appropriation of legal rules also involved a significant amount of decontextualising.[29]

The normalising pull of such amendments is seen in the Dissolution Bills where Labor, for example, attempted to graft a criminal justice model involving jury trials and proof borne by the Government, into the legislation. In the case of the ASIO (Terrorism) Bills, both the Government and Opposition borrowed extensively from the *Crimes Act.* In December 2002, for example, the Government identified as important safeguards, amendments relating to the protection of child detainees, legal professional privilege, and strip searches that were appropriated, often in modified form, from the *Crimes Act*.[30] For its part, Labor proposed a questioning regime that incorporated a significantly amended version of Part IC of the *Crimes Act*.

Similarly, references to compulsory questioning regimes in a range of quite disparate Commonwealth and state statutes were used to suggest that such provisions were unexceptional and thus acceptable in the case of ASIO warrants. In this regard, changes in perception about what was once seen as exceptional legislation — the *National Crime Authority Act* — are evident. They reveal the gradual removal of protections once built into such regimes — for example, the provision of derivative use immunity for compelled testimony.

These examples suggest a more complex picture than Gross's category of legislative accommodation by 'Special Emergency Legislation' might indicate. They reveal the uses made of 'ordinary' laws in framing, explaining and justifying 'exceptional' ones. They reflect the suggestions made by a number of scholars whose work has touched on 'crisis' laws. They indicate the fluidity of legal norms and the porous borders between the 'exceptional' and the 'ordinary' envisaged by scholars such as Nasser Hussain.[31] They bring to mind Laura Donohue's conclusion that emergency laws can contain reassuring indicators of normality

[29] See the quotation in Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002, 6820 (Tanya Plibersek, ALP).
[30] Commonwealth, *Parliamentary Debates*, Senate, 12 December 2002, 7846, 7848, 7859 (Chris Ellison, Minister for Justice and Customs, Liberal).
[31] For example, Nasser Hussain, 'Beyond Norm and Exception: Guantánamo' (2007) 33(4) *Critical Inquiry* 734 Nasser Hussain, 'Hyperlegality' (2007) 10(4) *New Criminal Law Review* 514.

and thus of legitimacy.[32] They remind us of Dyzenhaus's warning that the Executive is apt to carve out exceptions for itself even in 'ordinary' times.[33] They also recall, in relation to the presence of status offences in the Dissolution Bills and SLAT Bill, Bronitt and McSherry's reminder that '[s]uch derogations from the rule of law are significant. They reveal that the ideals of legality, upon closer scrutiny, are often hedged with qualifications'.[34]

[32] Laura K. Donohue, *Counter-Terrorism Law and Emergency Powers in the United Kingdom 1922–2000* (Irish Academic Press, 2001) 308–13.
[33] David Dyzenhaus, 'The Compulsion of Legality' in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008) 33, 55.
[34] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Law Book Co, 3rd ed, 2010) 9–10.

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