



## Secrecy's Corrupting Influence on Democratic Principles and the Rule of Law

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### Abstract

Sometimes secrecy in law is required to protect vulnerable witnesses or suppress sensitive evidence. However, particularly since the terror attacks of 11 September 2001, governments in liberal democratic societies have increased secrecy and the use of clandestine procedures under the pretext of safeguarding national security. In many instances, these developments have eroded civil liberties, infringed upon constitutional guarantees, and had negative effects on due process rights. In Australia, where individual rights and freedoms have only limited constitutional expression, it is hoped the doctrine of representative and responsible government will act as sufficient protection for human rights. Conversely, drawing on examples ranging from the regulation of immigration to the control of serious organised crime, this article proposes that escalating secrecy in the current era has a corrupting effect on democratic principles and the rule of law.

### Keywords

Corruption; democratic rights; immigration; legal secrecy; organised crime; press freedom.

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## Introduction

Under certain circumstances, secrecy is accepted as necessary in law. For instance, secrecy can arise in legal proceedings via the operation of a variety of evidential privileges, such as legal and other professional privileges, as well as in applications for public interest immunity, which, if successful, require the exclusion from proceedings of material that courts have determined would prejudice the public interest if disclosed. Secrecy has also been accepted as required to protect vulnerable witnesses and to safeguard police surveillance operations, although these factors have to be balanced against disclosure entitlements (Martin, Scott Bray and Kumar 2015: 1). Moreover, secrecy in law, or legal secrecy, may assume the form of a positive individual right, such as in the right to privacy *vis-à-vis* intensified state surveillance and corporate monitoring, as was exemplified in May 2014 when the European Court of Justice recognised the 'right to be forgotten', which enables people to request their removal from Internet search engine results (Martin, Scott Bray and Kumar 2015: 1).

Notwithstanding situations where legal secrecy is required or seen as positive, secrecy in law might manifest more negatively as, for instance, intruding upon the principle of open justice, through closed court or non-publication orders, or in the use of *ex parte* evidence, where one party produces evidence in proceedings without giving notice to the other party. Moreover, there are areas of law—and, indeed, society—where secrecy is seen as synonymous with corruption. Examples include the concealment of historic institutional child sexual abuse (Martin and Scott Bray 2015), police cover-ups (Scruton 2015), and the operation of financial secrecy in offshore banking (Christensen 2015), to name but a few. Nevertheless, secrecy continues to be regarded as essential to the workings of government where, for example, '[t]he principle of Cabinet secrecy is designed to allow full and frank discussion of policy ideas without fear of being held to account for the mere articulation of ideas' (Reilly and La Forgia 2013: 144). Indeed, although secrecy seems incompatible with the idea of democracy, Darius Rejali (2007) argues democracies move naturally towards secret and efficient modes of operation, especially in relation to highly contested issues, such as the use of torture. That is because the political class believe 'they are being watched and judged by others in how well they respect human rights and they believe at least a thin veneer of legitimacy is necessary' (Rejali 2007: 10).

Typically, however, legal secrecy is seen as negative because it is considered an affront to the separation of powers, due process, and the rule of law, which, in turn, impacts adversely on open justice, procedural fairness and human rights. Ultimately, it is argued, secrecy stands in opposition to the values that apparently underpin societies that are otherwise open, free and democratic. Especially since the terror attacks of 11 September 2001, commentators have observed a steady 'creep' of secrecy in western democracies, noting 'it is generally accepted that the recourse to sensitive evidence is increasing in forensic settings and that this trend has resulted in legal anomalies and obscurities' (Walker 2011: 1, 10-11).

While legal academics and others have expressed concern at the 'normalisation' of exceptional legal measures, including increased secrecy, that have been introduced by governments across the western world since 2001, politicians remain adamant such measures are necessary to protect national security, even though they encroach upon individual rights and civil liberties. In this context, too, keeping certain information secret has come to be regarded as necessary to preserve intelligence sharing arrangements and diplomatic relations between nation-states. Under the 'control principle', intelligence belonging to a foreign government may not be disclosed without that government's permission. This is one of the reasons the British government, for example, has been resistant to disclosing sensitive material from other countries, such as the United States (US), in court cases involving allegations of rendition and mistreatment in the 'war on terror' (Martin 2014a: 532; Scott Bray and Martin 2012: 126). These claims also inform arguments that the disclosure of such information has potential to endanger the lives of field

agents and civilians, as well as posing risks to national security, which are the kinds of charges levelled at Julian Assange and WikiLeaks, for instance (see Martin, Scott Bray and Kumar 2015).

In light of these developments and other examples discussed below, this article proposes that negative legal secrecy has a corrupting effect upon democratic principles and the rule of law. In so doing, the definition of corruption used here extends beyond narrow conceptions—such as the World Bank definition of corruption as ‘the abuse of public office for private gain’ (Whyte 2015: 6)—to include ‘the distortion and subversion of the public realm in the service of private interests’ (Beetham 2015: 42). In recent times, this has been no better illustrated than in the financial crisis of 2008 where, as Colin Crouch (2016) says, ‘the financial institutions that had created the crisis were able to influence public policy in a way that protected their interests, pushing the burden on to the general public who had been their victims and who had to bail out the banks with public spending cuts’. Crouch (2016) has talked about the bank bailout and other forms of corruption in the context of what he terms ‘post-democracy’, which he defines as ‘a situation where all the institutions of democracy—elections, changes of government, free debate, rule of law—continue, but they become a charade, because democratic institutions have been surpassed as major decision-making entities by small groups of financial and political elites’.

Although his analysis of post-democracy is not limited to political and corporate corruption, Crouch (2004: 10) nevertheless notes that ‘corruption is a powerful indicator of the poor health of democracy, as it signals a political class which has become cynical, amoral and cut off from scrutiny and from the public’. Moreover, he shows how the emergence of post-democracy is a consequence of neoliberalism, which has equated democracy ‘with limited government within an unrestrained capitalist economy and reduced the democratic component to the holding of elections’ (Crouch 2004: 11). David Harvey (2005: 19) also recognises the corruption inherent in the neoliberal project ‘to re-establish the conditions for capital accumulation and to restore the power of economic elites’. For him, the project of neoliberalism is achieved by setting up ‘those military, defence, police, and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper functioning of markets’ (Harvey 2005: 2).

Hence, we observe the contradictory nature of democratic rights under neoliberalism, which provides impetus to open government, transparency and freedom while strengthening state security and secrecy. To Crouch (2004: 14), these developments reached their ‘symbolic climax’ on 11 September 2001, after which ‘there have been, on the one hand, new justifications for state secrecy and the refusal of rights to scrutinise state activities, and, on the other, new rights for states to spy on their populations and invade recently won rights to privacy’. A fundamental argument of this article, therefore, is that negative forms of secrecy, which undermine established legal principles, rights and guarantees, have a corrupting effect on the rule of law and democratic values. This is because, in the context of the operation of the neoliberal state in post-democracy, they satisfy broadly the notion outlined earlier that corruption entails ‘the distortion and subversion of the public realm in the service of private interests’, where the idea of the public realm:

... is more than simply the sum of public offices and their occupants. It includes the idea that the activities of government should serve a general or public interest rather than a set of private ones, and that there should be a transparent public debate to determine where the general interest lies. (Beetham 2015: 42)

Howie (2016: 5) sees the erosion of Australia’s democracy as being reflective of a global trend of governments stifling criticism and restricting civil society. That has resulted in a situation where ‘the Australian government has increasingly sought to undermine some of the institutions that hold it accountable and to sideline our independent court system in a number of critical areas including immigration detention and national security’. Accordingly, this article begins by tracing some of the more recent legal incursions into democratic rights and freedoms in Australia. Many

of these have occurred since September 2001, including laws now criminalising conduct (and imposing lengthy prison sentences), where previously the same unlawful conduct would have less impact on a person's liberty. Following that, the article looks at cases of secrecy corrupting democratic rights and the rule of law in three areas: (i) press freedom; (ii) immigration policy and practice; and (iii) the control of serious organised crime. Escalating secrecy in these and other areas not only undermines basic legal rights, but also erodes democratic values, the doctrine of responsible governance, and the idea that parliaments should exercise restraint when making laws in respect of contentious issues. Thus, it is suggested attention should probably turn to questions about the need for a statutory human rights instrument or bill of rights in Australia. After considering whether that would in fact make any difference to the legal assault on democratic rights and freedoms, the article concludes by arguing ultimate responsibility lies with politicians to guarantee democratic principles, citizen rights, and the rule of law so they do not continue to be undermined by increasing secrecy on the pretext of ensuring national security and controlling crime.

### **Legal incursions into democratic rights and freedoms**

It is well known that Australia is the only western democratic nation without a bill of rights or other legal instrument guaranteeing rights and freedoms (Charlesworth et al. 2003: 424). Moreover, the *Australian Constitution* (the Constitution) provides only limited protection for individual rights and freedoms. Some of these rights are express (for example, freedom of religion, right to vote, trial by jury), while others are implied (for example, freedom of political communication). The absence of a national statutory human rights instrument in Australia often means it is incumbent upon courts, and especially on the High Court, to determine the existence, nature and scope of rights and freedoms. For instance, in *Australian Capital Territory v Commonwealth*, the High Court invalidated Part IIID of the *Broadcasting Act 1942* (Cth), which banned political advertising during elections and strictly regulated it at other times. The Court found the impugned legislation contravened an implied right to freedom of political communication contained in the Constitution. The decision of the majority of justices was that the Constitution provides for a system of representative and responsible government, and that the right to free political communication is an indispensable element of that system. In the later case of *Lange v Australian Broadcasting Corporation*, the High Court decided freedom of political communication could be implied from the system of representative government provided for in the Constitution.

As these cases indicate, the absence of a Commonwealth bill of rights can be explained by the drafters' belief in the doctrine of representative and responsible government, which they thought would be sufficient to protect individual rights and liberties. In recent times, however, the fragility of this doctrine has been revealed. Legal scholars in Australia and elsewhere have identified the terror attacks of 11 September 2001 as a watershed moment in lawmaking insofar as 'past conventions and practices that lead parliamentarians to exercise self-restraint with regard to democratic principles were put aside in the name of responding to the threat of terrorism' (Williams 2015).

In Australia, prominent legal scholar, George Williams, has identified 350 instances of current Commonwealth, state and territory laws that infringe democratic rights and freedoms, 209 (approximately 60 per cent) of which have been introduced since September 2001. Federal legislation and laws enacted by New South Wales and Queensland parliaments encroach the most upon democratic freedom. Not only have the number of laws infringing democratic freedoms increased but so too has their severity: where legislation previously made conduct unlawful, and therefore had a low impact upon freedoms, more recent legislation criminalises conduct, which can also be subject to long periods of imprisonment. Williams adds that the problem may well run much deeper, since the 350 identified instances of legislation that infringe democratic rights and freedoms on the face of the law do not include infringements that might occur via indirect means.

Accordingly, he concludes, '[a] dynamic has been created whereby extraordinary anti-terrorism laws have created new understandings and precedents that have made possible an even broader range of rights infringing legislation' (Williams 2015).

A recent example demonstrates just how corrupting an effect on democratic and legal principles these developments may prove to be when they are accompanied by a ramping up of 'law and order' politics. Soon after seizing power in 2012, the Queensland government, led by Campbell Newman, introduced tough measures to tackle the serious organised crime of outlaw motorcycles gangs, or 'bikies', as they are known colloquially. Among other things, it introduced the *Vicious Lawless Association Disestablishment Act 2013* (Qld), section 7(1) of which imposes 'mandatory sentences of 15 years' imprisonment in addition to the original sentence for a declared offence on a "vicious lawless associate", such as a bikie club member, and an extra 10 years (that is, 25 years on top of the original sentence) for a vicious lawless associate who was an office bearer of the relevant association at the time or during the commission of the offence' (Martin 2014a: 535).

At about the same time, and in anticipation of the state hosting the G20 summit in Brisbane and Cairns, 15-16 November 2014, the Queensland government also enacted the *G20 Safety and Security Act 2013* (Qld). *Prima facie*, there was nothing remarkable about this statute and, in many respects, it aped legislation enacted for the 2007 Sydney APEC meeting (see Martin 2010, 2011). Among other things, the Queensland Act provided for: police searches, including strip searches, in security areas (ss 23-25); arrest without warrant, and detention if the person is charged with an offence under another Act (s 79); and presumption against bail for those arrested for assault of a police officer, discharging a missile at a police officer, or generally otherwise disrupting the G20 meeting (s 82) (Galloway and Ardill 2014: 6). What has disturbed some commentators most of all, however, was the potential for these laws to interact with legislation directed at bikies:

If for example an otherwise peaceful (and lawful) assembly turns violent, there is the possibility for people to be charged with affray, one of the offences listed as a trigger for operation of the VLAD [*Vicious Lawless Association Disestablishment*] Act. Carrying out such an act with three others deemed to be participants in a serious crime then renders the accused a participant in a criminal organisation. This would attract the additional mandatory sentences. (Galloway and Ardill 2014: 6)

Certainly, the Queensland case is an extreme example, showing how protest, for instance, may be inadvertently criminalised although, as Williams (2015) suggests, this may be only one of many ways democratic rights and freedoms could be infringed indirectly. The situation in Queensland also demonstrates the fragility of the doctrine of representative and responsible government as a safeguard against politicians undermining citizen rights and liberties. It has been argued, firstly, that the idea of representativeness is something of a misnomer given: (a) Queensland's unicameral system (that is, no upper house to act as a check on power exercised by the government and executive branch); (b) the fact that the anti-bikie laws were rushed through, bypassing parliamentary committee and public consultation processes; and (c) despite claims made by the state's then Attorney-General that 70 per cent of Queenslanders supported the new laws, the Newman Government secured its overwhelming parliamentary majority with 49.66 per cent of the overall vote in the 2012 state election (Martin 2014a: 536-537). It has been proposed the idea of responsible government should also not apply in the case of Queensland, which highlights the dangers of 'overcriminalisation' whereby there is 'an increased recourse to criminal law and penal sanctions to solve particular problems that may be better addressed through alternative means, such as increasing state resources or allocating them more efficiently' (Martin 2014a: 537).

### Cases of secrecy corrupting democratic principles and the rule of law

This section examines secrecy's corrupting influence upon democratic rights and the rule of law in the three following areas: (i) freedom of the press; (ii) immigration policy and practice; and (iii) the control of serious organised crime. First, infringements on press freedom have been introduced pursuant to amendments made in 2014 to the *Australian Security Intelligence Organisation Act 1979* (Cth), which prohibits media reporting of 'special intelligence operations' and anything that 'relates to' them. Williams (2015) argues the effect of this provision is to criminalise reporting that may be in the public interest, since it could reveal incompetence or wrongdoing on the part of the authorities. Moreover, similar offences exist for other types of secret information, such as when information of a controlled operation is revealed.

Freedom of the press has been limited further by the enactment of the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth), which provides the executive with new powers to apply for 'journalist information warrants' that can compel telecommunications companies to surrender the metadata of journalists that may identify a source. Concerns this would crush investigative journalism in Australia were soon realised after documents obtained under freedom of information laws revealed that 'eight stories on Australia's immigration policy last year [2014] were referred to the Australian Federal Police for the purpose of "identification, and if appropriate, prosecution" of the persons responsible for leaking the information' (Williams 2015).

These developments ought to be set against the backdrop of broader secrecy surrounding immigration policy in Australia, as well as a tranche of new offences (and protections) available under law where Australian citizens disclose sensitive government information (see Hardy and Williams 2014). For instance, on 1 July 2015, the *Border Force Act 2015* (Cth) was introduced. Controversially, this piece of legislation imposes up to two years imprisonment on employees of detention camps who blow the whistle on camp conditions. It has been said this amounts to a deliberate attempt by the Australian government to keep secret atrocious conditions, including sexual abuse and self-harm, in offshore detention centres in Nauru (Editorial Board 2015). Alternatively, it has been argued, leaked stories are useful to the authorities because they act as a deterrent to would-be asylum seekers (McKenzie-Murray 2015). However, notwithstanding government efforts to cover-up abuse in offshore detention, information has slowly filtered out, including from health professionals, activists and former asylum seekers (Martin and Tazreiter 2018).

Along with criminalising whistleblowing, the *Border Force Act* created the Australian Border Force, which constituted an effective melding of Customs and Immigration Departments, now with considerably greater power, such as authority to carry arms, conduct surveillance and detain people. Vested with their new powers, on 28 August 2015 it was reported that armed Border Force officials would be patrolling the centre of Melbourne, randomly stopping and checking peoples' visa conditions. As with similar counterterrorism initiatives, Operation Fortitude, as it was named, was introduced on the basis of ensuring community safety, and it also involved the cooperation of police. These developments represent the continuation of a process of militarisation of the Department of Immigration, and its greater reliance on secrecy (McKenzie-Murray 2015), which are also features of changes police forces have undergone in recent times, and particularly since September 2001 (Martin 2011). Dehumanising asylum seekers is a key government strategy here too, as indicated by restrictions placed on media reporting of asylum seeker stories (Martin 2015a: 314). And the process of dehumanisation continued with the reimagined Department of Immigration being headed by Mike Pezzullo, who formerly ran the Customs Department. As one source put it:

I don't think Mike Pezzullo lets human consequence get in the way [...] He doesn't let the human element of policy get in the way. Pezzullo comes from Customs – he's

dealt with inanimate things. Containers, mail, suitcases, drugs. It's not humans. It's not issues of settlement, integration, support. Mike's not alone in this. Many in Customs are desensitised. (quoted in McKenzie-Murray 2015)

Contrast this to Reilly and La Forgia's (2013) analysis of the secret 'enhanced screening' of asylum seekers by Commonwealth officers working for what was then the Department of Immigration and Citizenship. They argue a very heavy burden is placed on individual Commonwealth officers who 'decide to return a person to their country of origin without hearing their whole story and thus potentially returning them to a place of great danger to them' (Reilly and La Forgia 2013: 143). While challenges to administrative decisions depersonalise individual decision makers, Reilly and La Forgia argue, in the context of pre-screening, Commonwealth officers should not be regarded simply as bureaucrats. Rather, they are moral human beings who 'actually have to make almost unbearable decisions about the fate of people arriving at the border to screen them in or to screen them out through asking questions that are designed to avoid receiving inconvenient answers' (Reilly and La Forgia 2013: 145).

Reilly and La Forgia (2013: 144) draw on democratic theory to argue that these new informal and secretive screening processes that have been used in Australia since 27 October 2012 are contrary to notions of democratic deliberation, which require issues be discussed publicly to ensure 'our mutual interaction and influence over each other'. Although democracies tend towards secrecy in relation to highly contentious issues, such as the treatment of asylum seekers, this 'loss of publicity is a profound loss of relationship with those with whom we share the polity and with those who wish to join it' (Reilly and La Forgia 2013: 144). Moreover, by outsourcing our democratic angst to Commonwealth officers, argue Reilly and La Forgia (2013: 145), we are asking those individuals 'to bear our democratic responsibility for the making of difficult judgments'.

Legal scholars and commentators have been quick to show how these developments highlight the contradictory nature of contemporary Australian democracy. In the context of secrecy surrounding immigration policy in Australia, and, in particular, provisions of the *Border Force Act* that impose jail sentences on workers of offshore detention centres who speak out about conditions, president of the Human Rights Commission, Gillian Triggs, has said this is 'worrying in a modern democracy', adding, 'I do find it rather curious that a government that in fact came into office promoting rights to freedom of speech has in fact diminished that freedom piece by piece; whether it's in relation to counterterrorism laws, but we've now got them in relation to managing the detention centres' (Medhora 2015).

Here, Triggs gestures to what, in the literature, is termed, 'seepage', whereby extraordinary legal measures introduced after September 2001 have gradually crept into other areas of law and policy beyond the counterterrorism context (Martin 2012: 191, 209). Williams (2015) too talks of threats posed to Australian democracy by seepage from anti-terror measures, as well as pointing to the contradictions inherent in statements made by politicians who, on the one hand, claim to value freedom by, for instance, proposing to repeal laws proscribing offensive behaviour on the basis of race, colour or national or ethnic origin while, on the other hand, they introduce more and more laws that effectively diminish established rights and freedoms.

Another area of law and government policy that has been affected by seepage from the counterterrorism context is the control of serious organised crime allegedly committed by members of bikie gangs. Accordingly, state and territory governments in Australia have introduced 'anti-bikie' legislation as part of a wider 'law and order' drive, although this has not been without its challenges, including constitutional challenges in the High Court. For the most part, the High Court has relied on the doctrine in *Kable v Director of Public Prosecutions (NSW)* (*Kable*) when deciding on the constitutional validity of legislation providing for the control of criminal organisations. The principle identified in *Kable* is that 'a State legislature cannot confer

upon a State court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Chapter III of the Constitution, as a repository of federal jurisdiction and as a part of the integrated Australian court system'.<sup>1</sup>

The doctrine in *Kable* was applied in *South Australia v Totani*, where a majority of the High Court of Australia held that s 41(1) of the *Serious and Organised Crime (Control) Act 2008* (SA) was invalid 'because it authorised the Executive to enlist the Magistrates Court to implement the decisions of the Executive in a manner repugnant to or inconsistent with its continued institutional integrity'.<sup>2</sup> In *Wainohu v New South Wales*, a majority of the High Court again applied the *Kable* principle to decide the *Crimes (Criminal Organisations Control) Act 2009* (NSW) was invalid 'because it exempted eligible judges from any duty to give reasons in connection with the making or revocation of a declaration of an organisation as a declared organisation'.<sup>3</sup>

The only time when the High Court has struck down a claim for constitutional invalidity was in the case of *Assistant Commissioner Condon v Pompano Pty Ltd (Pompano)*. Here, six justices of the High Court unanimously held that provisions of the *Criminal Organisation Act 2009* (Qld) relating to 'criminal intelligence' relied upon to declare a 'criminal organisation' do not impair the essential and defining characteristics of the Supreme Court of Queensland so as to transgress the limitations on state legislative power derived from Chapter III of the *Australian Constitution* (Martin 2014a: 502). Rather than applying the principle in *Kable*, however, in *Pompano*, the High Court followed its own 'jurisprudence of secrecy' (Martin 2012), affirming the previous decisions of *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* and *K-Generation Pty Ltd v Liquor Licensing Court*. In those cases, the High Court resolved the tension between reliance upon criminal intelligence and fair trial principles in favour of secrecy on the condition courts retain discretion to independently assess classified information (Martin 2014a: 503). Steven Churches (2010: 20; emphasis in original) refers to this approach as 'curial fairness', which, he says, has emerged in recent times to replace the requirements of procedural fairness, whereby 'evidence that formerly would not have been available to the affected party, pursuant to public interest immunity, on which basis it was not utilised by the court, may now still not be available to the affected party but *can* be used by the court' (see also Martin 2014b).

The judicial use of secret evidence not only has a corrupting effect on the rule of law but also, in turn, upon democratic principles; that is because both courts and parliaments have some discretion to make law although, in democracies like Australia, the doctrine of parliamentary sovereignty means ultimate authority lies with elected representatives rather than members of the judiciary. Another part of the equation, here, is the doctrine of representative and responsible government, which, as discussed earlier, is a lynchpin of Australian constitutionalism. However, this increasingly appears an impotent deterrent to politicians intent on winning the race to the bottom in 'law and order auctions', which is all the more reason for 'parliaments [to] exercise restraint in the current era to prevent the further erosion of civil liberties and human rights and damage to the rule of law and democratic values caused by the normalisation of extraordinary measures' (Martin 2012: 196).

According to these arguments, the use of criminal intelligence provided for under control of criminal organisations legislation, and indeed similar laws, poses a challenge not only to principles of fairness under the rule of law but also to democratic accountability. Looking mainly at transactional relationships in private and commercial law, like those involving trade secrets, for example, Scheppele (1988) draws a distinction between 'deep secrets' and 'shallow secrets'. While the former refers to a situation in which the 'target' of a secret is 'completely in the dark, never imagining that relevant information might be had' (Scheppele 1988: 21), the latter refers to a situation in which the target 'has at least some shadowy sense' they are not privy to all information (Scheppele 1988: 76). Although Scheppele's analysis does not extend to state secrets and, therefore, the impact of such secrecy on democratic values *per se*, this aspect of secrecy is explored by Gutmann and Thompson (1996: 121-123), who argue, 'deep secrets present



obstacles to public scrutiny because they are utterly hidden from citizens, whereas shallow secrets at least allow citizens the ability to respond to and challenge secret-keepers' (Martin 2014a: 520). Regardless of the public law or private law context, however, deep secrets are generally seen as problematic:

Just as deep secrets present a contractarian problem for Scheppele because they impair the ability of the individual to exercise meaningful choice, undermining values such as fairness and autonomy, they present a democratic problem for Gutmann and Thompson because they impair the ability of the citizenry to exercise meaningful oversight. (Pozen 2010: 264)

Although there is no bright line separating deep and shallow secrets, which exist along a 'depth continuum' (Pozen 2010: 274), it has been argued the use of criminal intelligence in Australian courts is probably more akin to a deep secret than a shallow secret, 'because even though respondents know a clandestine process is at work (i.e., a special closed hearing to determine an application to declare criminal intelligence), since they and their representatives are excluded from that process, they are unable to challenge information therein disclosed' (Martin 2014a: 521).

Of course, Australian jurisdictions are not alone in providing for the increased use of secrecy in curial settings. Similar criticisms of secret procedures have been made in English court cases involving allegations of torture at 'dark sites' like Guantanamo Bay. For instance, in *Mohamed (No 2)*, United Kingdom (UK) Foreign Secretary, David Miliband, made a public interest immunity application on the basis disclosure of government documents and information, which had originated in the US, pertaining to Mohamed's detention, rendition, and maltreatment would threaten intelligence sharing between the two countries, and ultimately endanger lives. While British courts have often deferred to the executive on matters of national security, in this case the Divisional Court questioned why 'a democracy governed by the rule of law would expect a court in another democracy to suppress a summary of the evidence contained in reports by its own officials [...] where the evidence was relevant to allegations of torture [...] politically embarrassing though it might be'.<sup>4</sup> In addition, the Court opined, 'the requirements of open justice, the rule of law and democratic accountability demonstrate the very considerable public interest in making the redacted paragraphs public, particularly given the constitutional importance of the prohibition against torture'.<sup>5</sup> Although the facts in that case were limited to matters of rendition and mistreatment amounting to torture, the same basic principles apply to other cases involving state secrecy, and, in this sense, *Mohamed (No 2)* provides a cautionary tale not only as to the dangers of allowing closed hearings and redacted summaries of secret material, but also of courts seeming to accept uncritically the word of members of the executive' (Martin 2014a: 533).

### **Will a bill of rights make a difference?**

Debates in Australia about the need for a statutory human rights instrument or bill of rights would seem highly pertinent given the emergence of 'curial fairness' where it is at a court's discretion to adjudicate on certain matters of due process, rather than upholding established principles of procedural fairness. Arguably, that need is all the more pressing in an era when politicians tend increasingly to depart from the principles of restraint and responsible government in making policy and legislating on populist 'law and order' issues.

In lieu of a federal bill of rights, the Australian government has enacted the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), although, according to Williams (2015), there is little evidence that has had a significant impact in preventing or dissuading parliaments from introducing laws that infringe basic democratic rights. Some states and territories have also enacted laws to protect human rights. Both Victoria and the Australian Capital Territory have enacted human rights legislation, but here human rights are not regarded as absolute, and 'are

subject to such reasonable limits as can be demonstrably justified in a free and democratic society' (Gotsis 2015: v).

The absence of a Commonwealth bill of rights frequently causes commentators to ask whether having one would actually make any difference in providing adequate protection for individual rights and freedoms in Australia. Sometimes this has led legal scholars in particular to test whether current legislation would conform to a statutory human rights framework, such as the *European Convention on Human Rights (ECHR)*. Most often, this has involved interrogating legal measures introduced since September 2001.

Using the example of control order regimes, which, as mentioned earlier, may require the use of secret criminal intelligence in closed hearings, Kieran Hardy (2011) has examined the effect that a statutory bill of rights might have on the judicial interpretation of rights-infringing counterterrorism legislation. He shows how, on questions of deprivation of liberty which are thrown up when applications for control orders are made, UK courts have consistently given substantial weight to notions of liberty under Article 5 of the *ECHR*, implemented through the *Human Rights Act 1998* (UK). Accordingly, they have concluded there are no bright lines between preventative restraints on liberty, such as those contained in control orders, and detention in state custody. In Australia, by contrast, the High Court has determined the restrictions imposed in a control order are conceptually distinct from detention in state custody.

Although this reasoning may be formally correct, according to Hardy (2011: 6), it is also indicative of 'an increasingly doubtful belief that informal human rights mechanisms (such as trust in government, procedural fairness and an independent judiciary) are sufficient to protect citizens from unjustified state interference'. Thus, he concludes, in the case of restrictions imposed on liberty by measures such as control orders, it would seem the presence of a statutory bill of rights in Australia could 'have a significant effect on how appeal court judges come to interpret the right to liberty' (Hardy 2011: 7). Conversely, he shows how, in determining the semantic breath of anti-terror legislation and deciding whether it is intended to be a punitive regime, a statutory bill of rights might prove less effective, given 'the near identical judicial interpretation of the Australian and UK control order regimes on these two points' (Hardy 2011: 8).

Indeed, the reticence of UK courts to challenge the broad drafting of anti-terror legislation or determine that punishment is a purpose of the control orders regime may suggest there would be little point introducing legislation similar to the UK *Human Rights Act* in Australia. In that respect, Ewing and Tham (2008) have commented on the futility of the UK Act, observing that British courts largely remain deferential to the sovereignty of parliament, and display only a diluted commitment to the rule of law, which means they have had a correspondingly weak commitment to the substance of human rights. Under these circumstances, argue Ewing and Tham, British courts have acted only as an irritant rather than an obstacle to the government's counterterrorism policies, which leads them to conclude there is:

... a strong lingering sense of deference by the courts to the political branches, in the sense that the centre of gravity on the Bench appears at the present time to be tolerant and accepting of measures that would have been regarded inconceivable restraints on liberty at the time the HRA [*Human Rights Act*] was introduced. (Ewing and Tham 2008: 692)

More recently, the *Justice and Security Act 2013* (UK) has been regarded by many as representing a significant challenge to the (unwritten) British constitution, civil liberties, and due process rights, including rights to minimum disclosure in closed proceedings (Martin 2014a; Martin and Scott Bray 2013; Martin, Scott Bray and Kumar 2015). And, in other jurisdictions where formal provision is made for human rights in statutes or other legal instruments, the events of 11 September 2001 and its aftermath continue to cast doubt on the genuine commitment of

governments to observe human rights norms. Hence, notwithstanding protections afforded Canadian citizens under the *Charter of Rights and Freedoms*, research in that country has shown how contemporary protest policing methods, for example, have involved 'the systematic violation of constitutional protections against arbitrary arrest and detention [...] as well as protection against abusive searches' (Fortin et al. 2013: 41).

In the US, too, commentators have argued the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)* is a source of human rights incursions and constitutional breaches. Indeed, it has been observed that over the past decade or so the US Supreme Court has deployed the Fourth Amendment to the *US Constitution*, 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures', contrary to the protection of basic rights. In the case of *Atwater v City of Lago Vista*, for instance, 'the majority five determined that the arrest, handcuffing and detention in cells of the appellant while being charged with the misdemeanour of driving with children unrestrained by seat belts, did not offend the Fourth Amendment' (Churches 2013: 67).

Conversely, a US federal judge recently ruled that, although the First Amendment does not protect the right to take photos or record videos of police, it would protect the right if filming is done in the spirit of protest (Mock 2016). This is a decision that is in line with prior proposals in California to protect citizens who record or photograph police actions, without obstructing them from performing their duties,<sup>6</sup> but out of step with later plans in Arizona to make it illegal to shoot close-up videos of police on the basis it would put officers in danger by distracting them while engaging with suspects.<sup>7</sup> More recently, a group of 40 documentary film-makers wrote an open letter to the US Department of Justice, after it was revealed citizen journalists who filmed shootings of black people by police were subsequently harassed and targeted by law enforcement agencies who are clearly intent on suppressing footage, intimidating witness, controlling stories, and obscuring instances of police brutality and other unjust activity (Lartey 2016). It has also been revealed that police departments across the US have collectively spent US\$4.75 million on software tools designed to monitor the locations of protestors and social media hashtags used by activists (Dwoskin 2016). In contrast to arguments about digital technologies and social media giving rise to a democratic levelling of the surveillance hierarchy (see Martin 2015b: 208-211), these developments illustrate clearly the lengths to which the state in seemingly open and democratic societies is prepared to go to monitor, control and, ultimately, silence protest.

Similar things have occurred in some Australian jurisdictions. For instance, in New South Wales, police have so-called 'sneak and peek' powers like those contained in the *USA PATRIOT Act*, which authorise entry to a subject premises without the occupier's knowledge (Martin 2010: 164). Police use of surveillance techniques such as this, as well as other secret procedures, means their powers are increasingly reminiscent of those formerly reserved for agents working within the security intelligence community. Moreover, the New South Wales government recently introduced measures aimed at 'criminalising dissent' (Martin 2017), subjecting anti-mining protestors to possible jail terms of seven years for locking onto mine equipment (Robertson 2016). Similar events have also taken place during protest policing in the UK (Gilmore, Jackson and Monk 2016).

## Conclusion

Over recent years, there has been a tendency for politicians to act with impunity when enacting laws relating to populist issues involving claims of threats to national security or public safety, such as in the areas of counterterrorism, organised crime, and immigration and border protection. Instead, however, our elected representatives ought to act responsibly and with restraint, especially when the laws they make contain substantial departures from established legal principles and practice. Notwithstanding arguments about the relative merits of introducing

a bill of rights in Australia, departing from normal court processes and legal doctrine should be accompanied by appropriately robust safeguards and protections to mitigate any potential unfairness that may be suffered by citizens and non-citizens alike when legal secrecy threatens liberty.

That is why, for instance, recommendations pertaining to the use of criminal intelligence in the control of serious organised crime include the use of special advocates to represent the interests of accused persons, and a minimum disclosure requirement enabling accused persons to know the substance or 'gist' of allegations made against them so as to enable them to give effective instruction to challenge those allegations (see Martin 2014a). However, these measures are themselves contentious and subject to debate regarding the de facto procedural protection they afford persons accused of criminal activity. Problems with special advocates include that they 'are gravely hampered by the rules which severely restrict communications between the special advocate and the party they "represent" once the closed material has been served' (Tomkins 2011: 218). Moreover, while minimum disclosure requirements, such as knowing the gist or essence of allegations made against accused persons, may inject a degree of basic fairness into closed hearings, if that is accompanied by curial control of fairness, it offends the equality of arms principle, which assumes 'the parties in court should be armed with equal weaponry, and that the judge should keep equidistant from them' (Churches 2010: 29-30).

Finally, although the courts have responsibility for administering law, ultimate responsibility for making law rests with parliamentarians who, in democratic systems, seek to secure power by winning votes. And, while the idea of post-democracy (discussed at the beginning of this article) may limit political participation to periodic voting in elections—producing citizens who are 'reduced to the role of manipulated, passive, rare participants' (Crouch 2004: 21)—recent populist uprisings in the US (the election of Trump) and the UK (Brexit) demonstrate that should not be taken-for-granted. Indeed, these events signal not only the widespread disillusionment with a corrupt political elite, but could also herald 'the removal of some fundamental supports of democracy and therefore a parabolic return to some elements characteristic of pre-democracy' (Crouch 2004: 22). In the context of the present discussion, one substantive consequence mentioned by Crouch (2004: 23) is a return to prominence of the state's role as policeman and incarcerator, which has certainly escalated since September 2001, and seems likely to continue as politicians tap into an unremitting culture of fear to justify the increased use of secret provisions and other exceptional legal measures under the pretext of ensuring community safety and crime control. That they might do so with disregard for democratic principles, citizen rights, and the rule of law, serves only to reinforce Lord Acton's well-known remark regarding power's tendency to corrupt.<sup>8</sup>

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<sup>1</sup> *Wainohu v New South Wales* (2011) 243 CLR 181, [44] (French CJ and Kiefel JJ).

<sup>2</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, [133] (Hayne, Crennan, Kiefel and Bell JJ).

<sup>3</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, [135] (Hayne, Crennan, Kiefel and Bell JJ).

<sup>4</sup> *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 WLR 2653, 2706 [69].

- <sup>5</sup> *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 WLR 2653, 2702 [54].
- <sup>6</sup> See 'California moves to protect citizens' right to record, photo police' (8 April 2015). Available at [www.rt.com/usa/247981-california-recording-cops-reprisal-protections/](http://www.rt.com/usa/247981-california-recording-cops-reprisal-protections/) (accessed 10 October 2016).
- <sup>7</sup> See 'Arizona lawmaker introduces bill to criminalize filming police at close range' (11 January 2016). Available at [www.rt.com/usa/328547-arizona-police-filming-bill/](http://www.rt.com/usa/328547-arizona-police-filming-bill/) (accessed 10 October 2016).
- <sup>8</sup> In a letter to Bishop Mandell Creighton, 5 April, 1887, Lord Acton commented: 'Power tends to corrupt, and absolute power corrupts absolutely' (Dalberg-Acton 1887 [1907]: 504).

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