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TERRORISM LAWS

"Being alert and alarmed when acting for those accused of terrorism offences"

CONSIDERATION OF AREAS OF LEGAL AND PRACTICAL DIFFICULTIES

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INTRODUCTION

1. Before 2002 terrorist acts in Australia would have been prosecuted as crimes such as murder, infliction of serious injury, assault, arson, possession of explosives, offences against aircraft or ships and so on. This position was radically changed by the ***Security Legislation Amendment (Terrorism) Act*** **2000**, which introduced a definition of terrorism into Australian law and created a number of offences based on that definition (Divisions 101 and 103 of the ***Commonwealth Criminal Code Act*****,** hereafter referred to as the Code). Ben Saul "Australian Anti Terrorism Laws", HOT TOPICS Vol. 58 p17.

2. At the Commonwealth level there have been more than 30 pieces of "anti-terror" legislation introduced since 2001. The full list appears at the National Security Australia web site: http://www.nationalsecurity.gov.au/agd/www/nationalsecurityHome.nsf/headingspagesdisplay/9F291545F46DC7B9C7B9CA256E43000565D4?OpenDocument Each State and Territory has introduced legislation to complement that of the Commonwealth. By way of example, the ***Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act*** **2003** introduced a regime whereby "questioning warrants" allowed for the detention and questioning of individuals.

3. This legislation was replaced by the ***ASIO Legislation Amendment Act*** **2006**, which consists of more extensive powers, including the detention of an individual for the purpose of questioning for days continuously on any one occasion. Multiple warrants may be sought.

4. Preventative detention was enacted in December 2005 by the ***Anti-Terrorism Act*** **(No 2) 2005 (Cth)** which inserted Division 105 of the ***Code*** allowing, amongst other things, for the detention of an individual for up to 48 hours to prevent an imminent terrorist act occurring or to preserve evidence.

5. The enactment of numerous pieces of anti-terror legislation has generated considerable criticism and evoked very strong concerns about infringement of individual rights and

liberties. The second part of this paper will deal, in a general way, with the various wide powers that now exist pursuant to the counter terrorism legislative regime. Arguably, the laws as passed represent a fundamental attack on human rights. Dr S Zifcak, Anti-terrorism legislation and the protection of human rights, (2006) Vol. 18, No 1, March Legaldate.

6. The first part of this paper is concerned with legal and practical considerations relating to trials involving terrorist related charges. I will focus on two areas of the Commonwealth Criminal Code that are of current interest. The first area relates to the offence of committing an act in preparation for a terrorist act (s.101.6); the second relates to the definition of a terrorist organisation (s.102.1).

7. Before embarking upon that analysis, it is helpful to briefly summarise the prosecutions for terrorism offences brought to date. Supra note 1 Ben Saul article p.19.

Zaky Mallah

8. Mallah was the first person charged under the anti-terror laws. He was indicted upon 2 counts of committing an act in preparation for or in the planning of a terrorist act, contrary to s.101.6(1). On 6 April 2005 a jury acquitted him on these two counts. He pleaded guilty to a third count of recklessly making a threat to cause serious harm to a third party: (s.147.2 carrying a maximum period of 7 years imprisonment). He was sentenced to a total term of two years, six months.

9. At the time of the offence Mallah was 20 years old. His application for a passport to travel to Lebanon was refused on the ground that ASIO was of the view that he might prejudice national security. When the decision was reviewed by the Administrative Appeals Tribunal, Mallah and his lawyer were excluded from some of the evidence presented. By his own account, he became upset and angry with the government. ***R v Mallah*** [2005]NSWSC 317 at [9]. He acquired a rifle and ammunition and made a video of what purported to be the message of a suicide bomber.

10. Mallah received significant media attention. He was contacted by journalists who were enthusiastic about obtaining a story from him about his grievances, his intentions and his plans. In the course of these communications he sold to journalists copies of documents that had been seized by police during their investigations.

11. The Counter Terrorist Command undertook an operation whereby an under cover operative made contact with Mallah in the guise of a freelance journalist apparently offering a sum of money for a copy of the "suicide" video. It was during those discussions that Mallah threatened to kill officers of ASIO or the Department of Foreign Affairs and Trade.

12. The sentencing judge, Wood CJ at CL, concluded that:

> *"The prisoner was an idiosyncratic, and embittered young man, who was to all intents something of a loner, without significant prospects of advancing himself……. While I accept that the Prisoner enjoyed posing as a potential martyr, and may from time, to time, in his own imagination, have contemplated creating a siege and taking the lives of others, I am satisfied that in his more rational moments he lacked any genuine intention of doing so."* ***Ibid*** at [38] and [41].

Faheem Lodhi

13. Lodhi was the first person to be convicted of an offence of committing an act in preparation for a terrorist act pursuant to s.101.6 (maximum penalty of imprisonment for life). He was acquitted of one count of making a document connected with preparing for a terrorist act, but he was found guilty of possessing a thing connected with preparing for terrorism, collecting documents connected with preparing for terrorism, doing an act in preparation for a terrorist act, and giving false or misleading answers to ASIO.

14. Lodhi worked for an architectural firm in Sydney. He was seen buying maps of the Sydney electricity grid, enquiring with a chemical supply company about the availability of materials capable of being used to make explosives, and collecting a document which set out the ingredients for making poisons, explosives, detonators etc.

15. Lodhi was sentenced to a total term of 20 years imprisonment with a 15-year non-parole term. He was the first NSW prisoner to be classified AA which entails harsh custodial conditions including confinement to a cell with limited exercise time and restricted visiting rights.

Jack Roche

16. In 2004 Roche pleaded guilty to a charge of conspiring to explode a bomb at the Israeli Embassy in Canberra. He was prosecuted under pre-existing legislation rather than post 2001 anti-terror laws. Pursuant to s.86 of ***Crimes Act*** 1914 (Cth) carrying a maximum penalty of 25 years. He was sentenced to a total term of nine years with a non-parole period of four years, six months. An appeal to increase his sentence failed. ***R v Roche*** [2005] WASCA 4.

17. Roche had received financial assistance from a co-conspirator in Pakistan. He purchased a camera, changed his appearance and travelled to Malaysia to receive more funds. He took video footage of the Israeli Embassy in Canberra and the Israeli Consulate in Sydney. He also made inquiries about obtaining explosives and a number of ignition devices.

18. Following the commission of these overt acts, Roche withdrew from the conspiracy and played no further part for over two years before he was taken into custody.

Bilal Khazal

19. Khazal was charged with two offences: Making a document likely to facilitate a terrorist act (s.101.5(1)) and attempting to incite a person to engage in a terrorist act (ss.11.1, 11.4, 101.1). The jury convicted on count one and were hung on count two.

Izhar Ul- Haque

20. Ul-Haque was 21 years old when he was arrested in 2004 and charged with training with a terrorist organisation in Pakistan. The organisation is Lashkar-e-Taiba (LET). The organisation was not a proscribed terrorist organisation at the time he was alleged to have trained with it although, in 2003, it was specified as a terrorist organisation. The prosecution was therefore brought pursuant to s.102.5(1). The Crown had to prove as an element that LET was preparing, assisting in or fostering the doing of a terrorist act.

21. The Crown case relied primarily on two records of interview. Objection was made to the admission of the interviews pursuant to ss.84 and 138 of the ***Evidence Act*** **1995** on the grounds that the admission was influenced by oppressive conduct. The conduct in question was primarily that of ASIO officers. The trial judge held that both records of interview were inadmissible. In the course of his judgment, his Honour was highly critical of the conduct of the ASIO officers, concluding that they committed offences of false imprisonment and kidnapping at common law. ***R v Ul-Haque*** [2007] NSWSC 1251 at [62].

22. A few days later the Commonwealth Director of Public Prosecutions terminated the proceedings.

R v Benbrika & Others **(2008)**

23. These proceedings took place in the Victorian Supreme Court. The jury convicted 6 of the accused, acquitted 4, and were hung in relation to one. The last accused was convicted of one charge and acquitted of the other. The twelve accused were charged with a number of offences, totalling 27 charges, including being a member of a terrorist organisation (s.102.3).

24. The prosecution alleged that each of the accused between about 1 July 2004 and 8 November 2005 was a member of a terrorist organisation, that he intended to be a member of that organisation, and that he knew the organisation was a terrorist organisation, in that he knew that it was directly or indirectly fostering or preparing the doing of a terrorist act.

25. A significant portion of the Crown case involved listening device and telephone intercept product of conversations between the various accused about their religious and political beliefs.

R v Elomar & Ors

26. Five accused were indicted for conspiracy to commit acts in preparation for a terrorist act/acts. The proceedings before the jury commenced in November 2008 at Parramatta Supreme Court. On 16 October 2009 all five accused were found guilty. On 15 February 2010 they were sentenced to terms of imprisonment ranging from 23 to 28 years.

ACTS DONE IN PREPARATION FOR A TERRORIST ACT

Section 101.6 provides

(1) A person commits an offence if the person does any act in preparation for, or planning, a terrorist act:
Penalty: Imprisonment for life.
(2) A person commits an offence under subsection (1) even if:
(a) a terrorist attack does not occur; or

(b) the person's act is not done in preparation for, or planning, a specific terrorist act; or

(c) the person's act is done in preparation for, or planning, more than one terrorist act.

(3) Section 15.4 (extended geographical jurisdiction – category D) applies to an offence against subsection (1).

A terrorist act is defined in section 100.1

(1) Terrorist act *means an action or threat of action where:*

(a) the action falls within subsection (2) and does not fall within subsection (3); and

(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

(c) the action is done or the threat is made with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

(ii) intimidating the public or a section of the public.

(2) Action falls within this subsection if it:

(a) causes serious harm that is physical harm to a person; or

(b) causes serious damage to property; or

(c) causes a person's death; or

(d) endangers a person's life, other than the life of the person taking the action; or

(e) creates a serious risk to the health or safety of the public or a section of the public; or

(f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:

(i) an information system; or

(ii) a telecommunications system; or

(iii) a financial system; or

(iv) a system used for the delivery of essential government services; or

(v) a system used for, or by, an essential public utility; or

(vi) a system used for, or by, a transport system.

(3) Action falls within this subsection if it:

(a) *is advocacy, protest, dissent or industrial action; and*

(b) is not intended:

(i) to cause serious harm that is physical harm to a person; or

(ii) to cause a person's death; or

(iii) to endanger the life of a person, other than the person taking the action; or

(iv) to create a serious risk to the health or safety of the public or a section of the public.

(4) In this Division:

(a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and

(b) a reference to the public includes a reference to the public of a country other than Australia.

27. The scope of these provisions is very broad. There is a concern that some of the provisions create new offences with the uncertainty and ambiguity inherent in such terms as "act in preparation", "terrorist act", and "terrorist organisation". There are a number of legal and practical difficulties that arise for an accused and his legal representative as a result.

28. This point is perhaps best illustrated by identifying some of the matters that make these provisions uncertain and ambiguous. I rely on six matters:

(i) An act in preparation is an act that precedes an attempt. The temporal nexus is far more tenuous than that which the criminal law has traditionally recognised in offences such as attempt, incite or aid and abet. An inquiry about the availability of chemicals capable of making explosives is sufficiently proximate to constitute an "act

in preparation". It seems that the political reaction to the fear of terrorism has resulted in a policy decision to broaden criminal responsibility.

Spigelman CJ commented on this very aspect in ***Faheem Khaled Lodhi v Regina*** [2006] NSWCCA 121 at [66]:

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

In its submissions to the Security Legislation Review Committee, the Federation of Community Legal Centres (Victoria) expressed strong concern about the definition of "terrorist act". It submitted in part:

> *"Generally speaking, legislation is silent on what kind of nexus there need be between the offending behaviour and a terrorist act. For example, the offence of doing an act in preparation for a terrorist act does not specify what kind of connection there must be between the preparatory act and the terrorist act. "An act done in preparation" is a vague term and may encompass a wide array of behaviour, much of which would only be indirectly linked to the terrorist act in question. This gives rise to the possibility that even tenuously linked preparatory acts may be subject to prosecution. Furthermore, there may be no nexus between the offence and an actual act of politically religiously motivated violence. The offence may include an act that is simply preparatory to making a threat of politically, religiously or ideologically motivated violence."* Report of The Security Legislation Review Committee, (The "Sheller" Report) Parliament of Australia June 2006 at p.58.

(ii) A person commits an offence pursuant to s.101.6 notwithstanding the fact that a terrorist attack does not occur: s.101.6(2)(a). Indeed, the Crown does not have to prove a specific terrorist act. The offence does not require any evidence of time, date or location of an alleged attack.

The ***Anti-Terrorism Act* (No 2) 2005 (Cth)** changed the wording of paragraph (a) of s.101.6(2) from *"the terrorist act does not occur"* to *"a terrorist act does not occur"*.

(iii) The extended geographical jurisdiction provided for under s.100.4 and s.15.4 of the Code, provides another layer of uncertainty. Section 100.4(1) states that Part 5.3 of the Criminal Code (Cth) applies to:

a) all actions or threats of action that constitute terrorist acts (no matter where the action occurs, the threat is made or the action, if carried out, would occur, and

b) all actions (preliminary acts) that relate to terrorist acts but do not themselves constitute terrorist acts (no matter where the preliminary acts occur and no matter where the terrorist acts to which they relate occur or would occur.

Section 101.6 is a category D offence under section 15.4. As such it is an offence with extended geographical jurisdiction. The offence is made out whether or not the conduct constituting the alleged offence occurs in Australia, and whether or not the results of the conduct constituting the alleged offence occurs in Australia.

In ***R v Ul-Haque*** it was argued that it was beyond the power of the Commonwealth Parliament to enact legislation that had such operation. That argument was rejected. ***R v Izhar Ul-Haque*** (unreported), NSWSC 8 February 2006 per Bell J, relying on the decision of ***Polyukhovich v The Commonwealth*** (1991) 172 CLR 501.

(iv) The definition of a "terrorist act" includes an "action" or "threat of action". The inclusion of a threat of action as sufficient to constitute a terrorist act appears to be a piece of legal circularity. A terrorist act means an action or threat of action that falls within subsection (2). Subsection (2) refers to action causing:

a) serious harm;

b) serious damage to property;

c) a person's death;

d) danger a person's life;

e) a serious risk to the health and safety of the public; and

f) serious interference with, serious disruption or destruction of an electronic system eg telecommunications, financial system, information system.

None of the paragraphs (a) to (f) sit comfortably with a "threat" of action such as a prospective bombing. If the action is not "done" even though the threat is made, subsection (2) could not apply. Supra n 10 at p.51.

(v) An accused can be prosecuted and convicted notwithstanding the fact that the prosecution does not have to establish who it was who was contemplated to be the actor or the person who would threaten the action that constitutes the terrorist act. There is no requirement, therefore, for the prosecution to prove that the person contemplated to be the actor had the requisite intentions. This was one of the grounds argued unsuccessfully on the special leave application in ***Lodhi v The Queen*** 13 June 2008.

(vi) The definition of terrorist act includes a requirement that the action is done or threat of action made with the intention of advancing a political, religious or ideological cause. This requirement raises practical difficulties for an accused that is a Muslim. Where does a court draw the line as to evidence that is admissible in support of this requirement? Is any evidence of Islamic belief and practice relevant and admissible?

The prosecution of a Muslim accused for a terrorist offence is likely to be deployed in a highly charged atmosphere in which ideology or religious background of an accused is key to the offence. This plays out against a backdrop of ignorance and prejudice reinforced by years of sensational and often ill-informed reporting about Muslims both here and overseas. In his paper, 'Difficulty in Obtaining a Fair Trial in Terrorism Cases', Whealy J cautioned:

> *"…that the issue of the accused receiving a fair trial was a matter of considerable importance and sensitivity in the particular circumstances of the matter (referring to the proceedings in Lodhi). One has only to reflect on the frequent barrage of articles and commentary in the media, certainly on a weekly if not daily basis, involving terrorism and practitioners of the Muslim religion, extending not only to activities overseas but to Muslims in our own local communities. There are arguments about Muslim customs, laws, practices, dress, attitudes to women, attitudes to non-believers and the like. They are sometimes sensational and ill formed."* (2007) 81 ALJ 743 at 744.

The requirement in subsection (1)(b) that the action is done or the threat is made with the intention of advancing a political, religious or ideological cause, makes relevant evidence of material possessed by an accused or found in the home of an accused of a political or religious type. In the recently concluded terror trial, ***R v Elomar & Ors***, [2009] Parramatta Supreme Court, a significant amount of time was spent on objecting to the worst of this type of material.

Islamic books, CDs, pamphlets, audio recordings, video tapes etc containing material that is categorised as "extremist" in nature is admissible to establish the necessary state of mind and the intention of each of the accused. ***Regina v B*** [No 50] SC, (unreported decision Whealy J 2 October 2008). See also ***R v Ibrahim & Ors*** (11 January 2007); ***R v Benbrika & Ors VSC***, BongiornoJ 17 December 2007. In considering the relevance of this type of material, Whealy J said:

> *"In my opinion, the Crown is, subject to an examination of the individual images, entitled to show the jury exactly what the accused, on the Crown case, were viewing. The Crown is entitled to ask the jury to put themselves in the place of the accused when the images and footage were watched by them".* ***Ibid*** at [45].

This category of evidence was held to be admissible notwithstanding the fact that the Crown were unable to prove, in the case of at least one of the accused, In the case against Abdul Rakib Hasan there was no evidence that the accused had read, viewed or accessed any of the subject material. The possession of the material was considered relevant to prove a general interest in extremist Islamic doctrine. that any of the material had in fact been read or viewed, or that any of the subject computer files had indeed been accessed. The Crown relied heavily upon what was categorised as the "commonality" of the material as between the accused.

Whilst it was conceded by the defence that the material was relevant, objection was taken to the gruesome images and footage of beheadings pursuant to section 137. Evidence was placed before the Court of research that supported the argument that such material was unfairly prejudicial and that such unfair prejudice could not be cured by judicial direction.

A report prepared by Associate Professor Goodman-Delahunty was tendered by the defence on the application to exclude. In summary, the report set out research contained in a number of studies both in Australia and overseas that deal with the placing of gruesome images before a jury. The expert concluded that in her opinion the gruesome images would be likely to exacerbate jury stress, arouse negative emotions, impair jurors' capacity to concentrate on other evidence, likely to increase the tendency to convict, and evoke mortality responses among the jury that would increase hostility toward the accused.

Whealy J did not exclude the material. His Honour did direct that the material, particularly the beheading videos, be edited so that they would be presented, in the main, by way of narrative. None of the actual beheadings were shown to the jury.

However a significant number of images depicting injured civilians, extremist Muslim leaders, destruction during the September 11 attacks on the twin towers as well as images glorifying those responsible were tendered. In addition a large volume of documents, CDs and audio recordings containing "extremist" material was also before the jury.

In rejecting the application and admitting the material, Whealy J was of the view that appropriate directions could be framed to cure any unfair prejudice:

> *"The overall comment I would make is that Australian courts have long grappled with the presence at trial of prejudicial evidence. The courts have struggled, in particular, with the need to strike the necessary balance where there is said to be a disparity between probative value and prejudicial effect. Part of the solution, arrived at over many decades of appellate supervision, has been the alertness of courts to detect the potential for unfair prejudice, and the allied capacity to diffuse such potential by insisting on the orderly presentation of such evidence, coupled with the giving of calm, careful and dispassionate directions. In the rare case where that cannot be done, the evidence will be excluded. The very terms of ss 135 and 137 of the* ***Evidence Act*** *are a reflection of the nature of the battle, and the recognition that it has been settled on terms that favour careful judicial supervision, both at trial and at appellate level."* Supra note 15 at [71].

Whealy J gave the following direction in relation to the gruesome material:

> *"While the greater part of the material the Crown is about to present to you as part of the evidence consists of written materials, the material also contains a number of photographic images and video footage that will also be shown to you which depict scenes of violence and the results of such violence.*
>
> *I recognise that explicit material of that kind may be disturbing, offensive and confronting to some people. Some of the images for example, show significant injuries to human beings. You must avoid reacting to this evidence in an emotional or irrational manner and you must guard against a natural human tendency to do so. It is of vital importance that as judges of the facts you maintain a dispassionate and detached view towards the whole of the evidence.*
>
> *The Crown alleges that the material you are about to see was located on computer hard drives and CDs located at the homes of the accused and the homes of other persons named in the indictment as alleged co-conspirators. The Crown also alleges that the accused were aware at least of the general nature of the content of those items. The Crown tenders this evidence relying upon it in the following ways:*
>
> *(a) The Crown says it is circumstantial evidence relevant to the existence and the nature and scope of the conspiracy alleged.*
>
> *(b) The Crown says that if you accept that a particular accused was aware, at least in a general sense, of the content of the material found at his home, or had an interest in it, it is evidence relevant to that accused's state of mind."*

His Honour went on to warn the jury that it would be completely wrong to reason that merely because this material was located at the premises of the accused that any one of them is guilty of the charge. He further instructed the jury in the following terms:

> *"I direct you as a matter of law that in determining your verdicts your consideration of the degree of weight, if any, to be given to the facts as you find them must be strictly an intellectual task. I direct you that your consideration must be solely based upon a rational thought process, but you must not allow yourself to be clouded or distracted by any feelings of revulsion, emotion or prejudice evoked by the nature of the material in question."* Transcript of proceedings ***R v Elomar & Ors***, Parramatta Supreme Court, Whealy J 30 March 2009 at page 4050.

The unfair prejudice associated with this material extended beyond the real risk that the images would cause distress and disgust. The unfair prejudice included a real risk that the material would cause anger, fear and hatred and entrench feelings of "us" and "them amongst members of the jury. The poor image generated in stereotype reporting of Muslims was potentially further fuelled by the presentation of this material.

Evidence was presented that exposure to images of Muslim extremists such as Osama Bin Laden and the destruction caused by terrorist attacks resulted in mortality salience, a phenomena that encourages people to invest in and defend their cultural worldview. Those perceived as out-group members, such as offenders whose conduct may threaten the identity of the in-group, are treated more punitively as a consequence. The response is greater identification with those perceived as part of the in-group, with a similar worldview and a bias against perceived out-group members. These responses against out-group members include racism, ethnocentric bias, and a desire to punish the violator. Report of Associate Professor Goodman Delhunty tendered by representatives of Abdul Rakib Hasan on the application to exclude gruesome images (***R v Elomar & Ors***).

TERRORIST ORGANISATION

29. Division 102 of the Code contains a number of offences relating to terrorist organisations:

Offence	Section	Penalty
Directing activities of a terrorist organisation	102.2	15 years imprisonment
Membership	102.3	10 years imprisonment
Recruiting for a terrorist organisation	102.4	25 years (if person knows the organisation is a terrorist organisation) 15 years (if the person is reckless as to whether the organisation is a terrorist organisation)
Training a terrorist organisation or receiving training from	102.5	25 years
Getting funds to, from or for a terrorist organisation	102.6	25 years (if intentional) 15 years (if done recklessly)
Providing support to a terrorist organisation	102.7	25 years
Associating with a terrorist organisation	102.8	3 years

A terrorist organisation is defined in section 102.1

> ***terrorist organisation*** *means:*
>
> *(a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or*
>
> *(b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4)).*
>
> *Definition of* ***advocates:***
>
> *(1A) In this Division, an organisation* ***advocates*** *the doing of a terrorist act if:*
> *(a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or*

(b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or

(c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act.

Terrorist organisation regulations:

(2) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of ***terrorist organisation*** *in this section, the Minister must be satisfied on reasonable grounds that the organisation:*
(a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or

(b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

(2A) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of ***terrorist organisation*** *in this section, the Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation.*

(3) Regulations for the purposes of paragraph (b) of the definition of ***terrorist organisation*** *in this section cease to have effect on the second anniversary of the day on which they take effect. To avoid doubt, this subsection does not prevent:*
(a) the repeal of those regulations; or

(b) the cessation of effect of those regulations under subsection (4); or

(c) the making of new regulations the same in substance as those regulations (whether the new regulations are made or take effect before or after those regulations cease to have effect because of this subsection).

(4) If:
(a) an organisation is specified by regulations made for the purposes of paragraph (b) of the definition of ***terrorist organisation*** *in this section; and*

(b) the Minister ceases to be satisfied of either of the following (as the case requires):

(i) that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);

(ii) that the organisation advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);

the Minister must, by written notice published in the Gazette*, make a declaration to the effect that the Minister has ceased to be so satisfied. The regulations, to the extent to which they specify the organisation, cease to have effect when the declaration is made.*

(5) To avoid doubt, subsection (4) does not prevent the organisation from being subsequently specified by regulations made for the purposes of paragraph (b) of the definition of ***terrorist organisation*** *in this section if the Minister becomes satisfied as mentioned in subsection (2).*

30. Essentially there are two descriptions of a "terrorist organisation". Under paragraph (a) an organisation can be a terrorist organisation even though it is not specified in the regulations as a terrorist organisation. Under this description a jury has to firstly consider the question as to what constitutes an "organisation". Is it sufficient, for instance, that the evidence establishes that there was a group or collection of people who have come together for particular shared aims or purposes?

31. Secondly, the jury has to consider such nebulous concepts as "indirectly fostering" the doing of a terrorist act. "Fostering" is defined as "promoting the development of". Concise Oxford Dictionary Tenth edition. Indirectly fostering the development of a terrorist act becomes even more uncertain if the terrorist act is a "threat of action".

32. The definition under paragraph (a) lacks legal certainty and introduces unclear terminology that may encompass a very wide spectrum of acts or representations. Such uncertainty has a negative consequence outside the criminal justice process as well as within. In its submission to the Security Legislation Review Committee, The Australian Muslim Civil Rights Advocacy Network (AMCRAN) expressed the following concern about paragraph (a) of the definition:

"While it is arguable that this bypasses the problem of broad executive discretion, in practice it is a dangerous provision. At the very least, the proscribed list of "terrorist organisations" as pronounced by the Attorney-General acts as notice to members of the public that certain organisations are "terrorist organisations" and therefore should be avoided. However, recent times have seen charges being laid … against terrorist suspects … as members of a "terrorist organisation" that was not previously proscribed. This means that it is much easier for many innocent people to be caught up in the legislation. It also increases the onus on individuals to ensure that their friends and acquaintances have nothing to hide. It is easily conceivable that a person could visit a mosque or Islamic studies class without knowing very much about the teacher or other attendees, and unwittingly be caught up in a situation of being charged with being a member, or with associating with a member, of an organisation.

In reality, most people think of terrorist organisations as large international organisations with sufficient resources to carry out deadly attacks. However, the law is drafted so broadly that it is subject to wide application. While we appreciate that a comprehensive proscription list is not possible, the effect and implication of this is that a person could be charged with committing a "terrorist organisation" offence despite there being no known terrorist organisation until the moment he is charged. This places a heavy burden on ordinary individuals to be suspicious of all those around them. It is also clearly undesirable in that members of the wider non-Muslim community are more likely to distance themselves from Muslims". AMCRAN Submission 17(a) supra note 10.

33. At present there are 19 organisations specified in the regulations as terrorist organisations:

Abu Sayyaf group;

Al Qaida;

Al-Zarqawi;

Ansar Al-Islam;

Armed Islamic Group;

Asbattyl-Ansar;

Egyptian Islamic Jihad;

Hamas's Izz al-Din al-Qassam Brigades;

Hizballah External Security Organisation;

Islamic Army of Aden;

Islamic Army of Aden;

Islamic Movement of Uzbekistan;

Jaish –I- Mohammed;

Jaiat ul-Ansar;

Jemaah Islamiyah;

Kurdistan Workers Party (PKK);

Lashkar I Jhangvi;

Lashkar e-Taiba (LeT);

Palestinian Islamic Jihad; and

Salafist Group for Call and Combat.

34. Currently, an organisation is listed as a terrorist organisation if the Commonwealth Attorney General is satisfied on reasonable grounds that the organisation is directly or indirectly engaged in preparing, planning, assisting, fostering or advocating the doing of a terrorist act. Once listed an individual or an organisation can make a "delisting" application. As far as I am aware there has been no such application made to date.

35. The process of proscription as it existed in 2006 was set out in the Report of the Security Legislation Review Committee (SLRC) as follows: Supra note 10at pages 75 to 77.

ASIO prepares an unclassified statement of reasons setting out the case for listing (or relisting) an organisation.

The Chief General Counsel of the Australian Government Solicitor provides written advice on whether the statement of reasons is sufficient for the Attorney General to be satisfied on reasonable grounds that the organisation is an organisation directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act, whether or not the terrorist act has occurred or will occur, or advocates the doing of a terrorist act (whether or not the terrorist act has occurred or will occur).

The Attorney General's Department consults with the Department of Foreign Affairs and Trade (DFAT) to identify any issues of which DFAT is aware.

The Attorney General considers the statement of reasons, the advice of the Chief General Counsel, DFAT's comments and a covering letter from the Director General of Security.

Section 102.1(2) requires the Attorney General to be satisfied that the organisation has the specified characteristics of a terrorist organisation (see above).

In the case of organisations that are to be listed for the first time the SLRC is informed that the *Inter-governmental Agreement (IGA) on Counter Terrorism Laws* signed by the Prime Minister, Premiers and Chief Ministers on 25 June 2004 requires the Prime Minister to consult Premiers and Chief Ministers. The IGA provides that the Australian government will not proceed with the listing of a terrorist organisation if a majority of the States and Territories object to the listing within a nominated time frame and provide reasons for their objections. The Australian government must provide States and Territories with the test of proposed regulations listing terrorist organisations, a written brief on the terrorist-related activities of the organisation that it proposes to list and also offer an oral briefing by the Director General of Security. In the case of organisations that are being relisted because of the two year expiry period, the Attorney General advises the Attorneys General of the States and Territories of the decision.

The Leader of the Opposition is advised and offered a briefing. The Governor-General in Executive Council makes the regulation. Executive Council usually comprises the Governor General and at least two Ministers or parliamentary secretaries.

The regulation is made and lodged with the Federal Register of Legislative Instruments (publicly available on the internet). A press release is issued and the Attorney General's Department's National Security website is updated.

The Parliamentary Joint Committee on Intelligence and Security (PJC) decides whether to review the regulation pursuant to section 102.1A(2). Review is not mandatory but has been undertaken in every instance to date.

If the PJC decides to review the regulation, the inquiry is publicly advertised (in newspapers and on the PJC's website) and submissions invited.

The PJC hearings are held; some in private.

The PJC tests the validity of the listing or re-listing, both on procedures and merits.

The PJC reports its comments and recommendations to each House of Parliament before the end of the applicable disallowance period, as required by section 102.1A (2).

36. Criticism has been levelled at this process of proscription in so far as it does not require that notice be given to the organisation or persons affected by the regulation proposed. Supra note 10 at page 77. Affected individuals and community groups have no real opportunity to be heard before a declaration is made. There is a question as to whether the process complies with fundamental rules of natural justice. This concern is particularly relevant to Australian organisations.

37. A more transparent process of proscription is called for. The Security Legislation Review Committee agreed on a number of reforms to the process, including: ***Ibid*** at page 85.

The criteria for proscription must be determined and stated.

A proposal to proscribe an organisation should be made public and an opportunity given for interested parties to make comment.

Once an organisation has been proscribed, that fact should be publicised widely, notifying any person connected to the organisation of the possible risk of criminal prosecution.

38. It is also suggested that paragraphs (a) and (c) be deleted from the definition of "advocates" under s.102.1(1A). An organisation would only satisfy the definition of "advocates" the doing of a terrorist act if it provided instruction on the doing of a terrorist act.

39. Finally, the extra territorial operation of the terrorist organisation provisions can conceivably give rise to significant injustice. McClellan CJ at CL, in his paper '***Terrorism and the Law'***, identified a potential difficulty with the extraterritorial operation of these provisions in relation to, for instance, the offence of making funds available to a terrorist organisation under s.102.6(1). His Honour outlined a hypothetical scenario where a Palestinian woman, fleeing Israel with her children, later settles in Australia. She sends a donation to Hamas because, while living in Gaza her children had received a legitimate education at a school run by Hamas. Hamas is an organisation that could be said to be widely known as a terrorist organisation in the West. Arguably, the Palestinian woman can be prosecuted pursuant to s.102.6(2) for making funds available to an organisation being reckless as to whether the organisation is a terrorist organisation.

GENERAL OBSERVATIONS

40. Long before the introduction of the anti-terror legislative regime, there existed (and continues to exist) a host of criminal offences that arguably covered "terrorist" offending behaviour. Relevant offences include:

Murder (s.18 ***Crimes Act* 1900** (NSW)).

Kidnapping (s.86 ***Crimes Act* 1900**(NSW)).

Possession of explosives (s.93F (1) ***Crimes Act* 1900**(NSW)).

Making or possessing explosives (s.93F (2) ***Crimes Act* 1900**(NSW)).

Various firearm offences (s.93G ***Crimes Act* 1900**(NSW)).

Maliciously exploding, sending, delivering throwing any explosive substance with intent to burn, maim, disfigure, disable or do grievous bodily harm (s.47 ***Crimes Act* 1900**(NSW)).

Causing an explosive to be placed in or near a building, vehicle, vessel, train (s.55 ***Crimes Act* 1900** (NSW)).

Engaging in hostile activities in a foreign state (s.6 ***Crimes (Foreign Incursions and Recruitment) Act* 1978** (Cth)).

41. There is a question therefore as to whether the anti-terror legislative regime was necessary when the existing law adequately dealt with "terrorist" offending behaviour. However, assuming there is an argument that a new regime criminalising terrorist related conduct was necessary post September 2001, Such an argument has been put forward by Richard Maidment SC in his paper Reviewing Australia's Anti-Terrorism Laws, presented at the 36th Australian Legal Convention 17-19 September 2009. the question remains as to whether we have struck the right balance between protecting the community against criminal conduct on the one hand, and protecting individuals against human rights abuses, on the other.

42. Answering this last question involves a consideration of the extraordinary powers created since 2002:

Warrant/ Order	Legislation (Commonwealth)	Effect	Issuing Authority
Detention Warrants	***Crimes Act* 1914**, Part 1C, Division 2 (inserted by ***Anti-Terrorism Act* 2004**)	Allows investigation period to be extended up to 20 hours in respect of persons arrested for terrorism offences.	Magistrate, bail justice, justice of the peace.
Control Orders	***Criminal Code Act* 1995** (inserted by ***Anti-terrorism Act* No 2, 2005**)	Allows the imposition of obligations, prohibitions and restrictions on an individual (s.104.5(3). A summary of the grounds upon which the order should be made do not have to be disclosed if such disclosure would prejudice national security (s.104.2 (3A). An interim control order is made *ex parte* (s.104.4). The issuing court may make an order if satisfied on a balance of probabilities that the prohibition or restriction is reasonably appropriate for the purpose of protecting the public from a terrorist act (s.104.4 (1) (d). The maximum duration of an interim control order is 12 months (s.104.5 (1) (f).	Federal Court. Family Court. Federal Magistrates Court.
Preventative Detention Orders	***Criminal Code Act* 1995**, Division 105 (inserted by ***Anti-terrorism Act* No 2, 2005**)	A person can be detained and kept in custody without charge for up to 24 hours to prevent an imminent terrorist act occurring or to preserve evidence: (s.105.7). The initial order can be made by a senior Australian Federal Police member (above the rank of superintendent: (s.105.8). A further 24 hours custody by way of a continued preventative detention order: (s.105.11). A continued preventative detention order must be made to an issuing authority: (s.105.11 (1)).	Continued preventative detention order: Federal or Supreme Court judges; retired superior court judges with 5 years experience; Federal Magistrates, President / Deputy President of AAT.
		During the period of custody the detainee is not entitled to contact any person: 105.34, except as provided for by ss. 105.35, 105.36, 105.37, 105.39 but only to tell that person that the detainee is safe and cannot be contacted for the time being: (s.105.35 (1)).	

Warrant/ Order	Legislation (Commonwealth)	Effect	Issuing Authority
		The detainee can only contact a family member, employer etc. if the police officer detaining the person agrees: (s.105.35(1)(f)). Any contact between a detainee and his/her lawyer is monitored by the police officer: (s.105.38) (although the content of the communication cannot be used in evidence). It is a criminal offence (punishable by imprisonment of 5 years) if a detainee discloses the fact that an order has been made; the fact that the subject is being detained; the period for which the subject is being detained. It is also a criminal offence for a lawyer to disclose such information: (s.105 41 (2)).	
Prohibited Contact Orders	***Criminal Code Act* 1995** ss.105.14A - 105.16 (inserted by ***Anti-terrorism Act* No 2, 2005**)	Prohibits contact by the detainee with specified persons if reasonably necessary to preserve evidence, prevent serious harm etc.	As above.
Detention and Questioning Warrants	***ASIO Act* 1979** Part III, Division 3 (inserted by ***ASIO Legislation Amendment (Terrorism) Act* 2006**)	Allows for the detention and questioning of a person if the issuing authority is satisfied that there are reasonable grounds for believing the warrant will substantially assist the gathering of intelligence in relation to a terrorist offence:	Eligible Federal Judges or Federal Magistrates, and persons specified

		(34E/34G). A person can be detained for up to 7 days on any one warrant. Several warrants could be issued as long as each relies on information additional or materially different from that relied on for the previous warrant: (34G (2)). A person so detained can be interrogated for increments of 8 hours at a time. A person so detained may be prevented from contacting anyone while in custody: (34K (10)). ASIO could object to the choice of lawyer: (34ZO). There is no right to silence. It is an offence to refuse to give information requested, punishable by imprisonment for 5 years: (34L (2)). It is an offence (punishable by imprisonment for 5 years) if a detainee discloses information indicating the fact that a warrant has been issued or a fact relating to the content of the warrant or questioning: (34ZS). Such disclosure remains an offence for 2 years after the end of the period specified in the warrant: (34ZS (2)).	by the regulations as issuing authorities.

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43. In November 2005 the Parliamentary Joint Committee on ASIO, ASIS and DSD Australian Security Intelligence Organisation, Australian Secret Intelligence Service, Defence Signals Directorate. (the Committee) released its report relating to ASIO's questioning and detention powers. The Committee made 18 recommendations. In 2006 the ***ASIO Amendment Act*** came into force adopting some of those Recommendations. The Act amends Division 3 of Part III of the ***ASIO Act* 1979**.

44. ASIO has the power to request a warrant to compulsorily question and/or detain a person aged 16 years and above suspected of having information relating to terrorism offences. The person questioned and/or detained need not be suspected of being engaged in or even have knowledge of an offence. All that is required is that the Minister be satisfied that there are reasonable grounds for believing that it will substantially assist the collection of intelligence that is important in relation to a terrorism offence in circumstances where relying on other methods of collecting intelligence would be ineffective: section 34D(4).

45. No detention warrants have been sought by ASIO. ASIO had considered seeking a detention warrant on one occasion but this was not pursued. The following Tables contain information supplied by ASIO through its Annual Report to Parliament 2003-2004 and by way of submissions by ASIO to the Committee, about the number of questioning warrants issued: *ASIO's Questioning and Detention Powers*: Parliamentary Joint Committee on ASIO, ASIS, and DSD, Parliament of Australia, November 2005, Canberra pages 5 & 6.

TABLE 1

Questioning Warrants 2003 – 2004

Person 1 15 hours, 57 minutes

Person 2 10 hours, 32 minutes

Person 3 42 hours, 36 minutes
(Interpreter required)

Total hours 69 hours, 5 minutes

TABLE 2

Questioning Warrants 2004-2005

Person 4 15 hours, 50 minutes

Person 5 5 hours, 17 minutes

Person 6 5 hours, 59 minutes

Person 7 12 hours, 49 minutes

Person 8 2 hours, 38 minutes

Total hours for

8 warrants 111 hours, 7 minutes

TABLE 3

Questioning Warrants 2005

Person 9 5 hours, 24 minutes

Person 10 4 hours, 5 minutes

Person 11 4 hours, 5 minutes

Person 12 1 hour, 38 minutes

Person 13 5 hours, 17 minutes

Person 14 6 hours, 2 minutes

Total hours for
14 warrants 137 hours, 38 minutes
----------46. The Committee recommended that the sunset clause be amended so as to allow continued operation of Division 3 Part III of the Act until 22 November 2011. This recommendation was adopted but the sunset clause is to come into effect on 22 July 2016 so that instead of an extension of 5 and half years, there is an extension of 10 years: s.34ZZ. In making this recommendation, the Committee had regard to the "emphatic" evidence of the Director General that the powers had been valuable:

> *"The use of the questioning warrant was critical in the Brigitte investigation. That was an example of where there was actual planning being undertaken for a terrorist attack in Australia and the questioning regime materially assisted what lay behind that threat and what was going on."* Supra note 28 at paragraph [1.71].

47. How can this statement be tested or challenged? One would have to have access to the interviews and the intelligence held by ASIO before the interviews were conducted to assess whether, in fact, the questioning warrants were "critical" in the Brigitte investigation.

48. Section 34D (4)(b) provides that the Minister making the request for a warrant be satisfied that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence and that other methods of collecting intelligence would be ineffective. The issuing authority who gave evidence before the Committee advised that the written briefs accompanying the requests for warrant included a statement expressing the opinion that the information could not be obtained by other means. However, he conceded that he had no means of testing that statement. ***Ibid*** at paragraph [2.34].

49. The Committee recommended that the issuing authority be required to be satisfied that other methods of intelligence gathering would not be effective [Recommendation 1]. This would require ASIO to provide a factual basis for their claim that other methods of intelligence gathering would not be effective. ASIO's existing powers of intelligence gathering are extensive. They include the power to obtain an executive search warrant to enter premises, remove and examine computers, track vehicles, use listening devices and general surveillance.

50. Recommendation 1 was not adopted. Section 34E(1)(b) only requires the issuing authority to be satisfied that there are reasonable grounds for believing that the warrant "will substantially assist the collection of intelligence that is important in relation to a terrorist offence."

51. ASIO has extensive powers under this legislation. Some of those powers are:

> The subject of a warrant cannot be detained for more than 7 days: (s.34S). They can be questioned under the warrant for no more than a total of 24 hours (48 if an interpreter is required). Questioning can take place in blocks of eight hours for adults and 2 hours for persons aged between 16 and 18 years.
>
> The subject of a questioning warrant is permitted to contact a lawyer of their choice at any time the person is appearing before the prescribed authority for questioning: (s.34E (3)(a)).
>
> Section 34E (3)(b) provides that subject of a detention warrant is permitted to contact a lawyer of choice at any time after the person is in detention and after ASIO is informed of the identity of the lawyer and advised the prescribing authority of whether there is a basis to prevent the subject from contacting that lawyer pursuant to s.34ZO.
>
> Section 34ZO provides that a subject of a warrant can be prevented from contacting the nominated lawyer of choice if the prescribed authority so directs. A prescribed authority may make such a direction if satisfied "on the basis of circumstances relating to that lawyer" that a person involved in a terrorist offence may be alerted or that a document or thing that the subject could be requested to produce may be destroyed, damaged or altered.
>
> Even though the subject of questioning is permitted to have a lawyer present the role of the lawyer is very limited. The lawyer cannot interrupt questioning except to request clarification of an ambiguous question: (s.34ZQ(6)).
>
> The lawyer is permitted, during a break in the questioning, to raise with the prescribed authority any matter of concern: (s.34ZQ(7)).
>
> A lawyer can be removed if the prescribed authority considers the lawyer's conduct disruptive: (s.34ZQ(9)).
>
> A person subject to a questioning/detention warrant does not have a right to remain silent. In fact, if a person refuses to give the information required he/she faces up to 5 years imprisonment: (s.34L(2)) Not only is a person required to attend pursuant to a warrant, the subject is required to answer questions and risks a gaol sentence if he/she refuses. While the information given or documents provided during questioning under the warrant cannot be used against the subject, this is not derivative use immunity. There is a legitimate concern that the powers are not limited to intelligence gathering but "slip into" investigative and policing operations. This concern was identified by the Committee in its, Report supra, at note 28 at paragraph [1.74].
>
> The subject of a detention warrant is not permitted to contact anyone unless the warrant authorises contact with particular people: (s.34K(10) (11)).
>
> Also of considerable concern is the secrecy under which this process takes place. A person commits an offence punishable by up to 5 years imprisonment if he/she discloses information that indicates that a warrant has been issued or discloses operational information. This prohibition on disclosure applies for 2 years after the expiration of the warrant: (s.34ZS). This prohibition applies to lawyers as well as subjects.
>
> A person commits an offence if he/she makes a statement in answer to questioning that, to the person's knowledge, is false or misleading: (s.34L(4)).
>
> The Committee had before it a number concerns raised by lawyers appearing with subjects of a questioning and/or detention warrant. One lawyer complained that some questions were not designed to elicit information, as that information was already in ASIO's possession, but rather to create an offence under s.34L. ***Ibid*** at paragraph [1.48].

52. The very wide powers given to ASIO under this legislation are of grave concern. The legislation empowers the executive to detain people who have not committed an offence for the purpose of intelligence gathering without the traditional protections of the right to silence and the right to effective legal representation. Furthermore, it subjects them to possible imprisonment for up to 5 years if they talk about their experience.

CONCLUSION

53. These provisions allow for detention without judicial hearing, based on a standard of proof of balance of probabilities, and without full access to the grounds for detention. Detainees are held in secret, with virtually no access to family members. Communications between a detainee and his/her lawyer may be monitored and ASIO can refuse access to a lawyer of choice. There is no right to silence. Disclosure of information about the detention, the content of the warrant or the questioning process could lead to prosecution and punishment by way of 5 years imprisonment.

54. Of pressing concern is the fact that the "anti-terror" legislative regime allows for the detention and interrogation of non-suspects in circumstances where stringent secrecy provisions apply. Article 9(1) of the I*nternational Covenant on Civil and Political Rights* states that "no one shall be subjected to arbitrary arrest and detention". The UN Human Rights Committee has said that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. McClellan CJ at CL Terrorism and the Law, page 102.

55. The remarks made by Stevens J of the US Supreme Court in ***Padilla v Rumsfield*** 124 SCt 2711, 2735 (2004) quoted by Kirby J in his article Terrorism and the Democratic Response 2004 at page 236. are a pertinent reminder of the potential threat to our society posed by some of the anti-terror provisions:

> *"Unrestrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber…If this nation is to remain true to its ideals symbolised by its flag, it must not wield to the tools of tyrants even to resist an assault by the forces of tyranny."*