



Australian Government

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BRET WALKER SC

**ONE NATIONAL CIRCUIT
BARTON ACT**

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Australian Government
Independent National Security Legislation Monitor

BRET WALKER SC

ONE NATIONAL CIRCUIT
BARTON ACT

The Hon Julia Gillard MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister

I present herewith my annual report for the period 21 April 2011, the date of my appointment to the office of Independent National Security Legislation Monitor, to 30 June 2011.

The preparation of an annual report by this office is required by section 29 of the *Independent National Security Legislation Monitor Act 2010* (Cth). The report is unclassified and is suitable to be laid before both Houses of Parliament.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bret Walker'.

Bret Walker

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CHAPTER I

INTRODUCTION

This is the first report of the first Independent National Security Legislation Monitor (“**INSLM**”). The first appointment to the office came into effect on 21st April 2011. This left just over two months of the year ended 30th June 2011 about which to prepare an annual report. The INSLM must report annually as soon as practicable after 30th June in each financial year and in any event by the following 31st December.

This year, the view has been taken that a full report should be prepared, even though there was virtually no opportunity in just over two months at the commencement of the INSLM’s term to carry out the relevant functions. Those functions are the review of the operation, effectiveness and implications of Australia’s counter-terrorism and national security legislation (“**CT Laws**”)¹ and other related laws, and consideration whether those laws contain appropriate safeguards for protecting the rights of individuals, remain proportionate to any threat of terrorism or threat to national security or both, and remain necessary.

The object of the appointment made by the *Independent National Security Legislation Monitor Act 2010* (“**2010 Act**”) is to assist Ministers in ensuring that Australia’s CT Laws are effective in deterring and preventing terrorism, are effective in responding to terrorism, are consistent with Australia’s international obligations and contain appropriate safeguards for protecting the rights of individuals. The method for achieving this object is by the functions of review and consideration noted above.²

Another aspect of the object of the office of INSLM is to assess whether Australia’s CT Laws are being used for matters unrelated to terrorism and national security. Clearly, this is a very important watchdog task. It has been and will remain constantly in mind. But nothing to date begins to suggest any serious possibility of that kind of abuse of the CT Laws. This function will be the subject of more detailed report in 2012.

1 The legislation designated in sec 4 of the *Independent National Security Legislation Monitor Act 2010* (Cth) is listed in Appendix 1.

2 This summary omits the INSLM’s functions of reporting to the Prime Minister or the Parliamentary Joint Committee on Intelligence and Security established under the *Intelligence Services Act 2001*(Cth), in response to a specific reference. There were no such references in the period 21st April to 30th June 2011.

The nature of the CT Laws makes it obvious that nothing like a completed review or overall consideration of these matters could have been accomplished in just over two months. Rather than a perfunctory annual report to this effect, this first report draws on the work of the last six months to date – it is thus a report on work up to December 2011.

One of the main reasons why this first report poses questions rather than suggests answers is the sheer scope and depth of the subject. To the credit of the many commentators – political, scholarly, historical, legal professional and civil society – whose words are recorded from late September 2001 in relation to the régime Australia has enacted by the CT Laws, and in relation to corresponding laws elsewhere, there is a large and dynamic literature to be read and pondered. It may be doubted whether anyone will ever master it in the sense of exhaustive and detailed understanding of it, continually up-to-date.

The purpose of this first report is threefold. First, to set out matters of principle and general policy considered fundamental to the continuing scrutiny of the CT Laws. Second, to highlight the most obvious questions raised by the CT Laws as they presently exist – chiefly, concerning whether they are effective criminal laws and contain appropriate human rights safeguards. Third, to notify a provisional agenda for the work of the INSLM over the next year or so, in order to reach informed conclusions about the effectiveness and appropriateness of the CT Laws.

Australia's CT Laws were not made in a vacuum. They drew on overseas examples, mainly British. Although they were made – in several bursts – relatively quickly, they cannot fairly be seen (or excused) as legislation improvised to meet a pressing emergency. On the contrary, the history of their making is a history of weighing of factors and choices of policy. In sum, the question for the INSLM is whether the balance and the choices can be improved.

The work of the INSLM to date has been reading, listening and thinking. The material to be read and the limited time to read it, and the wide range of views and insights to be gained from conversations with Australians involved in these topics, have combined to make the basic review function of the INSLM very much a work in progress, this year. Next year, a bibliography and conspectus of views received in discussions are hoped to be informative parts of the 2012 report. Nothing of these kinds has been attempted this year because time has permitted only a fraction, almost certainly not representative, of publications to be considered, and only some of the many needed conversations to be held.

The work required for the office of INSLM is not full-time: for the purposes of remuneration, the office has been reckoned by the Government as 60 days in a year. It will involve every bit of that. To date, but perhaps only thus far, the provision of an adviser within the Department of the Prime Minister and Cabinet (working confidentially and only to this office) for three days a week, has been adequate. The bulk of reading and the breadth of consultation by discussion that the provisional agenda for the next year or so will require are very large. Successfully accomplishing the tasks proper to discharge of the office will require further administrative and clerical assistance.

A list of people already consulted is contained in Appendix 2. I am grateful to all of them. Their generosity, intellectual and professional, in sharing their experience and expressing their views promises well for the capacity of the INSLM, at least, to be better informed. I hope to be able to pursue further with many of those already met the topics on which they have already greatly assisted. It is intended that items found in the provisional agenda assembled below will be raised with them and the many others yet to be consulted, and with the public. Whether this will involve hearings has yet to be decided.

The lack of a bibliography should not conceal a felt deficiency in the reading so far by the INSLM. Practically all of the material read to date is in English (a very little in French). The English is so far confined to Australia, New Zealand, the United Kingdom, the United States and Canada. None of those jurisdictions has laws so similar to Australia's CT Laws as to enable straightforward transfer to Australia of the observations – let alone lessons – obtainable from their experience. But it is certain that the work of this office cannot proceed sensibly without frequent gauging of Australia's position by reference to the various positions in other societies, especially those with whom we have historical and cultural close links. On the other hand, the real possibility of valuable perspectives on these international problems from systems and societies outside the British or anglophone orbits is compelling, and efforts will be made to repair this deficiency.

Drawing on reading and consultation to date, the next Chapter addresses matters of principle and policy presently thought to provide a useful basis for the review, consideration and assessment functions of the INSLM in relation to the CT Laws.

Integral to the functions of the INSLM is an understanding of Australia's international obligations, binding by treaties to which Australia is party. In particular, the concern is with human rights obligations, counter-terrorism obligations and international security obligations. They inform, of course, the matters of principle and policy addressed in Chapter II. More detailed exposition of their implications is set out in Chapter III.

Chapters IV to IX deal with the provisions comprising the CT Laws, in the order they appear in the relevant definition contained in the 2010 Act. It is intended that these parts of the report be read as considered preliminary views on matters deserving closer attention to the form and substance of the CT Laws.

For ease of reference, issues for consideration raised in the body of the report below have been collected in a numbered list in Appendix 3.

My work, and this report, have been greatly assisted by the skills and diligence of my Adviser, Teneille Elliott. I am very grateful to her.

CHAPTER II

PRINCIPLES AND POLICY

The functions of the INSLM and the object of the 2010 Act may be paraphrased as the review of the effectiveness and appropriateness of the CT Laws. The specific words of secs 3, 6 and 8 of the 2010 Act govern, but the paraphrase serves to emphasize the twin poles between which the CT Laws are to be considered.³

As to whether the CT Laws are effective, the question concerns their part in deterring and preventing, and responding to, terrorism and terrorism-related activity including that which threatens Australia's security.

As to whether the CT Laws are appropriate, the question concerns, first, their consistency with Australia's international obligations including human rights obligations, counter-terrorism obligations and international security obligations. Second, it concerns the safeguards contained in them for protecting the rights of individuals. Third, it concerns their proportionality to any threat of terrorism or threat to national security or both.

Linking the questions whether the CT Laws are effective and appropriate is a further question drawing on all these inquiries. It is whether the legislation comprising the CT Laws "remains necessary". Those two words in subpara 6(1)(b)(iii) of the 2010 Act compress all the issues to be examined by the INSLM. They seek a conclusion based on principle as well as overall policy.

Those words are also an emblem of the dominating character of the CT Laws – as laws enacted to meet conditions thought to constitute an international and national emergency. That meant the CT Laws were thought to provide means of countering terrorism and enhancing national security that were not already fully available in existing criminal and national security laws. A constant test to be applied to the CT Laws is to scrutinize this supposed need for something different and extra over and above the pre-existing criminal and national security laws. That scrutiny cannot rest on a once-and-for-all satisfaction that

3 The INSLM must have regard also to arrangements between the Commonwealth, the States and the Territories for a national approach to countering terrorism. In this first report, there is little explicit reference to that important dimension of the CT Laws' effectiveness. The commenced and continuing work on this aspect of the CT Laws will be reported in 2012.

the CT Laws were in order when first enacted. The people and their Parliament should check that circumstances and conditions as they change from time to time continue to justify the CT Laws – including checking whether they could be wound back or even need to be winched up.

The pre-existing law, by way of obvious example, already provided imprisonment for life as a possible penalty upon conviction for murder, attempted murder or conspiracy to murder. Conventional sentencing approaches would require the circumstances and character of the offence as well as the offender to be reflected in the penalty to be imposed. It follows that the most serious cases of terrorism could not be treated any more seriously under the CT Laws than under pre-existing law.

The more detailed discussion in Chapter VII thus starts from the position that terrorist crimes, at their worst, are murders – and murders were already punishable to the utmost under pre-existing laws. The pre-existing modes of ancillary criminal liability in relation to murder (such as conspiracy, accessory, incitement, aid and abet) were just as available for a group of terrorists as for a gang of drug traffickers.

As discussed in Chapter VII, the CT Laws' definition of "terrorist act" and enactment of inchoate and preparatory offences in relation to terrorist acts therefore require evaluation against a standard simple to state but not so simple to apply. Do these provisions really add anything of value to the set of pre-existing laws criminalizing lethal violence?

Legislation in Australia and elsewhere that provides antecedents for the CT Laws had been enacted over many years before the terrorist attacks of 11th September 2001. It continued to be enacted after the further terrorist attacks in London, Madrid and Bali. Some of it was enacted so quickly that legislative scrutiny could not have been as thorough as such drastic laws should attract: witness the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, enacted the month after the Twin Towers' destruction.

The response in Australia, on any view, was more deliberate. It was made partly because of the perceived international obligations described in the next Chapter. Many provisions of the CT Laws show explicit care to balance or safeguard large new official powers in their application to individuals. The CT Laws themselves reveal the clear understanding of those responsible for their passage through Parliament that these powers should be regarded as extraordinary.

One of the striking ways Parliament showed this appreciation of the extraordinary nature of the new powers contained in the CT Laws is the use of sunset clauses for some of the most important provisions – these are express limits to the operation of the legislation expiring on specified dates in the relatively near future. A description of some of these sunset clauses and their later extensions is set out in Appendix 4.

The tenth anniversary of “9/11” (ie the attacks of 11th September 2001 on the Twin Towers and the Pentagon and the attempted attack on presumably the Capitol) has just passed. Nothing in the material available to the INSLM suggests that the risk of terrorist attacks internationally including in Australia has diminished so as to render the CT Laws mere relics of an unhappy past.⁴

This position means that the model of extraordinary powers to meet an emergency is an unconvincing justification for the CT Laws and especially their most stringent restrictions on individual liberty. The putative emergency has lasted longer than either of the two World Wars, and both combined. No legislation can be regarded as permanent, but the CT Laws in substance if not in form ought to be seen as a régime of intended indefinite duration. Their effectiveness and appropriateness should be assessed on the basis that they or any improvements of them will be in force for a long time to come. Otherwise, there is likely to be an unfortunate embedding of temporary extraordinary powers more or less permanently. If the CT Laws are scrutinized without being given the benefit of the doubt because they are supposedly only going to apply for a short time, it is more likely they will be scrutinized properly.

Warnings about allowing temporary emergency powers to go beyond what would be tolerable in the long term are not new. Famous strong statements, colourful and perhaps hyperbolic, can be found in judicial dissents against the validity of emergency powers in other times and places. Mr Justice Jackson in the Supreme Court of the United States warned against treating drastic military orders as constitutional, when they forced Americans of Japanese ancestry, without any reason to doubt their loyalty, into detention:

The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition embeds that principle more deeply in our law and thinking and expands it to new purposes.⁵

The decision and majority reasoning in that case have now been heavily criticized by many legal scholars and political scientists. It concerned constitutionality, which distinguishes it from the task of the INSLM, as further discussed below. But it stands as an eloquent critique of apparently temporary expediency, from a great lawyer who soon thereafter at Nuremberg acquired special practical experience of military atrocities including war crimes and terrorist actions.

Closer to present circumstances, and not in wartime, are the pungent comments of Lord Hoffmann, dissenting as to the reasoning, in a case about the consistency of laws providing for the detention of non-national suspected terrorists with the United Kingdom’s international human rights treaty obligations concerning equality and the protection of individual rights:

4 See eg the official assessment quoted in Appendix 5

5 *Korematsu v United States* 323 US 214 (1944) at 246

Of course the Government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms.

... Terrorist violence, serious as it is, does not threaten our institutions of government or existence as a civil community. ... Others of your Lordships who are also in favour of allowing the appeal would do so, not because there is no emergency threatening the life of the nation, but on the ground that a power of detention confined to foreigners is irrational and discriminatory. I would prefer not to express a view on this point. I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our Constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.⁶

That these words were written in dissent is enough to show the room for reasonable and cogent arguments to the contrary. Omitted from the quotation are references to matters of national history and culture bordering on fustian. For Australia, it would be wrong to approach the CT Laws as if there were something unique or peculiar about some homogeneous or monolithic “Australian spirit” that somehow affected where the balance of power and liberty should best be struck. But Lord Hoffmann’s words, again those of a great lawyer, addressing the British constitution as well as its contemporary European limits, emphatically lay down a challenge.

As it happens, a salutary Australian judicial admonition that ought weigh in assessing the appropriateness of the CT Laws was also in dissent. In a case not involving terrorism, but rather an unlawful non-citizen, the issue concerned interpretation of legislation that arguably authorized detention indefinitely until deportation was possible, if ever. Chief Justice Gleeson wrote:

Where what is involved is the interpretation of legislation said to confer upon the Executive a power of administrative detention that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested in unambiguous language, which indicates that the legislature has

⁶ *A v Secretary of State for the Home Department* [2005] 2 AC 68 at 131-132 [95]-[97]

directed its intention to the rights or freedom in question, and has consciously decided upon abrogation or curtailment. ... “[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness”.

A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.⁷

These statements were made in a case concerning statutory interpretation which, as discussed below, is not the task primarily of the INSLM. But again, from a great lawyer, they pronounce values that ought be honoured in considering the appropriateness of the CT Laws.

A distinct difference between the cases addressed by these judges and the task of the INSLM is that the INSLM does not rule upon the constitutionality or the correct interpretation of laws. While from time to time opinions concerning those matters may be expressed, they are no more than opinions.

Anyhow, constitutionality would be a poor test of the qualities of effectiveness and appropriateness of the CT Laws. Laws that are misconceived, counterproductive and unfair can easily pass muster as valid laws made in the exercise of the legislative competence of the Commonwealth. Similarly, the proper bias with which enacted texts should be interpreted so as to promote liberty is an inadequate tool in the evaluation of the CT Laws for their effectiveness and appropriateness. While their meaning needs to be understood for this purpose, they need not be treated as an immutable given by the INSLM.

In this regard, the decision and reasoning of the High Court of Australia in *Thomas v Mowbray*⁸, about control orders (as to which see Chapter IV), should be noted. These particular provisions of the CT Laws were held to be constitutionally valid as an exercise of the power to legislate with respect to the defence of the Commonwealth, and were considered by three of the seven justices (three others not expressing an opinion on this point) to be constitutionally valid as an exercise of the power to legislate with respect to external affairs. Significantly, the provisions survived a challenge to the effect that, even if generally within the legislative competence of those heads of Commonwealth power, they infringed upon the limits of judicial power by requiring courts to engage in an exercise at odds with the nature of judicial power. As noted above, the fact that the control order provisions survived constitutional challenge by no means concludes the INSLM inquiry concerning them.

7 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19]-[20]

8 (2007) 233 CLR 307

In particular, although again dissenting on the point in question, the consideration by Justice Hayne of difficulties he regarded as insurmountable in the judicial enforcement of these provisions has informed the assessment on a preliminary basis of those matters in Chapter IV. With respect, the reasoning of his Honour has cogency in evaluating the appropriateness of these provisions, unaffected by its minority status on the question of constitutionality.

The importance of the international or global milieu in which the CT Laws were enacted (and are being enforced) cannot be understated in assessing their effectiveness and appropriateness. As elaborated in the next Chapter, Australia's enactment of them can fairly be seen as a wholehearted and faithful compliance with perceived binding international treaty obligations. The framework set by the 2010 Act and public international law itself, furthermore, require attention to equally binding international obligations that may be seen generally to protect the liberties of individuals against the power of states. To answer the questions whether the CT Laws are effective and appropriate, particularly the latter, there must be a constant reference to those international standards. As discussed in the next Chapter, this basal requirement of the INSLM's task involves what lawyers call a balancing exercise.

In that balancing exercise, effectiveness and appropriateness must not be seen as only ever in opposition to each other. For the reasons declaimed by Mr Justice Jackson (again in dissent) in a case of a rabble-rousing fascist orator, the "choice is not between order and liberty. It is between liberty with order and anarchy without either".⁹ As will be seen in the next Chapter, Australia's international obligations to respect the human rights of individuals are far from the "suicide pact" that Mr Justice Jackson thundered was the character wrongly given to the US Bill of Rights in that case. But it is vital to assess the CT Laws on the premise that they must and can comply with Australia's obligations (such as they are) to join in the global countering of terrorism and also with Australia's (undoubted) obligations to respect the human rights of individuals. It is almost certainly an error to proceed as if more effectiveness means less appropriateness, or vice versa.

In large part, that is because the social values sought to be protected against terrorism include the very same human rights and respect for individuals that accused or suspected terrorists will be entitled to invoke during investigations or trials. Departure from the standards of legality and civility that are regarded as proper for so-called ordinary crime, in order to deal with supposedly extraordinary aspects of terrorist crime, involves accepting the claims of terrorists themselves to be special. It involves granting them an exalted status, high in the criminal calendar from our point of view but dangerously glamorous in the hero or martyr stakes for them.

It may be that here lies a paradox. It may be that terrorism is best countered – insofar as that is done by legislation – by ensuring it can be effectively investigated, prevented or disrupted, and when detected by prosecuting and punishing it as just another kind of ordinary serious

⁹ *Terminiello v City of Chicago* 337 US 1 (1949) at 37

crime. To say any serious crime is “ordinary” may jar, but is true nonetheless. The moral and ethical foundation should be that the highest value sought to be vindicated and protected by counter-terrorism as well as by all police and criminal administration is human life. Moreover, it is the human life of individuals.

The paradox arises because, internationally and within Australian politics and social discourse, terrorism is plainly not treated as anything ordinary. A sensible concern, however, may be that terrorism is now sufficiently present and continuing as a threat that we are better off regarding it as simply another one of the criminal threats to human life with which our society deals.

The apparent paradox recedes, somewhat, when considering the not implausible threats of massive casualties inherent in terrorist threats. The kinds of homicides with which comparisons may be drawn (as addressed below) come nowhere near the monstrous ambitions of some declared international terrorists. Port Arthur and Quakers Hill, assuming they were mass killings by psychopaths, do not rival the claimed intentions and occasionally realized slaughters carried out by terrorists. If one adds the feature of so-called WMD (“weapons of mass destruction”), without intending to lend any credibility to such threats, it is impossible to deny a feature of terrorism special – not at all ordinary – from the point of view of the value of individual human lives.

The puzzle of motivation to be a terrorist appears far from solved. It is of great practical and social importance, given the reasonable expectation that prevention would be better than punishment. What is understood, however imperfectly, of that motivation (which should not be assumed in any way to be uniform or predictable), certainly goes a long way to remove one ordinary aspect of criminal justice from the project of countering terrorism.¹⁰ It is a cardinal feature of criminal sentencing in Australia and like jurisdictions that punishments should include a deterrent element. It is believed, or at least treated as if it were believed, that condign punishment may deter the individual convict and may deter others who could commit similar offences. Terrorism, on the contrary, appears to have an opposite tendency whereby apprehension, punishment and publicity could encourage sympathetic imitation. And a would-be suicide bomber is untouchable by earthly deterrence.

As the activities of the United Nations described in the next Chapter show, terrorism is treated very differently from most other kinds of serious crime including those that take or threaten human life. It is on a par with slavery, war crimes and crimes against humanity in this regard. There is some strain, then, in the consensus view reported internationally that it is better to counter terrorism by treating it as crime than by fighting it like war. In a sense, the notion seems to have been to deal with the extraordinary by treating it as ordinary.

These paradoxes, ironies and strains are not of much practical assistance in assessing the effectiveness and appropriateness of the CT Laws. They do serve to remind participants and observers that the way chosen by the United Nations, and thus by Australia as a Member,

¹⁰ See eg *opposite sentencing remarks* quoted in Appendix 6.

for dealing with the special threat of terrorism is to treat terrorist acts as municipal crimes. That involves Member states having their own domestic criminal laws enforced by their own domestic procedures.

This template of ordinary criminal law and its attached processes provides an Australian yardstick to measure the CT Laws. There are broad fair trial values that are almost universal, but different national systems achieve, or aim to achieve, them in different ways. At the heart of international and Australian fair trial norms is the right of an accused to know the evidence against him or her, and to have a reasonable opportunity to meet it. The dilemma of national security intelligence, being information (not always admissible as evidence) usually gathered surreptitiously and inherently of significance for national security, looms large for the CT Laws. The problem of a defendant's general right of access to prosecution and investigation material, when some of that material is so sensitive that disclosure would be against the public interest (other than the public interest of a fair trial of a fully informed accused), is not novel nor unique to counter-terrorism. So-called privileges and immunities have been enforced for more than a century at common law to protect the identity of informers, and a doctrine of public interest immunity to cover law enforcement and national security matters best kept secret in the public interest has developed at common law during the last century.

The balancing of values and interests as weighty as national security and fair trial is not straightforward. An important governmental function for the public good, being the gathering, consideration and use of national security intelligence, could well be in some cases substantially compromised by public disclosure. Yet public disclosure of evidence used against an accused person is central to the very strong common law tradition of open justice. Many thinkers about justice have said that the confidence that society needs in its administration of justice is best secured by its public exposure to scrutiny and criticism. Less traditionally, but now well-established, is the requirement for a fair trial that the authorities disclose to the defence material that may assist the defence even, or especially, if the prosecution does not intend to use that same material. Again, the secrecy appropriate for real national security information contradicts that aspect of an Australian fair trial.

As Chapter IX notes, the secrecy components of the CT Laws include very sophisticated provisions painstakingly regulating this tension between secrecy and fair trial. It is one of the CT Laws where actual experience enables rather more advanced assessment than is possible for many other of the CT Laws. The effectiveness and appropriateness of laws in this area should involve weighing their felt or likely influence on the complications, duration and expense of the criminal process including terrorism trials.

Provisions of the CT Laws that have not been used, or not much used, present their own frame of consideration by the INSLM. It would be facile to treat an unused law as, thereby, an unnecessary law. "Be prepared" is not only for Boy Scouts. However, the necessity of any law curtailing personal liberty should appear from demonstrations or arguments that make their operation concrete. A law introduced to meet a need presented by urgent or grave circumstances – such as terrorism – should be explicable by reference to cases or

situations in which the law can reasonably be envisaged to operate. If no such cases or situations have occurred for, say, a decade, then it is a reasonable approach for the INSLM to question any further need of the law.

There is another, different and possibly sinister aspect of unused provisions of the CT Laws. Those that concern detention or custody other than imprisonment as punishment upon criminal conviction may not have to be actually used in order to have a cowering or chilling effect. It is quite realistic to contemplate those powers having real effect by threats (veiled or otherwise) to use them rather than by the use of them. That potential abuse has at least two further damaging implications. First, powers not used will nearly always escape judicial scrutiny. Second, the safeguards attached to such powers will not protect individuals and the public interest when those powers are not used. The result could conceivably be that spuriously voluntary co-operation may be achieved by the threat and non-use of these extraordinary powers.

This is no mere theoretical possibility. Records of interview critical in a terrorist prosecution were ruled inadmissible on the grounds of oppressive conduct¹¹ because the trial judge (Mr Justice Adams in the Supreme Court of New South Wales) found that ASIO officers had acted in such a way.¹² Investigations by the INSLM in 2012 will include the effect of this ruling in *R v Ul-Haque*, if any, on the practices and procedures of ASIO.

Much of the literature about terrorism and counter-terrorism assumes or argues for a trade-off approach. Some liberties or measure of liberty should be given up (so it is said) in order to obtain in return some safety or measure of safety. It may be this view has solid ground when terrorism and counter-terrorism are seen through the prism of national defence. Constitutionally and socially, it is historically accurate to say that Australians have accepted more or less willingly sacrifices of that kind to defeat the enemy in wartime.

If counter-terrorism were cast as a military rather than police matter, in the “War on Terror” some credence could be given to a trade-off approach. But even wars can be too expensive in blood or treasure.

Counter-terrorism is only figuratively a war. That terrorists kill people or threaten to do so, as do belligerents at war, does not make counter-terrorism a war any more than the continuing programmes for road safety are military campaigns. And wrongful killing and maiming, and threatening to do so, are what criminals do. We do not deal with crime by soldiers on patrol with shoot-to-kill orders. We have trials conducted under the rule of law. The extreme nature of the wrongdoing does not call for any trade-off in those fair trial and lawful investigation values.

The detention and secrecy extraordinary powers in the CT Laws are those most obviously apt for evaluation in this light. Do they represent undesirable trade-offs? Have there been unjustified departures from fundamental values of personal liberty and fair trial?

¹¹ under sec 84 of the *Evidence Act 1995*

¹² see in particular [2007] NSWSC 1251 at [21], [27], [34], [35], [44] and [45]

As the word “terrorism” conveys, the various acts or threats of violence by which it is committed differ from ordinary murder or assault in the calculated effect of engendering great fear in people beyond the immediate victims or witnesses. (Difficulties of definition are referred to in various passages below including in Chapters III and VII.) This defining characteristic of terrorism is inherently of great social concern as it involves intended widespread social effects – whether political, religious or other ideological causes are invoked. But, like war, counter-terrorism could involve too high a price. Defeating the terrorism of criminals by engendering fear of officials is surely not worthwhile. In most regards, it would probably also be strongly counter-productive. Ultimately, it will not be the CT Laws that deter and prevent terrorism, if that outcome is realistic at all, but much broader and deeper elements and dynamics of Australian and international society that include as just one formal part the counter-terrorism laws.

It is therefore not irrelevant to compare the numbers of Australian terrorism casualties with the numbers of Australian homicides. The ultimate value of an individual's life is lost in both kinds of cases. Some statistics are contained in Appendix 7. The comparison suggested is flawed in a number of ways, of course. For one thing, experience is much against ordinary murder rates multiplying – but our relatively good fortune in escaping terrorist killings in Australia cannot conceal the very practical possibility of terrorist casualties multiplying hugely by dint of very few incidents (as Bali showed).

In sum, many more Australians have been and are being killed by people they know at home than have been killed by terrorists. Lives lost by domestic murders are just as valuable as those lost by terrorism. The governmental and social resources deployed to deter, prevent and respond to domestic murders are dwarfed by those devoted to counter-terrorism. We do not sacrifice civil liberties because of the evil of domestic murders. Have they been too much infringed in confronting the scourge of terrorism?

CHAPTER III

INTERNATIONAL OBLIGATIONS

The specific international obligations of Australia that provide the chief test of the CT Laws are those requiring concerted international action against terrorism (and the financing of it) and those requiring national states to observe individual rights and freedoms. For practical purposes, these counter-terrorism and human rights international obligations are those the INSLM should focus on in assessing the CT Laws. Other international obligations, to which more attention will be paid in the next annual report, are of much lesser import.

The constitutionality, or legal validity, of the CT Laws has nothing to do with Australia's international obligations. The legislative competence of the Commonwealth (and the States and Territories) does not require compliance with treaties – except in one important respect, under the Commonwealth external affairs power. Generally, it is no objection to the binding effect of an Australian statute that its enactment amounts to a breach of international law by Australia.

The important qualification to this general rule is for laws that depend solely on the external affairs head of legislative power under sec 51(xxix.) of the *Commonwealth Constitution*. The *Tasmanian Dam Case*¹³ established that reliance on that head of Commonwealth power required the legislation in question reasonably to appear as implementation of the treaty in question (where a treaty was relied upon) – and that is for the judges to decide by interpreting the treaty and construing the legislation, while according some margin of appreciation (a kind of deference) to the legislative judgement. And the principle of judicial responsibility for constitutional legality, as illustrated in the *Communist Party Case*¹⁴, does not permit these matters to be determined by assertions of the executive government or recitals in the legislation.

This has not yet been critical for any of the CT Laws. As noted in Chapter II, three justices of the High Court have held that the provisions for control orders are validly enacted in reliance on the external affairs power, but not on that power alone. This is not the time or place to speculate whether some provisions of the CT Laws could be based only on the external

13 *Commonwealth v Tasmania* (1983) 158 CLR 1

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

affairs power alone: it suffices to note in passing that reliance on the defence power in sec 51(vi.), as was held effective for control orders, may not be available for some others of the CT Laws particularly over an indefinite duration.

By contrast, the task of the INSLM expressly involves assessing the CT Laws for their compliance with Australia's relevant international law obligations – not as to their validity, but rather as to their continuing appropriateness.

The enactment by the CT Laws of terrorism offences and of provisions facilitating investigation of them, together with important ancillary provisions such as secrecy of intelligence material, can most usefully be seen, for the purposes of assessing compliance with international law, as Australia's attempted compliance with Security Council Resolution 1373 adopted on 28th September 2001 (“**1373**”).¹⁵ Its full text is set out in Appendix 8.

Significant extracts of 1373 are paraphrased as follows:

- The sixth preambular clause expressed concern at the increase of acts of terrorism.
- The seventh preambular clause called on States to work together urgently to prevent and suppress terrorist acts.
- The eighth preambular clause recognized the need for States to take additional measures to prevent and suppress through all lawful means the financing and preparation of any acts of terrorism.
- The final preambular clause claimed the Security Council was acting under Chapter VII of the *Charter of the United Nations*.
- Paragraph 1(a) decided that all States shall prevent and suppress the financing of terrorist acts.
- Paragraph 1(b) decided that all States shall criminalize the wilful provision or collection of funds with the intention they be used in order to carry out terrorist acts.
- Paragraph 2(b) decided that all States shall take necessary steps to prevent the commission of terrorist acts.
- Paragraph 2(e) decided that all States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice.
- Paragraph 2(e) also decided that all States shall ensure that terrorist acts are established as serious criminal offences in domestic laws with punishment duly reflecting their seriousness.

Australia is bound to observe 1373 by its treaty obligations imposed by membership of the United Nations. The treaty is the *Charter of the United Nations 1945*, and the obligation is expressed in Article 25 as the agreement of Members to accept and carry out the decisions of the Security Council in accordance with the Charter. The Security Council's claimed power in and for 1373 directs attention to Article 39 concerning, amongst other things, threats to and breaches of the peace and empowering the Security Council to decide

¹⁵ S/RES/1373 (2001)

what measures to take in accordance with Article 41 (in the case of unarmed measures) to maintain or restore international peace and security. The power to decide those measures under Article 41 gives the Security Council very wide discretion.

The international obligations that the INSLM is bound to consider in assessing the appropriateness of the CT Laws must really be obligations – Australia has to be bound by the terms of the treaty or treaties (in cases where treaty obligations are in question), as opposed to merely acting as if it were. However, the conduct of Australia and the practice of other Members of the United Nations in relation to 1373 under Article 25 of the UN Charter are centrally relevant and could be decisive on the issue of what international obligations bind Australia to enact and enforce legislation like the CT Laws. Investigation so far shows that Australia's conduct of enacting and enforcing the CT Laws has been undertaken expressly to comply with what Australia has recognized unequivocally to be the binding effect of 1373. It is not appropriate at this stage for the INSLM to question that position, and it may not become so in the future.

Nonetheless, study of 1373 and its implementation internationally quickly reveals a number of serious arguments contesting its legality, in the sense of questioning whether the Security Council acted beyond the limits of its Chapter VII powers. If terrorism constitutes an Article 39 threat to or breach of the peace, is the difference between it and ordinary murder and mayhem sufficient to prevent the Security Council thereby having power to promulgate a global régime to deal with murder? Does the Article 39 object of maintaining or restoring international peace and security authorize the Security Council to require Members to have and enforce laws within their own national territories with respect to all terrorism, even where there are no acts outside that territory? May Article 41 measures include, in effect, a general requirement to promulgate and enforce domestic criminal laws for an indefinite period? If so, in this regard have Articles 25, 39 and 41 produced a global legislative rôle for the Security Council, contrary to historical understandings and basic democratic expectations?

The doubts raised about these matters by some scholars and commentators are beyond the scope of this report to explore further. In any event, contentions that an organ of the United Nations such as the Security Council has acted beyond power involve further questions about the kind of cases or forums in which those contentions could be entertained and, if correct, upheld. Those issues are also beyond the scope of this report.

Any uncertainties about the status of 1373 would become moot if Australia were party to a counter-terrorism treaty that imposed similar obligations to those purported to be imposed by 1373. In relation to the financing of terrorism, Australia is already party to the *International Convention for the Suppression of the Financing of Terrorism* (ratified by Australia on 26th September 2002). But over 15 years of international discussion, the hoped-for Comprehensive Convention on International Terrorism remains in draft.¹⁶ It is also beyond

16 The Ad Hoc Committee established by General Assembly resolution 51/10 of 17th December 1996 has as its main objective the drafting of a Comprehensive Convention on International Terrorism which would supplement existing sectoral counter-terrorism conventions and strengthen the international counter-terrorism framework.

the scope of this report to explain or comment upon the reasons for the apparent stalling of this peak international effort to address by a comprehensive treaty what the General Assembly, the Security Council and the Commission on Human Rights (replaced by the Human Rights Council) have repeatedly described as a grave and urgent global problem.

The most significant practical effect for the assessment by the INSLM of the appropriateness of the CT Laws from these ultimate international uncertainties is the lack of a consensus definition of terrorism. The draft Comprehensive Convention on International Terrorism may not be controversial, but has no binding force.¹⁷ More detailed comment on issues arising from the definition of terrorism is made in Chapter VII (of this report). The text of 1373, itself, is remarkable for the absence of any definition of terrorism – although its genesis in intolerance or extremism is explicitly recognized in the preamble.

Another striking lack of explicit text in 1373 is the requirement for observance of international law protecting human rights in carrying out counter-terrorism activities. This probably has little if any adverse implication for the promotion of human rights compliance by the CT Laws, given other aspects of United Nations' counter-terrorism work. First, the Purposes and Principles in Articles 1 and 2 of the UN Charter go a long way to requiring compliance with human rights obligations (notwithstanding arguments from the paramountcy clause Article 103). Second, the United Nations is required by Article 55 to promote observance of human rights and fundamental freedoms. Third, the Security Council is specifically bound by the Purposes and Principles under Article 24 paragraph 2 of the UN Charter. Fourth, paragraph 3(f) of 1373, concerning safeguards before granting refugee status, explicitly stipulates for conformity with international standards of human rights – and it would be odd to argue those standards applied to refugees who may be terrorists but not to terrorists who did not claim to be refugees. Fifth, paragraph 5 of 1373 declared terrorism to be contrary to the Purposes and Principles of the United Nations, which probably involves implied reference to international legal protection of human rights. Sixth since 1373, there have been repeated statements by the Security Council, the General Assembly, the Secretary-General and other organs and officers of the United Nations including the Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism (operating under the Human Rights Council) ("**Special Rapporteur**") plainly to the effect that counter-terrorism requires observance of international obligations that protect human rights, eg:

The promotion and protection of human rights for all and the rule of law is essential to all components of the [United Nations Global Counter-Terrorism] Strategy, recognizing that effective counter-terrorism measures and the promotion of human rights are not conflicting goals, but complementary and mutually reinforcing.¹⁸

¹⁷ The relevant provisions of the draft Comprehensive Convention on International Terrorism for the definition of terrorism are reproduced in Appendix 9. The text of the draft articles reflects the current state of negotiations (A/C.6/65/L.10).

¹⁸ General Assembly resolution 60/288, see Appendix 10. Other examples are collected in Appendix 11.

It certainly appears that Australia's implementation by the CT Laws of its international counter-terrorism and national security obligations is accepted as full and proper. The first Special Rapporteur, Prof Martin Scheinin, raised some issues to which reference will be made in Chapters V and VII, but they should not be seen as suggestions of breach of international obligations as opposed to room for improvement. The second Special Rapporteur, Mr Ben Emmerson QC, appointed this year, has not yet addressed aspects with particular application to Australia. Consideration of the Special Rapporteurs' work as it expressly or impliedly applies to Australia's CT Laws will be reported in 2012.

For present purposes, Australia's international obligations imparted by customary international law and the category of non-derogable norms dubbed *jus cogens* may be passed over. They are not, of course, irrelevant, but almost certainly do not bring as much sharp focus to assessment of the appropriateness of the CT Laws as do the express and specific treaty obligations.

Australia's international human rights obligations are numerous and are imposed by Australia being party to quite a few such treaties. It is not useful, at this stage, to be exhaustive as to arguably relevant treaty provisions, because practically all matters of real concern can be raised by attention to key provisions of the *International Covenant on Civil and Political Rights 1966* ("ICCPR"), signed by Australia on 18th December 1972 and ratified on 13th August 1980. This is not intended to deprecate the significance for the task of the INSLM of other relevant treaties, nor for that matter of the *Universal Declaration of Human Rights 1948* adopted by the General Assembly albeit not legally binding as such. Those other important treaties, upon which there may be specific report in 2012 as circumstances warrant, include the *International Covenant on Economic, Social and Cultural Rights 1966* (ratified by Australia on 10th December 1975), the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984* (ratified by Australia on 8th August 1989), the *International Convention on the Elimination of all Forms of Racial Discrimination 1966* (ratified by Australia on 30th September 1975), and the *Convention on the Rights of the Child 1989* (ratified by Australia on 17th December 1990).

The ICCPR should be to the forefront of the INSLM's task in assessing the appropriateness of the CT Laws because it protects rights, freedoms and immunities considered to have universal value, because it pronounces that protection in specific terms, and because it recognizes and requires civilized balances where individual freedoms and social aims may be in tension. In relation to the CT Laws, at the head of relevant provisions are the very rights threatened or violated by terrorism:

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

...

Article 9

1. Everyone has the right to liberty and security of person. ...

As Australia has no capital punishment, the sting of these provisions is to denounce the defining way in which terrorists threaten to kill or do kill other people. Terrorism can and should be seen as essentially an outrageous violation of this right to life. Remedies for its violation must, therefore, include appropriate means by which Australia prevents and punishes terrorism.

The other provisions of the ICCPR are more directed, in the present context, to ensuring that persons accused of terrorism, and others caught up in its prevention or investigation, are accorded full and equal protections in an appropriate balance with public order and national security in a democratic society. Certain provisions of ICCPR are reproduced in Appendix 12, and the key features of the most salient may be paraphrased as follows.

- The third preambular clause recognizes the ideal of freedom from fear requiring universal enjoyment of civil and political rights.
- The fifth preambular clause realizes that individuals have duties to other individuals and to the community.
- By Article 2 paragraph 1, parties (including Australia) undertake to ensure to all individuals within jurisdiction the Covenant rights without distinction of any kind such as race, religion, political opinion or national origin.
- Under Article 2 paragraph 3, parties undertake to ensure an effective remedy is available for violations of Covenant rights or freedoms even by officials.
- Article 7 forbids torture and cruel, inhuman treatment or punishment.
- Article 9 paragraph 1, following its opening words quoted above, forbids arbitrary arrest or detention and deprivation of liberty except on grounds and procedures established by law.
- Article 9 paragraph 3 entitles anyone accused of crime to trial within a reasonable time.
- Article 9 paragraph 4 entitles anyone deprived of liberty by arrest or detention to take proceedings for judicial review of the detention's lawfulness.
- Article 12 paragraphs 1 and 3 give everyone the right to liberty of movement within the territory of a party subject only to restrictions provided by law, that are necessary to protect national security or public order or the rights and freedoms of others and that are consistent with other Covenant rights.
- Article 14 paragraph 1 requires equality of all persons before courts and tribunals, and entitles everyone to a fair and public hearing by a competent, independent and impartial tribunal established by law.
- Article 14 paragraph 1 also permits exclusion of the press or the public from a trial for reasons of public order or national security in a democratic society, or to the extent strictly necessary in special circumstances where publicity would prejudice the interests of justice.
- Article 14 paragraph 2 gives everyone charged with a criminal offence the right to be presumed innocent until proved guilty according to law.
- Salient minimum guarantees for the determination of any criminal charge include, under Article 14 paragraph 3, adequate time and facilities for the preparation of a defence, trial without undue delay, entitlement to defend or be defended, examination

of witnesses against the accused, and immunity from being compelled to testify against himself or herself.

- Article 18 stipulates for the right to freedom of thought, conscience and religion, including worship, observance, practice and teaching, subject only to limitations prescribed by law that are necessary to protect public safety, safety and order or the fundamental freedom and rights of others.
- Article 19 stipulates for the right to hold opinions without interference and to freedom of expression relating to ideas of all kinds, subject to restrictions to reflect the special duties and responsibilities carried by exercise of these rights, being restrictions provided by law that are necessary for respect of the rights of others or for the protection of national security or public order.
- Article 20 calls for propaganda for war and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence to be prohibited by law.
- Article 21 requires recognition of the right of peaceful assembly with no restrictions on its exercise other than those in conformity with law that are necessary in a democratic society in the interest of national security, public safety, public order or the protection of the rights and freedoms of others.
- Article 22 paragraphs 1 and 2 provide for the right to freedom of association with others, without restrictions on its exercise other than those prescribed by law in a democratic society in the interests of national security, public safety, public order or the protection of the rights and freedoms of others.
- Article 26 proclaims all persons equal before the law and entitled without any discrimination to the equal protection of the law.
- Article 27 forbids ethnic, religious or linguistic minorities to be denied the right to enjoy their own culture, to profess and practise their own religion or to use their own language.

Of these ICCPR provisions that are the main ones relevant to the task of the INSLM, Articles 6, 7 and 18 are non-derogable by reason of Article 4. That is, the parties to the treaty have agreed that there may be no derogation, or departure or non-compliance, from them. The significance of that status is that Article 4 paragraph 1 permits parties to take measures derogating from their obligations under provisions not given that status by Article 4 paragraph 2. That possibility of derogation highlights three matters relevant to assessment of the appropriateness of the CT Laws.

First, the right to life (Article 6), the prohibition of torture etc (Article 7) and the freedom of thought, conscience and religion (Article 18) cannot be diminished. Circumstances cannot permit departure from them.

Second, the possibility of derogation from other provisions of ICCPR is closely controlled as most exceptional, by the express terms of Article 4 paragraph 1. (And any derogation must be formal, notified and temporary, under Article 4 paragraph 3.) The possibility of derogation arises only in time of officially proclaimed public emergency threatening the life of the nation.

Any derogation can be only to the extent strictly required by the exigencies of the situation. Derogating measures may not be inconsistent with a party's other obligations under international law and may not involve discrimination solely on the grounds of race, language, religion or social origin (among others).

Third, the judgement or evaluation as to the existence and exercise of the derogation power resembles a familiar balancing of factors. The same also follows from the express references in important ICCPR provisions, noted above, to departures, restrictions or limitations no greater than public order or national security in a democratic society, etc, would permit.

These three propositions about Australia's obligations under ICCPR suggest some conclusions about the consistency of the CT Laws with ICCPR. A major part of the projected work of the INSLM to be reported in 2012 will be the canvassing of views on that topic, and consideration of these matters in more detail and with the assistance of more reading and discussions.

The protection against terrorism implied as necessary by Articles 6 and 9 appears, superficially, well and truly attempted by the CT Laws. Insofar as legislation can do so, as opposed to operational successes by intelligence and police services, it could well be that this superficial impression will be confirmed upon further investigation. That also will be reported in 2012.

As also noted in Chapter VII, one matter involved in the definition of terrorism that may justify modification of the legislation is the possible desirability of expressly including kidnapping or hostage-taking as acts within the scope of terrorism. The concern of Article 9 of ICCPR could be seen as supporting that extension (if extension it would be). Although not universal practice, the inclusion of hostage-taking is frequent in UN usage, as illustrated in Appendix 13.

Another possible paradox or irony raised by consideration of the CT Laws emerges from the prerequisites for Australia derogating from ICCPR provisions. Notoriously, statements attributed to apparent terrorists abound with hubris. Sweeping claims of political surrender by nation states to small groups of terrorists seem to demonstrate the magnitude or grandiosity of terrorists' projects. But nothing in the material available to the INSLM comes anywhere near substantiating the reality of these outlandish and boastful terrorist claims.

There may be some nation states, a very few, the governance or social integrity of which have been or are being damaged by terrorism. If so, that is a mark of them being so-called failed States. At least, that is true at present. The history of terrorism and like activities obviously includes insurgencies, anti-colonial independence struggles and "ethno-nationalist/separatist organizations" that were existential threats to régimes and societies, some of them victorious.¹⁹

¹⁹ See the discussion of Algeria, Palestine, Israel, Cyprus, the Armenians, South Moluccas and the Kurds in Bruce Hoffman *Inside Terrorism* (rev ed) 2006 at 46-61, 71-74.

This is not, at present, true for Australia. Terrorism does not present any existential threat to our nation or to our society. Terrorist rhetoric claiming to do so may be frightening and is offensive, but does not prove itself true.

It is hard to see how the CT Laws when first enacted or now could have any basis as responses to a “time of public emergency which threatens the life of the nation”. None of the presently understood terrorist acts or threats could affect Australia and Australians so gravely. And none of the United Nations statements gives any support to the notion that the counter-terrorism imperative arises only when there is such an emergency. That would be contrary to the increasing insistence on full compliance with ICCPR provisions among other human rights obligations as an integral part of effective counter-terrorism.

It may also be thought ironic by some that these values are put into action by according, for example, accused terrorists all applicable ICCPR rights such as fair trials. The irony, if any, is only from the perverted antisocial perspective of terrorists and their supporters. There is no irony, at all, in according persons accused of crime the benefit of the rule of law including fair trials. Fair trials are certainly not only for attractive defendants. It would betray the same values terrorists despise (or affect to despise) were they to be debauched in overzealous pursuit of convictions and punishment.

By way of very summary note in this regard, the elaborate trials of terrorist offences already held in Australia appear to have been conducted in accordance with law, and certainly to have been conducted by lawyers (judges, and counsel and solicitors on both sides) who consistently attempted to do so. Given the pendency of some appeals in those proceedings, it is not appropriate for the INSLM to go much further than these comments, in this year’s report.²⁰

Some of the Australian defendants were acquitted, and some were acquitted of some of the terrorist charges against them.

The concern of the ICCPR with freedoms of political opinion and religion is particularly relevant in assessing the appropriateness of the CT Laws. As noted in Chapters V and VII, the Parliament has recognized the significance of these freedoms. A related concern can be seen in the ICCPR provisions forbidding unfair discrimination. Together, these matters and their reflexion (adequately or not) in the CT Laws compel attention to the contemporary nature of the terrorist threats under consideration by Australian authorities. Published information (a summary of which is found in Appendix 15) places extreme and violent Islamism squarely as the main danger. This does not mean it is identified as the only danger – unfortunately, not at all. Nor does it mean that the religion of Islam or Muslims are identified as the sources of that danger. (No more than persons of Irish ancestry or Roman Catholics are by those characteristics responsible for the Provisional IRA’s atrocities.)

20 Descriptions of the matters for which some defendants were convicted and sentenced are summarized in Appendix 14. This is for the purpose only of explaining in a concrete way the kind of actions and involvement in them that have been proved in this country.

The observance of ICCPR mandates the rule of law, fair trials and freedoms of political, religious and cultural positions and from unfair discrimination. These values – and Australia’s international obligations to honour and protect them – converge acutely when the general abstraction of “terrorism” is embodied in particular “Islamist terrorists”.

One problem that may not have any remedy arises from the demonstrated capacity of terrorism to be motivated by religious beliefs and for religions to have typical cultural or ethnic identifications. Those identifications may not be fair or accurate. Prejudices can elide critical distinctions. The presence of religion in terrorist motivations also adds in most cases the weight of monotheism, a shared attribute of Judaism, Christianity and Islam. Sharing that attribute has not historically linked the People of the Book in close friendship. Such tolerance as monotheism permits is toleration, after all, of others who are held to be wrong. None of this helps to prevent social distrust or hostility when different ethnic and cultural groups travel or migrate, including in settler societies such as Australia. The success of multiculturalism cannot conceal this problem.

The messages and propaganda of Islamist terrorists are shocking partly because of the scorn and hatred shown by their words for other religious beliefs, sometimes including other modes of Islam. The position displayed is completely at odds with the enjoyment by anyone else than the terrorist speaker of his or her different religious beliefs and practices. It also denies the freedom not to have religious beliefs. Terrorist claims for justification of their acts or threats are often couched in language claiming a monopoly of the truth, and that the truth so claimed is more important than the lives of individual human beings. When the audience, as it always does, includes people with utterly different beliefs, this shock can well harden into reflexive opposition to other attributes of the terrorist speaker – such as ethnic origin, culture, general religious identification and language.

Legislation cannot prevent, but legislators recognize, that in this way the opinion of large sections of the public shows contemporary prejudices against Islam and Muslims, migrants from the Middle East and their descendants and Arabic speakers. These prejudices include a general suspicion, or worse, that people so labelled are inclined to be or support terrorists.

The trials in Australia for terrorist offences have included clear and firm judicial instructions to the juries not to be deflected from fair and dispassionate assessment of the evidence by such prejudices. The legal system requires acceptance that juries abide by such directions. This does not mean the prejudices cease to be a most troubling element in assessing the effectiveness and appropriateness of investigations and trials for terrorist offences under the CT Laws.²¹

It may be that more work by the INSLM into this aspect of Australia’s international human rights obligations and the CT Laws will be reported in following years. Consideration to date has not produced any substantive suggestions for improvement in this regard (apart from tentative comments about the definition of terrorism, in Chapter VII).

²¹ For an example of such a jury direction see Appendix 16.

The factors which explain these prejudices, and also the objective historical facts of the deeds and words of avowedly Islamist terrorists, present another problem most acutely for counter-terrorism planning, intelligence gathering, disruption programmes and criminal investigation. It may be called stereotyping or profiling, depending on context. It is a very controversial topic, with many important implications for administration, operations and expenditure. As such, it mostly lies outside the task of the INSLM.²²

A dilemma for justice arises in the prosecution of terrorist offences from the character of terrorism that most obviously distinguishes it from ordinary crime. Whether it be called altruist or political or ideological, an attributable motivation other than selfish gain or gratification is thought to typify terrorism.²³ When it has been attached to an atrocious act or threat, the idea or aim espoused by a terrorist is unlikely to be enhanced in general social regard for it. An idea like respectful humane treatment of animals is probably attractive enough not to be spoiled by murders committed in its name. The same is probably true, to a degree, for some viable independence causes. But a generalized homicidal hatred for people of another religion or no religion, pronounced in the name of the terrorist's own version of religion, seems very likely to form an association among people hearing his words between that religion and that hatred. That is likely to taint, in many minds including those of some investigators and some jurors, all apparently similar versions of that religion.

In such a case, which is presently considered the most pressing threat in Australia, the so-called religious motivation will be front and centre of the prosecution evidence presented to prove the commission of a terrorist offence. That is because, as explained in Chapter VII, the elements of the statutory offence require that. Is this too close to proving criminal guilt by proof of religious belief? Does it show the law treats as inherently suspect claims that a particular version of religion is the right way and all others are the wrong way? How can those possibilities co-exist with ICCPR Article 18's non-derogable right to freedom of thought, conscience and religion?

There are reasonable answers to these questions, including opposite ones. This is not the time and place to pursue them. The present point is that Australia's international human rights obligations may combine in various ways to produce a dilemma such as using religious belief to convict a person in a society committed to freedom of religious belief. (Of course, terrorist offences require more than religious belief, but the essential motivation element is inescapable.)

International law on this subject has clearly chosen to treat all and any motivations for terrorism as equally incapable of excusing it. At least, so it has been stated, many times, including the selection noted in Appendix 17. It could be, some may think, that special pleading for some motivations in relation to violence explains why there has still not been agreement on the draft Comprehensive Convention on International Terrorism.

²² By para 6(2)(a) of the 2010 Act, the INSLM's functions expressly exclude the review of priorities and the use of resources of counter-terrorism agencies.

²³ The definitional quagmire is touched on in Chapter VII. See Hoffman *Inside Terrorism* at 35-38.

But otherwise statements in the United Nations strongly reject as inadequate justification any motivation for terrorism. Thus, the Security Council:

...

Condemning in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security ...

Condemning also in the strongest terms the incitement of terrorist acts and *repudiating* attempts at the justification or glorification ... of terrorist acts that may incite further terrorist acts,

Deeply concerned that incitement of terrorist acts motivated by extremism and intolerance poses a serious and growing danger to the enjoyment of human rights ...²⁴

By the time the Security Council so resolved, claimed religious motivations for terrorism were internationally notorious. The Security Council condemns terrorism irrespective of motivation, including any religious motivation. It must be that this condemnation prevents any proper claim by any religionist that his or her God requires murder and mayhem. Such threats and acts must be seen to lie outside the non-derogable right to observe religion, simply because that freedom is subject to limitations prescribed by law that are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.²⁵

This is an important example of the essential consistency between condemning the terrorism of religious zealots and protecting religious freedom. It is the same approach as produced another clear statement by the Security Council in the same resolution:

...

... *stressing* that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular human rights law, refugee law, and humanitarian law ...

...

... *emphasizing* the need to take all necessary and appropriate measures in accordance with international law at the national and international level to protect the right to life. ...²⁶

24 S/RES/1624 (2005)

25 ICCPR Article 18 paragraph 3

26 S/RES/1624

CHAPTER IV

AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION ACT 1979

Special powers relating to terrorism offences

The first set of provisions designated as comprising counter-terrorism and national security legislation in the 2010 Act²⁷ is Division 3²⁸ of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (“**ASIO Act**”) and any other provision of the ASIO Act as far as it relates to Division 3. Division 3 has a sunset clause under which it ceases to have effect on 26th July 2016.²⁹

Like most of the CT Laws, perhaps like most recent Commonwealth legislation, these provisions are not concise. The following discussion assumes the reader has ready access to the full text, which will not be reproduced in this report.

The powers of compulsory questioning are aptly described as special in the heading of Division 3. They are not unique as powers to compel persons to attend and answer questions concerning the suspected wrongdoing of others. At Commonwealth and State levels, bodies such as the Australian Crime Commission, the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, the Independent Commission Against Corruption and the New South Wales Crime Commission all have powers to this effect. Given the need to counter terrorism, the criminal and conspiratorial character of terrorist activity and the requirement for cogent evidence, there is no objection in principle to such compulsory powers of questioning. In particular, modern concepts of privacy and traditional preferences to be left alone by the government have little if any weight against an official power to question people about suspected terrorism.

The relevant enquiry is not about the existence of a power, but its extent and safeguards. Only reasonable powers exercised reasonably would be appropriate.

27 sec 4 of the ASIO Act

28 secs 34A-34ZZ

29 sec 34ZZ

The starting position of official questioning of people about the possible wrongdoing of others shows both similarity and difference between Division 3 and other unexceptionable laws. (Not all laws concerning official questioning are unexceptionable or uncontroversial.)

The power of courts of law to compel the attendance of witnesses and to compel them to answer questions, subject to lawful exceptions, is accepted by everyone. It serves the administration of justice. It requires a witness to give up a measure of his or her personal liberty by attending a designated courtroom and remaining there until excused by the presiding judicial officer. It requires him or her to give up a measure of his or her personal liberty by answering questions, on pain of penalty if untruthful, regardless whether the witness wants to answer or not. Excuses or privileges are governed by law ruled on by the court. Contempt of court or other offences are committed by failures to attend, remain or answer questions as directed. Those offences may be punishable by imprisonment.

Compulsory questioning, and effective detention while it is carried out, is therefore an everyday piece of civil and criminal justice in Australia (and most other political systems).

If there were a principled distinction between compulsory questioning in courts of law and by non-judicial officials, it would be applicable for all crimes or contraventions of the law, not just for terrorism. Australian parliaments have decisively taken the course of empowering officials to question people, the answers being compulsory, in some cases without privilege against self-incrimination, in schemes sanctioned by criminal penalties. These schemes apply for organized and other serious crime (typically, drug trafficking and gangsterism), corporate and securities market regulation and trade practices regulation. These are only the most obvious and often used examples of such powers. Royal Commissions and Special Commissions of Inquiry are other plain examples.

It follows, for the INSLM's task, that it would be quite wrong to consider official questioning, as such, inappropriate under the CT Laws – unless the absurd step were taken of regarding all those other powers as in principle inappropriate. That position should not be taken.

The only one of these special powers used in the last two years has been the Subdivision B questioning warrants power.³⁰ Further investigation is necessary before evaluation by the INSLM of the effectiveness of questioning warrants. The question itself involves some debate yet to be concluded about the utility of apparently unproductive questioning. It suffices in this report to note that the power has been used, not very much, and apparently without difficulties emerging in any particular case.

The provisions of Subdivision B³¹ concerning requests for and issuing of questioning warrants require four different official persons to be involved. Other officers will also have to be involved. First, ASIO officers must follow their Director-General's statement of procedures, which itself requires Ministerial approval after consultation with the Inspector-General of

³⁰ Some statistics appear in Appendix 18.

³¹ secs 34D and 34E of the ASIO Act

Intelligence and Security and the (Federal) Commissioner of Police, and on which the Director-General must brief the Parliamentary Joint Committee on Intelligence and Security.³²

Second, the Director-General must give the Minister a draft request including information about past dealings with the same person. The nub of the draft request is a statement of facts and grounds on which the Director-General considers it necessary that the questioning warrant be issued.³³ Third, the Minister may consent to the Director-General requesting the issue of a questioning warrant only if the Minister is satisfied there are reasonable grounds for believing that its issue will substantially assist the collection of intelligence that is important in relation to a terrorism offence,³⁴ and that relying on other methods of collecting that intelligence would be ineffective.³⁵ There must also be a Director-General's statement of procedures. The Minister may require changes to the draft request. Other safeguards and requirements relate to the issue of the person to be questioned contacting a lawyer.³⁶

Fourth, an issuing authority, who must be a Federal Magistrate or a judge of another federal statutory court,³⁷ may issue a questioning warrant if satisfied there are reasonable grounds for believing that it will substantially assist in the collecting of intelligence that is important in relation to a terrorism offence.³⁸

Fifth, the questioning under a Subdivision B warrant is before a prescribed authority, who must be a retired superior court judge (or other persons similarly qualified if there are insufficient superior court judges).³⁹ The prescribed authority must ensure the person is aware of the effect and limits of the questioning warrant, and important rights to contest it including by judicial review.⁴⁰ Every 24 hours, the prescribed authority must inform the person of the right of judicial review relating to the warrant or treatment under it.⁴¹ The prescribed authority must specifically inform the person of rights to complain to the Inspector-General of Intelligence and Security, the Ombudsman and to a police complaints agency.⁴²

This staged sequence of official consideration of prerequisites for questioning under a warrant, with safeguards explicitly including judicial and other review of the whole process, is very different from the problematical National Security Letters in the United States. While that contrast is most favourable to the Australian law from the point of view of human rights, rule of law and appropriate caution, that contrast does not conclude the enquiry for the INSLM.

³² sec 34C

³³ para 34D(3)(e)

³⁴ para 34D(4)(a)

³⁵ para 34D(4)(b)

³⁶ subsec 34D(5)

³⁷ subsec 34AB(1)

³⁸ para 34E(1)(b)

³⁹ sec 34B

⁴⁰ subsec 34J(1)

⁴¹ subsec 34J(5) of the ASIO Act

⁴² para 34J(1)(e)

The threshold requirements to be addressed by the Director-General, the Minister and the issuing authority in turn together constitute a requirement for ASIO officers and the Director-General to have and comply with pre-existing procedures, themselves approved by the Minister, and then the critical involvement of judicial (including retired judicial) officers in the issue and supervision of the warrant. As a matter of procedure, this is more elaborate than most warrant procedures in the criminal investigative usage long familiar to common law jurisdictions with legislative provisions for warrants.

The nature of the compulsory questioning, however, goes beyond the ordinary in some respects, and so these more elaborate procedural safeguards at the outset of a questioning warrant are appropriate.

Inquiries by the INSLM so far do not throw up any cause for concern as to compliance.

The most important involvement is that of the Inspector-General of Intelligence and Security, who has a right of presence (including by assisting staff)⁴³ and a right to raise concerns that must be considered by the prescribed authority, concerning impropriety or illegality.⁴⁴

The prescribed authority, a retired judicial officer in most cases, also has a critical rôle that constitutes a major safeguard. Its features include a broad power of directions⁴⁵ which may defer questioning or release the person from detention. Inquiries in relation to experience to date do not reveal any cause for concern as to non-compliance or unreasonable outcomes. This topic will be further investigated before the next annual report.

The same is true of other important safeguards including rights of legal representation and disclosure of otherwise secret information about warrants.⁴⁶

Experience has not extended to any of the exceptional cases of special rules for people aged between 16 and 18 years, where a warrant may be issued only if the Minister is satisfied on reasonable grounds that it is likely the person will commit, is committing, or has committed a terrorism offence. In the abstract, the balance of personal liberty and public order is not unreasonably struck in such cases by compulsory questioning.

Finally in relation to safeguards, the mandatory video recording of questioning under a warrant⁴⁷, reports by the Director-General to the Minister of the assistance to ASIO in carrying out its functions provided by action under each warrant⁴⁸ and the reports and inventories that the Director-General must give to the Inspector-General of Intelligence and Security for all warrants⁴⁹ together with the Inspector-General's particular duty annually to

43 sec 34P

44 sec 34Q

45 sec 34K

46 eg subsec 34E(3), sec 34ZO – 34ZQ

47 sec 34ZA

48 sec 34ZH

49 sec 34ZI

report on multiple warrants for any individual⁵⁰ are calculated to promote due accountability. There is insufficient experience to date to gauge the effectiveness of this elaborate scheme, which has a degree of commendable redundancy.

Before turning to matters of human rights concerns raised by questioning warrants, and the so far unused questioning and detention warrants, one comment may be made about the threshold requirements sketched above. It may be theoretical because experience does not yet enable a practical test of the matter. Warrants cannot be issued, ultimately, unless reasonable official views are formed that a warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and that relying on other methods of collecting that intelligence would be ineffective. The test is not, say, that a warrant may substantially assist (etc) or that relying on other methods (etc) would likely be ineffective. (The actual warrant requests information that is or may be relevant to intelligence that is important (etc).⁵¹)

There is insufficient practical experience to explore whether this is too high a test for the effective gathering of information under these warrants. The effectiveness of methods seems inherently to be a question of relative success or failure or relative fitness or unfitness. The present prerequisites are posed as if an absolute were attainable. An issue may be whether in practice something less than an absolute is, as a matter of common sense, treated as if it were the impossible absolute – a departure from literal compliance that has its own dangers. On the other hand, these are extraordinary powers and reserving them for extraordinary cases is an attractive starting position.

The first major concern, like most procedures in question, has not been tested by sufficient practical experience so far. It is the time elements in the questioning and related detention. All time elements, being maximum times for detention, questioning by episodes or total, and currency of warrants, are stipulated by precise periods of hours or days. That is appropriate, so as to impose bright-line limits on powers of this kind. But one aspect of such clarity is an appearance or sometimes reality of arbitrariness. The question for the INSLM is whether the cut-offs have been set too short or too long (or about right).

The idea of there being a correct answer to such questions is itself odd. International comparisons do not greatly assist, especially as there is no one foreign system that would be chosen to set a good or bad example generally. Some systems have shorter times, others longer times, and none in exactly corresponding procedures.

Warrants are in force for no more than 28 days.⁵² That period, commonly used in many legal and administrative procedures, is not inappropriate. There is ample provision for ASIO or the prescribed authority to adapt within that period, for example by no longer requesting

⁵⁰ sec 34ZJ

⁵¹ para 34E(4)(a)

⁵² para 34E(5)(b) and para 34G(8)(b) of the ASIO Act

information or by releasing a person, if circumstances were materially to change within a 28 day warrant currency.

The period that should be of most concern so far as concerns ICCPR Article 9 and cognate common law values is the 168 hours that is the maximum period for a person to be detained continuously.⁵³ There has not appeared to the INSLM, so far, explanation why this should be seven days rather than, say, three days. For that matter, there is no reason appearing why it is not ten days or even longer.

In particular, there is, so far and on incomplete inquiries this year, no operational justification for regarding such a long period of detention as reasonably necessary in order for useful intelligence to be gained. There can be (and has been) no reliance on psychological distress or disorientation such as have been observed to follow some lengths of custody. The procedures expressly require humane treatment.⁵⁴ The crucial oversight and checking functions of the prescribed authority and the Inspector-General of Intelligence and Security, also prevent – one hopes – the use of an extended period of detention to “break” someone.

So, why 168 hours? Why not a shorter period? If a longer period cannot be said to have an appreciable operational benefit, the interests of liberty run completely towards the shortest possible period of detention. The project of examining this issue for the next annual report will attempt to analyse individual cases, cautiously consider international experience and proceed by comparisons with ordinary criminal process.

Within this project there will have to be some attempt empirically to assess the extendable time limits for periods of questioning. All such periods are subject to interruption or deferral by the prescribed authority, and proceed by a kind of statutory stopwatch whereby certain times are disregarded, such as rest and recuperation.⁵⁵ The prescribed authority controls whether the questioning may be extended at most twice after the initial period.

This discretion exists only if the prescribed authority is satisfied that there are reasonable grounds for believing that permitting continuation of questioning will substantially assist the collection of intelligence that is important in relation to a terrorism offence.⁵⁶ The prescribed authority must also be satisfied that the relevant ASIO officers have conducted questioning so far properly and without delay.⁵⁷

The periods stipulated, with the same beneficial precision and problematical arbitrariness as the time limit for detention discussed above, are an initial period of 8 hours, extendable to 16 hours, and finally extendable to 24 hours;⁵⁸ in cases where an interpreter has been present at any time during questioning, the corresponding periods are 24, 32 and 40 hours

53 sec 34S

54 sec 34T

55 subsec 34R(13)

56 para 34R(4)(a)

57 para 34R(4)(b)

58 subsecs 34R(1), (2) and (6)

(with a 48 hour limit);⁵⁹ and with a special limit of 2 hours for continuous periods of questioning for people aged between 16 and 18 years.⁶⁰

Some queries are raised by these provisions, again none of which can be assessed with significant practical experience. Cases where an interpreter is present during any time during questioning seem to be rather crudely accommodated by the large expansion of time for permitted questioning including extensions. Perhaps the prescribed authority should explicitly be required to be satisfied that any extension of time is no more than could reasonably be attributable to the use of a foreign language during questioning. It may be that the 48 hour rather than 40 hour period for the end of questioning and the resultant release from detention in cases of a interpreter being present at any time during questioning is to permit problems of translation to be addressed, but again the increment seems rough and ready.

Given the likely resort to Arabic during current conditions, these matters are of immediate concern, and justify analysis of individual cases. It is proper, however, to observe that nothing of concern in this regard appears in the records to date.

A questioning period of 24 hours is quite remote from the ordinary experience of Australians. On any view, it is an extraordinary power. It could be that the real risk and consequences of terrorism, combined with the commendable safeguards noted above, will suffice to justify its length. But the necessary bias in favour of a shorter period in order to observe the value of individual liberty, where there is little or no empirical justification for 24 hours rather than, say, 12 hours, places these provisions to the forefront of the next year's review.

Another deprivation of liberty in relation to questioning warrants is considerable, although not unparalleled in criminal and regulatory investigations. Passports must be surrendered and departure from Australia subjected to prior permission of the Director-General of ASIO.⁶¹ The practical importance of these provisions to ensure effective questioning is persuasive. The extraordinary nature of the infringement of ordinary freedoms justifies, on the other hand, further investigation. There may be some relation in this area with the quite separate administrative question concerning cancellation of passports.

The compulsion to answer questions and to produce records and things is sanctioned, in the usual way, by criminal offences punishable by imprisonment (for 5 years).⁶² This is in itself unremarkable, subject to questions of comparison with a wide variety of perjury and other false evidence or disobedience to warrants offences in the various Australian jurisdictions.

More remarkable, but nowadays not at all unusual, is the abolition of privilege against self-incrimination⁶³ albeit with protection against the use of such answers in criminal

59 subsecs 34R(9) and (11)

60 subpara 34ZE(6)(b)(ii)

61 secs 34W-34Z of the ASIO Act

62 subsecs 34L(1)-(6)

63 subsec 34L(8)

proceedings (other than for an offence against the same provision).⁶⁴ It is a large question, that ought not simply go by assumption, whether these provisions are consistent with Australia's international human rights obligations. Obviously, they are inconsistent with the common law. Even with use immunity, given it is limited to criminal proceedings, people will be compelled to say things that could well – and properly – lose them their passports, for example.

On balance and provisionally, the view of the INSLM is that there are so many such provisions given effect every day in Australia that the issue cannot be given top priority. It does seem as if the pass has been sold on statutory abrogations of this privilege.

Detention and custody, like all ultimate sanctions in a society governed by the rule of law of a kind familiar to Australians, depend on the exertion of physical force by officials against individuals – threatened if not carried out. It is therefore a good thing for statutes like this Act to stipulate the degree of force and the circumstances in which it may be exerted for the purposes in question. Both at common law and under statutes in daily use there has been and remains a variety of ways to delimit this sanctioned force.

Some aspects of the provisions regulating the use of official force for questioning warrants are of preliminary concern. There is certainly no difficulty with the permissible force being necessary and reasonable, and it is admirable standard-setting for a person's dignity (by way of the indignity being limited) to be explicitly part of these provisions.⁶⁵ Beyond those matters, however, the provisions concerning lethal force exerted lawfully⁶⁶ might repay further attention in advance of any practical experience.

At first reading, the reference to doing something likely to cause the death of a person if an officer believes on reasonable grounds that it is necessary to protect life or to prevent serious injury to another person (including the officer) is unexceptionable. Coupling that with the belief that there is no alternative way of taking a person into custody is rather disturbing. That last requirement⁶⁷ should not, in logic, add anything of weight to a belief of necessity to protect life (etc). Could this part of the test distract from a simple one of saving another or defending oneself? Could it assist expanding that life-protection component to a general licence to kill reasonably suspected terrorists? Given the explicit context of a person attempting to escape by fleeing, does it give rise to the hackneyed but sinister "shot while trying to escape"?

The discussion above started by focussing on questioning warrants and moving to general safeguards and other factors applicable to them. Those safeguards and other factors are also applicable to the questioning and detention warrants obtainable under Division 3.⁶⁸

64 subsec 34L(9)

65 subsecs 34V(1) and (2)

66 subsec 34V(3)

67 subpara 34V(3)(b)(ii)

68 secs 34F-34H of the ASIO Act

The comments and questions raised for the work of the INSLM, above, also apply to questioning and detention warrants.

There are differences and similarities between questioning warrants and questioning and detention warrants, all of which tell against the justification of the provisions for questioning and detention warrants. As to similarities, and in the nature of compulsory questioning, both warrants authorize the detention of people for the purpose of questioning – in one case, by direction of the prescribed authority after attendance under the warrant, and in the other case by execution of the warrant before first attendance before the prescribed authority. In short, a questioning and detention warrant is not at all necessary in order to permit a person to be detained after attendance for questioning and until the statutory limits have been reached.

The different and extra ground in relation to a questioning and detention warrant is that there are reasonable grounds for believing one of three possibilities: the person may alert another person involved in a terrorism offence of the investigation, the person may not appear if not immediately taken into custody and detained, or the person may destroy, damage or alter a record or thing the person may be requested to produce under the warrant.⁶⁹

This ground is similar to that which permits rejection of a person's choice of a lawyer.⁷⁰ There is a gulf between another lawyer needing to be chosen, and an individual being detained. What does appear reasonable in the case of a choice of lawyers has a quite different appearance in the case of a person to be questioned.

One concern is the need for only one of the three possibilities to appear by way of reasonable grounds.

The second possibility (risk of non-appearance) may well literally be true of everyone, in the sense that the failure to answer subpoenas or summonses in ordinary court proceedings is any everyday occurrence. No doubt that reading borders on the unreasonable, but it indicates the undesirable elasticity of this apparent safeguard prerequisite. The risk of non-appearance is also a matter traditionally and best determined by an impartial judicial officer rather than by an officer of the executive government that is seeking the person's detention.

The first and third possibilities (risk of tip-off or tampering with evidence) may not provide a very high bar to be cleared before the extraordinary power of detention is exerted. In the nature of things, a person in relation to whom there are reasonable grounds for believing that questioning will substantially assist the collection of intelligence that is important in relation to a terrorism offence is usually going to be a person who can provide evidence or assist in its collection, and in turn that means he or she will often know another person or other people of interest to ASIO. It does not take much imagination to see a straightforward link – providing the requisite reasonable grounds – for regarding any such person as a candidate for detention and not just questioning.

⁶⁹ para 34F(4)(d)

⁷⁰ sec 34ZO

Further, a person about whom those suspicions are entertained on reasonable grounds could well – not necessarily – also be someone whose suspected complicity in suspected terrorism makes them not only a risk of tipping off others or tampering with evidence but also of much greater importance, a suspect himself or herself. As such, the person would ordinarily be regarded as a candidate for arrest and charging, a régime with drastically different safeguards from those of a questioning and detention warrant.

Consideration will be given by the INSLM, in consultation with those interested to comment, on a slight change to the provisions for enforcing the obligation to produce records or things under a warrant.⁷¹ The tampering or destruction at least of material requested to be produced under a warrant could be specifically made, or included in, an offence in the nature of non-production.

As to tip-offs, the secrecy provisions provide for punishment of an offence in such cases,⁷² and there has been no empirical demonstration from the limited practical experience to date that these provisions are inadequate.

Worse, this safeguard prerequisite special to questioning and detention warrants requires only the Minister (being the Attorney-General) to be satisfied of the reasonable grounds of believing one of the three possibilities. The issuing authority is not, in terms or perhaps at all, authorized to consider that question. The attention of a judicial officer to a matter of such moment to an individual's personal liberty is highly desirable, approaching the point of necessity. As a matter of policy, it is difficult to see why bail in the administration of criminal justice involves judicial decision, but not a potential 7 day detention for a possible 24 or 48 hour questioning.

There have been no questioning and detention warrants. The INSLM will be investigating further the need for these provisions.

Enough has been written above to dispel the fear that questioning warrants involve a kind of incommunicado disappearing. Furthermore, the elaborate provisions concerning the right to seek judicial review appear on the face of the scheme to differ greatly from roughly corresponding US procedures productive of acute civil rights concerns in that country. There are possibilities for financial assistance, but not for judicial review.⁷³

Alike with schemes for compulsory questioning by crimes commissions in Australia, concerns have been expressed about the secrecy imposed on the fact and process of the compulsory questioning itself. The provisions in this Act for secrecy are elaborate and criminally sanctioned.⁷⁴ Whether the penalties are appropriately pitched might be

⁷¹ subsecs 34L(6) and (7)

⁷² subsec 34ZS(2) of the ASIO Act

⁷³ sec 34ZX

⁷⁴ sec 34ZS

reconsidered, given the 5 years imprisonment for offences in relation to secrecy compared to the 2 years imprisonment for the offences of deliberate contravention of safeguards.⁷⁵

On the preliminary consideration by the INSLM, the category of permitted disclosure sufficiently includes contact with lawyers and those lawyers' work on judicial review, and contact between the person being questioned and his or her appointed representative or family member, as to alleviate the prospect of unfair or cruel isolation. This matter is of such moment, however, that detailed examination of individual cases will be continued.

⁷⁵ sec 34ZF

CHAPTER V

CHARTER OF THE UNITED NATIONS ACT 1945

Security Council decisions that relate to terrorism and dealings with assets

The provisions of Part 4 of the *Charter of the United Nations Act 1945* (Cth) (“**UN Charter Act**”) are explicitly made so that Australia carries out its obligations to implement 1373 under Article 25 of the UN Charter.⁷⁶ Thus the listing of persons or entities, and assets or classes of assets, is intended to proscribe certain dealings with the persons or entities, and to freeze the assets, as part of the international countering of terrorism.⁷⁷

The matters of which the Minister for Foreign Affairs and Trade must be satisfied before listing are, by regulation, specified as the fact of the person or entity being mentioned in paragraph 1(c) of 1373.⁷⁸ (Its text is found in Appendix 8.) In substance, the persons are those who commit or attempt to commit terrorist acts or participate in or facilitate them, and the entities are those controlled directly or indirectly by such persons – and persons and entities extend to include those acting on behalf of or at the direction of such persons or entities. The funds and other assets or resources in question include not only those of such persons and entities, but also funds derived or generated from property owned or controlled directly or indirectly not only by those persons but also by associated persons and entities.

This mouthful is no doubt expedient to catch the breadth of malevolent and underhand operations by which terrorism may be financed. Its breadth is not in itself objectionable. In any event, the terms of 1373 are not for the INSLM to criticize.

There is much to be said in favour of the direct and explicit way in which the UN Charter Act requires action to be taken which exactly reflects Australia’s international counter-terrorism obligations, being those under 1373. In the nature of the judgements involved, and the substantive efforts called for by repeated UN statements in this regard, the Australian requirement that the Minister be satisfied on reasonable grounds that a person, entity or asset is within paragraph 1C of 1373 cannot be faulted.

⁷⁶ subsec 15(5), subsec 16(1), sec 19 of the UN Charter Act

⁷⁷ secs 14, 15, 18

⁷⁸ sec 15, *Charter of United Nations (Dealing with Assets Regulations) 2008* reg 20

But does this process infringe any of Australia's international human rights obligations? This issue recalls the matters noted in Chapter III concerning the necessary congruence or complementarity between counter-terrorism and human rights protection.

As to the form by which the UN Charter Act provides this scheme to counter the financing of terrorism, so long as the regulations made to prescribe the matters of which the Minister must be satisfied before listing remain materially the same as they are now, the connexion with terrorism is sufficiently clear and close to provide an appropriate balance between the private right of holding and using property, and dealing with it, and the public interest in public order, safety and national security.

In theory, this sufficient nexus may not be guaranteed, because the broad power of prescription contemplates Security Council decisions under Chapter VII of the UN Charter generally, and not specifically confined to 1373; and the requirement is merely that it relates to terrorism and dealings with assets.⁷⁹ Future Security Council resolutions will not be drawn in the same style as Australian legislation, are unlikely to lend themselves to Australian judicial interpretation in predictable ways, and need not be confined to persons who commit, facilitate or finance terrorist acts – to which 1373 is confined.

Relating to terrorism may open wider and looser links between persons, entities and assets on the one hand and terrorist acts on the other hand. Perhaps Australia's legislation should be tied specifically to known Security Council decisions such as 1373, which presents no such difficulty. This would help to minimize the danger that the net is cast too wide in the interference with private property rights in order to counter terrorism.

The UN Charter Act also permits regulations directly proscribing persons or entities identified (directly or by using a mechanism contained in the Security Council decision) in Security Council decisions under Chapter VII of the Charter.⁸⁰ In practice, apart from al-Qaeda and the Taliban, this method of proscription or listing has not been used. It remains available, in a plain and useful way, so as to permit prompt implementation of Security Council decisions binding on Australia under Article 25 of the UN Charter.

The scheme of the UN Charter Act appropriately reverses a listing to reflect cessation of the operation of the particular Security Council decision in question.⁸¹ It also empowers the Minister to revoke a listing if the Minister is satisfied it is no longer necessary to give effect to a relevant Security Council decision.⁸² An obvious question is why the Minister is not obliged, rather than merely empowered, to do so in that case.

Listing schemes internationally have provoked a range of objections. It is reasonable to ignore opposition to such schemes that proceeds on the intolerable premise that

79 subsec 15(5) of the UN Charter Act

80 sec 18

81 sec 19

82 sec 16 of the UN Charter Act

everyone should be allowed to provide and use their own assets entirely as they please including for the commission of terrorist crimes. But there are many other instances of principled criticism of listing schemes that do not proceed in this immoral or amoral fashion. Practical experience in Australia is insufficient so far to permit the INSLM to complete a critical assessment of Australia's listing scheme.

Although it is not strictly an obligation owed by Australia, the aspiration expressed in Article 17 of the *Universal Declaration of Human Rights* should be seen as centrally relevant to the important value, long recognized by the common law, at stake in a listing scheme that freezes assets and prohibits dealings. Those provisions state:

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

In light of these broad and abstract concepts, there is a good way in practice to bring a listing scheme into an appropriate balance. That is for affected people to have the right to effective review including by impartial judges who are able to provide substantial remedies.

The Australian scheme permits application for administrative review, by seeking the Minister to revoke a listing.⁸³ The fact that the Minister is not required to consider more than one application every 12 months may appear reasonable, but would impose unjustified restrictions on the use of private property when new information or changed circumstances come to light just after an unsuccessful application. The difference is between a Ministerial power to revoke immediately, which is available, and an enforceable obligation of the Minister to consider a revocation application, which is available only once a year. Whether this has had any substantive effect to date has yet to be investigated.

Dealings with freezable assets may be authorized administratively.⁸⁴ This power could be most salutary as a means of rectifying an imbalance between infringement of private rights and protection of public interest. Its practical implementation has yet to be investigated. In terms, the provisions do not hold out much if any relief by way of judicial review, but only because the merits are, in the conventional way, not for the courts of law. Whether that is appropriate in this area will be considered further.

The provisions that provide immunity for actions done in good faith and without negligence under this part of the UN Charter Act⁸⁵ probably reflect an appropriate protection for officers of the Commonwealth and others attempting to do their duty. But the limited compensation provisions⁸⁶ do not provide a mirror of all the situations where a person could suffer loss by mistakes in administration of the listing scheme. A possibility to be pursued is ensuring that

83 sec 17

84 sec 22

85 sec 24

86 sec 25

the cost of all mistakes should be to the public account and not borne by hapless affected individuals or entities.

The broad injunction power⁸⁷ extends to permit orders restraining a person from engaging in specified conduct whether or not the person has previously engaged in such conduct and whether or not it appears to the court that he or she intends to engage again or continues to engage in such conduct.⁸⁸ In form, this resembles familiar provisions of the former *Trade Practices Act 1974* (Cth) sec 80. On that ground alone, the power may be thought not inappropriate assessed by established precedent.

However, a considerable breadth of completely innocent conduct potentially falls within this injunctive power. The general law protection for errors in exercise of such injunctive powers, being the undertaking by the party seeking the order (under the UN Charter Act, the Attorney-General) to pay damages for loss suffered by the person wrongly restrained, is expressly excluded.⁸⁹ Again, exclusion of the Crown giving the usual undertaking as to damages is traditional, and may thus appear appropriate in the UN Charter Act. The question remains (for further consideration) – has the balance between rights and liberties of private property and the public interest in countering terrorism been well struck by these provisions?

Like all prospective litigation under the CT Laws, it is a real possibility that the quality of the preliminary advice available to an affected person and the fairness of subsequent hearings could be detrimentally affected by secrecy provisions. That large and difficult topic is addressed in Chapter IX.

The offences provided to sanction compliance with Part 4 of the UN Charter Act may raise questions of balance, somewhat similar to those raised in Chapter VII. In particular, the INSLM will investigate further problems of potential reach that appear in the offence of making an asset available to a listed person or entity.⁹⁰ Strict liability applies,⁹¹ and punishment may include imprisonment for 10 years as well as a triple-value fine (ie three times the value of the contravening transaction).⁹²

The listing of a person is made by publication in the *Commonwealth Gazette*.⁹³ That publication is not much read or discussed by the public. The effect of strict liability in relation to making an asset available to a listed person therefore throws a burden of proof on a person accused of doing so, that involves information available in the *Gazette*. The effect of strict liability involves application of sec 9.2 of the *Criminal Code*, under which the person would have to show he or she had considered facts existed and is under a mistaken or reasonable belief about those facts, that would be exculpatory had they existed.

87 sec 26

88 subsec 26(7), cf subsec 26(1)

89 subsec 26(5)

90 subsec 21(1) of the UN Charter Act

91 subsec 21(2)

92 subsec 21(2A)

93 subsec 15(6)

It might be thought obvious that it is reasonable for a person not to know that another person had been listed in the *Gazette*. It is not at all obvious that an accused person would ever have considered whether or not the other person was not listed – which seems to be the exculpatory fact necessary to make out the defence of mistaken fact in cases of strict liability. There is no practical experience to test the existence and seriousness of these issues.

They are nonetheless important to pursue, not least because uncertainty and potentially broad scope of criminal provisions can do much social damage by lending themselves to threats and overbearing by officials, without any prosecution that would allow courts to administer justice fairly and openly. The national attempt to counter violent extremism probably involves engendering trust rather than provoking distrust in vulnerable communities. The issue of uncertain and potentially broad criminal liability from connexions and dealings with suspected terrorists is thus one with graver implications than technical criminal law.

CHAPTER VI

CRIMES ACT 1914

Powers in relation to terrorist acts and terrorism offences

Bail and non-parole periods

Investigation of terrorism offences

The provisions of Division 3A of Part 1AA of the *Crimes Act 1914* (Cth) regulate the search, information gathering, arrest and related powers affecting persons suspected of terrorist offences, with ancillary matters. They bear comparison with the powers involved in questioning and detention warrants under the ASIO Act, discussed in Chapter IV.

The provisions of sec 15AA and 19AG of the *Crimes Act* make specific provisions for access to bail before conviction and the imposition of non-parole periods in sentencing, in relation to persons charged with or convicted of terrorist offences.

The provisions of Part IC of the *Crimes Act* relating to the investigation of terrorist offences regulate questioning and detention of persons arrested for terrorist offences.

The bail and non-parole provisions can be briefly noted in this first report by the INSLM. They provide special and more stringent provisions than would apply but for the terrorism element of the offences in question. Leaving aside matters of detailed differences – which involve questions of degree and matters of impression – there is the overarching issue whether Parliament or the judges are the best arbiters of these matters.⁹⁴ There is no question at all of legislative power, but the policy and principle involved has features in common with the controversial topic of so-called mandatory sentencing.

The INSLM will probably, resources permitting, investigate the relatively slight practical experience to date concerning bail and non-parole for terrorism offences as they compare to other offences.

⁹⁴ see eg comments by Justice Whealy (extra-curially) in “Difficulty in obtaining a fair trial in terrorism cases” (2007) 81 ALJ 743 at 756

The extraordinary powers granted and regulated by Division 3A of Part 1AA of the *Crimes Act*⁹⁵ could be very important. They are aimed at emergencies. They are conditioned on reasonable apprehensions of serious risks to life and limb. Fortunately, therefore, there is no experience of them in application to enable the INSLM, in particular, to consider whether they have been abused.

Abuse of these powers is likely to be the most significant area for investigation by the INSLM. This is, emphatically, not because there is any ground to suspect a willingness or propensity of the police and other authorities to do so. Rather, it is because the effectiveness, appropriateness and necessity of these parts of the CT Laws are not likely, of their very nature, to be in doubt. In short, emergency situations justify reasonably adapted emergency powers, including the searches, seizures, forensic examinations and arrests regulated by these provisions. The real question is likely to be whether these provisions have been, or lend themselves to be, abused by officials.

These provisions also contain safeguards expressed to limit the exercise of these extraordinary powers to that which is reasonably necessary.⁹⁶ Actions in excess of these limits on power will be, in the ordinary way, subject to proceedings in the courts of law, including actions for trespass to the person. Thus the fundamental subjection of official action in excess of power to civil liability is fully observed in relation to these provisions.

These search etc extraordinary powers are available only in two kinds of circumstances. The first is where a police officer suspects on reasonable grounds that a person in a Commonwealth place⁹⁷ might have just committed, might be committing or might be about to commit a terrorist act.⁹⁸ The second is where the person in question is in a prescribed security zone.⁹⁹ A prescribed security zone is made by a Ministerial declaration if the Minister considers that a declaration would assist in preventing a terrorist act occurring or responding to a terrorist act that has occurred.¹⁰⁰

As to the first of these, the provisions show on their face a kind of verbal slide. The condition for a police officer to be authorized to exercise these extraordinary powers is not that he or she suspects on reasonable grounds that the person in question has just committed, is committing or is about to commit a terrorist act – rather, the word “might” inserts another layer of permissible uncertainty. Given the use of the word “suspects”, it is perhaps disquieting that this relaxation of a safeguard prerequisite was regarded as necessary.

On the other hand, emergencies call for emergency responses. The INSLM will need considerable further investigation of Australian and relevant international comparator

95 secs 3UA-3UK of the *Crimes Act*

96 eg subsecs 3UD(2), (3) and (4) of the *Crimes Act* for stopping and searching

97 as defined in the *Commonwealth Places (Application of Laws) Act 1970*

98 para 3UB(1)(a) of the *Crimes Act*

99 para 3UB(1)(b)

100 subsec 3UJ(1)

experience before assessing whether this relaxation of a safeguard prerequisite remains appropriate. At present, this will not be a top priority for the INSLM.

A somewhat more substantial concern is whether these extraordinary powers should become available by reason of one police officer's mental processes, rather than by the kind of procedure involving senior official minds such as the prescribed security zone declaration procedure.¹⁰¹ Obviously, that would involve bureaucratic dealings in situations where immediate physical response appears to be required. The INSLM does not regard this matter as a top priority.

The second ground for availability of these extraordinary search etc powers, presence in a prescribed security zone, raises a somewhat similar point, even less urgent for the INSLM to pursue. The provisions regulating the Ministerial declaration do not expressly include a requirement for the Minister to have reasonable grounds for his or her consideration that a declaration would assist in preventing a terrorist act occurring or in responding to one.

It may be doubted whether this is of any material significance, given the likely approach to statutory interpretation in the (unlikely) event of such a point being argued in a court of law. Put shortly, the judges would probably attribute a legislative intention that a Minister would be required to act reasonably, albeit with full appreciation of the emergency nature of the situation facing the Minister. And it is most unlikely that the Commonwealth would ever argue that a Minister is authorized to act unreasonably (as opposed to, say, very cautiously) by these provisions.

Declarations of prescribed security zones are limited by mandatory revocation when the Minister is satisfied that there is no longer a terrorism threat that justifies it, or it is no longer required as a response to a terrorist act.¹⁰² At the outer limits of practical reality in contemporary Australia, there could be a question whether this kind of provision gives too much power to a Minister. That is, these extraordinary emergency powers will remain available in such places unless the Minister is actually satisfied that the states of affairs mandating revocation exist. It cannot be assumed that there will be judicial review available to compel a Minister to address that question, let alone to be satisfied.¹⁰³

The social and political conditions in Australia today and for the foreseeable future do not justify any priority for the INSLM's work for this issue, which theoretically raises grave matters of the political science of a democracy. One is reminded of Carl Schmitt's dictum that he who determines the emergency is in charge. (And of the régime to which he gave early juristic support.)

A ten year sunset provision, expiring on 16th December 2015, reflects an original legislative unease with these emergency search etc powers. If they are appropriately calibrated

¹⁰¹ secs 3UI and 3UJ

¹⁰² subsec 3UJ(4)

¹⁰³ cf *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540

to emergencies which remain as real possibilities in light of current risk assessments, presumably legislative review in 2015 will see their continuation in force. It is not sensible to anticipate future risk assessments. But even the best risk assessments can be mistaken, and emergencies arise suddenly. Perhaps allowing sunset provisions to deprive Australia of these emergency powers is therefore unwise.

The provisions of Part IC of the *Crimes Act* include specifically Subdivision B concerning terrorism offences.¹⁰⁴ As a whole, Part IC is a most important set of statutory provisions. They strike the balance between individuals and government officials. They do so in the most critical area for that balance to operate, being the investigation of crime. It is not for the INSLM to comment at large on these provisions as they apply to offences other than terrorism offences – and so the general nature of these provisions is taken by the INSLM as a given. The only qualification is if these provisions generally are thought to infringe Australia's international human rights obligations such as contained in the ICCPR. Nothing at present gives rise to concern in that regard.

Indeed, the provisions of Part IC generally are very elaborate and sophisticated in the attempt to accommodate reasonable investigative powers and opportunities as well as the rights of suspected individuals. The provisions manifest Parliament's concern that any trial eventuating after investigation regulated by them will not be rendered unfair or confessions unusable.

One adverse comment should be made of Part IC generally. It is a striking example of prolix and complex statutory language. It is very hard to read. It is ridiculous to suppose it could be set out in a placard on the walls of police stations as a practical aid to the exercise of police powers, especially as regards permissible duration in light of times out. However, the INSLM shrinks from recommending further attention to its drafting, given the justified pessimism that any improvements would result. Perhaps attention will be given by the INSLM to how in practice its provisions are rendered intelligible for use by police officers.

The non-terrorism application of Part IC is important as the point of comparison for the provisions of Subdivision B. In short, the critical notion of an investigation period during which an arrested person may be detained and questioned is in both cases limited to that which is reasonable in the circumstances. More importantly, the maximum period in cases other than terrorism is 4 hours, extendable by a magistrate once to 8 hours for cause.¹⁰⁵ For terrorism offences, the corresponding periods are 4 hours, extendable by a magistrate any number of times to a total of 20 hours.¹⁰⁶ (In both cases, the initial period is 2 hours if the person is or appears to be under 18 years old or an Aboriginal person or Torres Strait Islander.¹⁰⁷)

In all cases, the *Crimes Act* requires a person under arrest to be treated with humanity and with respect for human dignity, and a person under arrest must not be subjected to cruel, inhuman

¹⁰⁴ secs 23DB-23DF of the *Crimes Act*

¹⁰⁵ paras 23C(4)(b) and 23DA(7)(b)

¹⁰⁶ subsecs 23DB(5) and 23DF(7)

¹⁰⁷ paras 23C(4)(a) and 23DB(5)(a)

or degrading treatment.¹⁰⁸ Also, the general right to silence, burden on the prosecution to prove an admission or confession was voluntary and judicial discretions to exclude unfairly, illegally or improperly obtained evidence apply as well to terrorism as other cases.¹⁰⁹

The important issue for the INSLM arising from these extraordinary investigation powers available against persons arrested for terrorism offences is simply whether the terrorism element justifies the difference between a maximum of 8 hours with one extension and a maximum of 20 hours with any number of extensions. Is that difference in compliance with, for example, ICCPR Article 14 and related rights? Is it reasonably necessary to counter terrorism?

Like the matters raised in Chapter IV, these are matters requiring considerable further investigation of particular cases before the INSLM can reach informed conclusions on these issues. It will be a priority for 2012.

108 sec 23Q

109 secs 23Q and 23S

CHAPTER VII

CRIMINAL CODE

The security of the Commonwealth

The provisions of Parts 5.1 and 5.2 in Chapter 5 of the *Criminal Code* (“**Code**”) (which is the Schedule to the *Criminal Code Act 1995* (Cth)) relate to treason and espionage and related activities. The provisions of Part 5.4 concern harming Australians overseas and related matters. They are all important provisions, but as a matter of priority and resources will not have the same detailed consideration by the INSLM in 2012, as other parts of the CT Laws will. They are not further considered in this report.

It is the provisions of Part 5.3 concerning terrorism¹¹⁰ that warrant the closest early attention by the INSLM. There have already been serious terrorism investigations and trials, enabling consideration of these provisions concerning terrorism crimes (including those directed to terrorist organizations and financing terrorism), as they have been applied in practice. (It remains important at this time for the INSLM to refrain from any comment germane to matters that may be live as issues on appeal in those proceedings.)

There are two other topics arising for urgent attention by the INSLM under the Code. They are control orders¹¹¹ and preventative detention orders.¹¹² The attention should be urgent because of the quite extraordinary ambit of these powers to abrogate or restrict the personal liberty of individuals otherwise than for the legitimate purposes of punishment or investigation. Jurisprudence under Chapter III of the *Constitution* and based on the assumed rule of law and the principle of legality amounts to a flashing red light against these provisions. The authority of *Thomas v Mowbray* in relation to control orders has been noted in Chapter II, but there is much besides, which will not be expounded in this first report. Very serious doubts have been voiced by some scholars about constitutional aspects of these extraordinary powers: the most striking contribution to this vital debate being that of the Hon Michael McHugh AC, a former justice of the High Court, 5 years ago.¹¹³ The material

110 Divs 100-103 of the Code. See Appendix 19 for a table of Part 5.3 offences and penalties.

111 Div 104

112 Div 105

113 “Constitutional Implications of Terrorism Legislation” (2007) 8 *The Judicial Review* 189

so far reviewed by the INSLM has done little if anything to blunten the point of the judge's concerns and warnings.

In short and in the interim, although the constitutional validity of control orders was upheld by a majority of 5:2 justices in the High Court, there does remain even for them questions of appropriateness and necessity in light of Australia's international human rights obligations. Those questions and the question of effectiveness also arise in light of Australia's international counter-terrorism obligations. All these questions arise, quite acutely, in relation to preventative detention orders.

The programme of work for the INSLM in 2012, therefore, will include Australian and comparative law and practice in relation to compliance of these aspects of the CT Laws with human rights norms. Integral to these considerations will be the countervailing factors of effectiveness and appropriateness in the national and international efforts to counter terrorism and violent extremism. Are control orders and preventative detention orders really necessary at all? As they are provided for in the Code, are there sufficient safeguards in relation to their exercise? Do they infringe on personal liberty no more than is fairly justifiable?

The only control orders that have been made are those against Jack Thomas, litigated in *Thomas v Mowbray*, and against David Hicks, which have now expired.¹¹⁴ The fact that these provisions have not been used since then, as noted in Chapter II, would not be enough to count them as unnecessary. It is certainly enough to question their necessity in times when the risk of terrorism has not materially abated. If they are not being used, and the times are not unusually safe, why should these powers stay on the books?

A darker perspective can be brought to a view of both control orders and preventative detention orders. These provisions are intended, at their core, to protect human life. But for the risk presented by terrorism to human life, it is unimaginable that they could be enacted by a parliament respectful of human rights. However, terrorism is simply not the only source of threat to human life in Australia or for Australians. We all know that accidental and other criminal modes of people being killed far outnumber what has happened by terrorism. If we are fortunate, that will continue. Should we, as a society, give consideration to control orders and preventative detention orders against violent husbands, drunken or adolescent drivers or careless foremen? Surely not. Have we properly articulated the reasons why counter-terrorism should produce an opposite response?

Like detention for questioning discussed in Chapter IV, these extraordinary powers to make control orders and preventative detention orders have some parallels in existing laws in relation to criminal conduct. The crimes in question are ordinary only in the sense they are not terrorism. Exceptional cases of detention on the ground of continuing danger after a convict has served his term of imprisonment have been held, constitutionally, to be within

¹¹⁴ I was senior counsel for Hicks in earlier litigation not involving control orders: see *Hicks v Ruddock* (2007) 156 FCR 574.

the power of the Commonwealth Parliament.¹¹⁵ One of the critical points of reference for the work of the INSLM in 2012 on these pressing issues will be the relation of them to the considerations relevant to the constitutional validity, and social appropriateness, of the CT Laws. Constitutional validity does not necessarily bestow social appropriateness.

A rounded view of the extraordinary powers to make control orders and preventative detention orders should also consider whether these powers have been excessively cabined, by over strict threshold requirements. This is an essential part of the INSLM's inquiry whether the effectiveness and appropriateness balance has been struck too far in one direction or the other or about right. It is not sensible to approach the question of threshold requirements for such extraordinary powers in the abstract. A task for the INSLM in 2012 will be examination of actual individual cases to see, among other things, whether there have been opportunities lost to enhance protection of the community against terrorism, that ought to have been available.

The questionable analogy between control orders and preventative detention orders under the Code and orders for the continued detention of convicts after expiry of their sentences gives rise to a further inquiry that the INSLM proposes to conduct about these extraordinary powers. It is whether their availability and exercise should be grounded on prior conviction of a terrorist or related offence and, say, a failure of rehabilitation. The rôle of the criminal courts in any such process will be a central part of that enquiry.

The provisions of Divisions 100-103 in Part 5.3 of the Code¹¹⁶ are the centrepiece of Australia's implementation of 1373. As the discussion in Chapter III attempted to explain, one grey area is the definition of terrorism by which in theory one could measure the quality and extent of compliance by Australia with 1373 by the offences created in Divisions 100-103 of the Code. This is not, however, to the forefront of the INSLM's concern, given the international situation concerning that definition referred to in Chapter III. Assuming 1373 is binding and further assuming terrorism is sufficiently similar in 1373 and the Code so far as their respective meanings go, it has to be said that Australia's implementation of 1373, as the understood main source of Australia's international counter-terrorism obligations, has been wholehearted.

The main focus for the INSLM, given the counter-terrorism effectiveness as far as after-the-event criminal law can go of the provisions of Divisions 100-103 of the Code, is therefore the appropriateness of these provisions as criminal law cognizant of human rights.

The necessity of some such provisions will not be further considered in this report, or probably at all in any detail by the INSLM, because the criminalizing of terrorist conduct is essential for Australia's compliance with its international counter-terrorism (and human rights) obligations. As noted in Chapter II, a constant test to be applied to the CT Laws is

¹¹⁵ eg *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575

¹¹⁶ secs 100.1-103.3 of the Code

whether they are specifically necessary, if pre-existing general laws already implemented Australia's international counter-terrorism obligations.

At the outset, the constitutional basis for the operation of Part 5.3 of the Code should be noted in particular for the inclusion of so-called referred powers under sec 51(xxxvii.) of the *Constitution*. This is no doubt a very significant element in any federal scheme. The 2010 Act requires the attention of the INSLM to arrangements which may include such references in order to ensure a national approach to countering terrorism.¹¹⁷ Preliminary investigations to date do not justify any particular aspect of federal co-operation having high priority in the work during 2012 of the INSLM in light of resources.

A comment that may go nowhere is that resort to the referral of powers by the States under sec 51(xxxvii.) of the *Constitution* may have been and may be quite unnecessary. A respectable argument is that the combination of secs 51(v.), (vi.), (xiii.), (xx.), (xxvii.), (xxviii.), (xxix.) and (xxxix.), as well as secs 52 and 61 of the *Constitution* is more than sufficient to support every provision of the CT Laws. Negotiation (and any resultant compromise or delay) with the States is probably not necessary.

Some aspects of the broad reach of Part 5.3 of the Code may be remarkable but should be considered effective, appropriate and necessary to counter terrorism. For instance, the provisions apply to all terrorist actions or threats of them wherever they occur, are made or are threatened to occur; and all preliminary acts relating to terrorist acts are within the provisions no matter where those terrorist acts occur or would occur.¹¹⁸

Given the international concern manifest in 1373 and many other UN statements about the scourge of terrorism, from an Australian point of view including in order to implement its international counter-terrorism obligations, these extraterritorial elements in Part 5.3 are unexceptionable. Nor have they, to date, presented diplomatic or other so-called comity issues. There may be practical issues raised, including the proof of elements of terrorism by reference to events and circumstances existing in another country (such as Sri Lanka with respect to the LTTE or Tamil Tigers). These practical issues do not detract from the appropriateness of Australia legislating to this extent.¹¹⁹ If resources permit, this aspect of the federal implementation of Australia's international counter-terrorism obligations will be considered by the INSLM to ensure that an excess of constitutional caution has not produced any gap in the effective criminalization of terrorism.¹²⁰

Books have been written about the definition of terrorism. The INSLM is still in the course of absorbing their learning.¹²¹ They teach diversity rather than uniformity, arguments rather

117 para 8(b)

118 subsec 100.4(1)

119 cf the processes envisaged by secs 100.2, 100.6, 100.7 and 100.8 of the Code

120 cf subsec 100.4(4)

121 eg Ben Saul *Defining Terrorism in International Law* 2006

than agreement. The range of possibilities can be dispiriting.¹²² There are useful discussions enabling better or at least more useful definitions to be identified.¹²³ Of these, one version is the synthesis proposed by Bruce Hoffman that terrorism is:

- ineluctably political in aims and motives;
- violent – or, equally important, threatens violence;
- designed to have far-reaching psychological repercussions beyond the immediate victim or target;
- conducted *either* by an organization with an identifiable chain of command or conspiratorial cell structure (whose members wear no uniform or identifying insignia) or by individuals or by a small collection of individuals directly influenced, motivated, or inspired by the ideological aims or example of some existent terrorist movement and/or its leaders; and
- perpetrated by a subnational group or nonstate entity.¹²⁴

Although it is legalistic and lacking in any rhetorical force, the Australian definition of terrorism in the Code represents on any view a serious and commendable attempt to achieve comprehensiveness and precision. It is the provision of all in the CT Laws deserving of verbatim quotation in this report. It reads as follows:

100.1 Definitions

(1) In this Part:

...

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.

¹²² see eg "Appendix 2.1: 250-plus Academic Governmental and Intergovernmental Definitions of Terrorism" in Alex P Schmid "The Definition of Terrorism" in Schmid (ed) *The Routledge Handbook of Terrorism Research 2011*

¹²³ eg Hoffman *Inside Terrorism* at 20-41

¹²⁴ *ibid* at 40

...

- (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.

Much of the INSLM's discussion with academic and practitioner lawyers and reading of comparative law in the first half of 2012 will be directed to the topic of this definition's aptness for the task. Initial considerations strongly suggest that it is in compliance with 1373, when

that UN text is read in conjunction with other UN discussions of terrorism. An important qualification, to be pursued next year, is the question whether the Special Rapporteurs' opinions justify revisiting the Australian definition. It is to be recalled, as discussed in Chapter III, that work towards an international consensus on the definition of terrorism has stalled.

One element has not been included in the Australian definition that does appear in a number of international texts and scholarly suggestions. Hostage-taking or kidnapping is sometimes expressly included as possible acts of terrorism. Consideration will be given as to whether its omission – at least, in terms – from the Australian definition weakens the effectiveness of the CT Laws' criminalization of terrorism. It can be argued that all hostage-taking involves a threat of physical harm, and is thus implicitly within the explicit elements of the Australian definition.

It has been a concern of the INSLM whether it is appropriate for Australia's definition to require a political, religious or ideological motive – as it is stipulated in para (b) of the definition in subsec 100.1(1) of the Code, "the action is done or the threat is made with the intention of advancing a political, religious or ideological cause". One legitimate response to this concern is that this element is required to capture appropriately that which distinguishes terrorism from criminal extortion. Another is that the reference to the kinds of "cause" in question appropriately acknowledges the international condemnation of violent extremism – as noted in Chapter III, focussing on the motivation of terrorism "by extremism and intolerance".

Questions tending in the opposite direction also arise from this tentative concern. First, is the specific provision for motivation in the service of a cause a good idea when international condemnation of terrorist acts, again as discussed in Chapter III, is "irrespective of their motivation"? As an element in a central part of a criminal definition, does para (b) require proof of sincere beliefs actuating conduct by those accused of terrorism? What of sociopaths or thrill-seekers willing to attach themselves to any convenient pretext for violence? What of nihilistic perpetrators whose confused idiosyncratic rantings are difficult to identify as "a political, religious or ideological cause"?

At a more functional level, does this element in the central definition for terrorist offences run the risk with the currently prominent rôle of Islamism in the terrorist threats faced by Australia that the prosecution is thereby obliged to prove religious belief? Certainly, as the trials to date have shown, there is quite enough violent extremism (which, as it happens, would be repudiated by many Muslims) to be demonstrated by intercepted words of or approved by the accused. Is there a risk that juries will be, to an unacceptable degree, invited to take steps in reasoning uncomfortably close to this sequence: equating Islam with Islamism, Islamism with violent extremism, violent extremism with terrorist motivations – and so Islam is linked with terrorist motivations?

To date, the preliminary inquiries and consideration by the INSLM in this area justify further work in 2012. It would be premature to go beyond raising the questions, at present.

These concerns about an element of the definition are sharpened by the fact that there is a further element, in para (c), which also involves an "intention". That second intentional

element might be regarded as the purpose, different from the first intentional element in para (b) which may be called the motivation. The purpose required by para (c) is to coerce or influence by intimidation a government, or to intimidate the public or a section of it.

One theme, nearly constant in the intellectual history of the term “terrorism”, is its defining characteristic of actions or threats calculated to come to the knowledge of many more people than their immediate victims and to strike fear generally. Why have both intentional elements? Could the second one, to do with purpose, not suffice? In this way, could one avoid the arguable perversity of the prosecution proving the sincere beliefs of accused terrorists? Could it alleviate the disquieting requirement, in some cases, to link Islam as a religion with the commission of very serious crime?

Again, these are questions the INSLM intends to pursue next year.

Other aspects of the Australian definition should be noted, but raise less acute questions. They reflect well on the careful legislative process. First, the international dimension is clear from subsec 100.1(4), as well as from the extension in the purpose element to coercing etc any government anywhere. It is, in the view of the INSLM, necessary and appropriate for Australia’s implementation of its international counter-terrorism obligations to extend this far. Otherwise, each separate nation State could become a safe refuge for terrorists seeking to affect the politics or population of another nation. And what could happen from Australia to another country might resemble what could happen from another country to Australia.

The second aspect to be noted briefly is, to the observation of the INSLM from comparative law to date, a relatively superior aspect of the Australian definition. The categories of action described as “advocacy, protest, dissent or industrial action” will not be capable of constituting a terrorist act if it is not intended to be dangerous to life or limb.¹²⁵

Finally, there has been some controversy about the extension of the Australian definition to include actions beyond those presenting dangers to life and limb. They are interference or destruction of electronic systems, systems to deliver essential government services or used by essential public utilities, or transport systems.¹²⁶ At present, this does not strike the INSLM as a top priority to tease out, given the likely substantial overlap between dangers to life and limb and interference etc with systems affecting communications, power, transport and essentials such as water or sewerage. Nonetheless, as resources permit and comparative law studies may reveal, attention will be paid to the question whether this element in the Australian definition may overreach.

The core of the Australian criminalization is Div 101 of the Code. Engaging in a terrorist act is punishable by imprisonment for life.¹²⁷ Doing any act in preparation for or planning a terrorist

125 para 100.1(3)(b) of the Code

126 para 100.1(2)(f)

127 sec 101.1

act is also punishable by imprisonment for life.¹²⁸ These offences may be committed wherever the conduct or any of its results may occur, in the world.¹²⁹

The offence of doing an act in preparation for or planning a terrorist act may be committed even if no terrorist act occurs, the preparation or planning was not for any specific terrorist act or was for more than one terrorist act.¹³⁰

The extended geographical jurisdiction for these life sentence offences is appropriate in order for an effective contribution by Australia to combating terrorism. It serves as compliance with Australia's international counter-terrorism obligations, and may even be necessary to that end.

The other attributes of the sec 101.6 offence are more problematical. They may be described as the preliminary or inchoate quality of conduct which constitutes the offence. In distinction from common law and statutory conspiracy offences (to be addressed below), a solitary person may commit the offence of doing an act in preparation for or planning a terrorist act. There need be no specific act in mind and the possibility of plural acts therefore comprehends a state of mind where a range of choices or possibilities exists without any decision to carry out one or more of them.

While an act of preparation for a terrorist act involves more than a state of mind, as a matter of ordinary English planning a terrorist act does not.

The combination of these attributes of the sec 101.6 offence means there is perhaps not a great distance between the activity of thinking about committing terrorist acts in general and committing an offence under these provisions.

While it will be a matter for a properly instructed jury to decide whether certain alleged conduct constitutes an act in preparation for a terrorist act, it does not require much imagination to realize that many mundane activities could contribute to an eventual atrocity – such as ascertaining public transport timetables. It is not only the obviously sinister steps of buying ingredients for explosives that may be acts in preparation for an act of terrorism.

A major task for the INSLM in 2012, perhaps subject to appellate proceedings in the cases in question, will be consideration whether these possibilities in relation to the sec 101.6 offence comprehend too wide a range of culpable conduct and states of mind to be effectively or appropriately all punishable by imprisonment for life. Comparison of the sec 101.6 offence with the others to be noted next underlines the importance of this task.

Providing or receiving training while knowing it is connected with preparation for, the engagement of a person in, or assistance in a terrorist act is punishable by imprisonment

¹²⁸ subsec 101.6(1)

¹²⁹ subsecs 101.1(2), 101.6(3) and sec 15.4

¹³⁰ subsec 101.6(2)

for 25 years.¹³¹ The same conduct while being reckless as to the existence of that connexion is punishable by imprisonment for 15 years.¹³² Again, there is extended geographical jurisdiction – effectively and appropriately to carry out Australia’s international counter-terrorism obligations.¹³³

It is also not necessary for these sec 101.2 offences to be committed that any terrorist act actually occurs, or that the training be connected with any specific terrorist act, and it may be connected with more than one such act.¹³⁴

These training offences under sec 101.2 of the Code are not committed by individuals acting alone – to train or be trained, there must be at least one other person involved. These offences thereby approach more closely to the traditional concern of criminal law with the dangers presented of wrongdoers acting or preparing to act in combination or concert. They may be contrasted with the sec 101.6 life sentence offence in this regard. The different maximum penalties, though large in both cases under sec 101.2, are strikingly less for these offences in company under sec 101.2 compared with possibly solitary offences perhaps mostly in an individual’s head under sec 101.6. The disparity calls for critical consideration.

The possibility of an alternative offence under sec 101.2 being found in a prosecution under these provisions appears at first sight to be in accordance with established precedents, and appropriately safeguarded by a requirement for procedural fairness.¹³⁵ However, in terms these provisions theoretically provide for a jury to be not satisfied that the accused was reckless because the jury was satisfied the accused actually knew of the nefarious connexion between this training and terrorism. It is admittedly hard to see this actually occurring. The matter is thus not urgent, but may repay attention to ensure that the only alternative possible is the offence of being reckless in a prosecution charging the offence of knowing the nefarious connexion.

With one important difference, a similar legislative scheme is provided to create offences of knowingly or recklessly possessing a thing connected with preparation for etc a terrorist act.¹³⁶ They are punishable respectively by imprisonment for 15 and 10 years. Again, the disparity between these penalties and the life sentence under sec 101.6, given the overlap between potentially offending conduct under all these provisions, justifies further consideration during 2012.

An important difference between the sec 101.4 offences of possessing things connected with terrorist acts and the sec 101.2 training offences is the provision that the offences do not apply if the possession of the thing was not intended to facilitate preparation for etc

131 subsec 101.2(1) of the Code

132 subsec 101.2(2)

133 subsec 101.2(4)

134 subsec 101.2(3)

135 subsec 101.2(5)

136 sec 101.4

a terrorist act.¹³⁷ This is an exception, exemption, excuse, qualification or justification within the meaning of the Code provisions that impose an evidential burden on the accused.¹³⁸ An evidential burden involves the accused adducing or pointing to evidence that suggests a reasonable possibility that (in a case under sec 101.4) the possession of the thing was not intended to facilitate preparation for etc a terrorist act.

These provisions raise some disquieting aspects of the project to criminalize terrorism in Australia. People can possess many different things. There are few words in the English language more inclusive than “thing”. Many things we may possess can be turned to multifarious uses – a carving knife is the most gruesome illustration of a dual-purpose “thing”. Anything to do with electricity, communication or transport will be immediately adaptable for uses of such vast variety as to defy full description in advance. Things that lend themselves to such a wide range of possible future uses already have that potential. And as a matter of English, why would not the potential use for purpose X of a particular thing be a kind of connexion between that thing and purpose X?

Fortunately, the invidious vagueness of the criminalized connexion between a thing and terrorism has been addressed by the Court of Appeal of Victoria.¹³⁹ The fact of that judicial decision and its elaborate but clear reasoning may well, standing alone, remove the difficulties that would otherwise been raised by the statutory wording of the sec 101.4 offences. Consideration will be given by the INSLM to the question whether the binding interpretation of the Court of Appeal provides sufficient assurance against inappropriate breadth of potential application of these provisions. It is not unknown for intermediate appellate decisions to be departed from, distinguished or overruled.

This unstable breadth of the critical connexion between a thing and a terrorist act is rendered the more disquieting because of the subsec 101.4(5) exception etc. Apparently, from a reading of these provisions of sec 101.4 together, a thing may be relevantly “connected with” a terrorist act but not “intended to facilitate” preparation for etc a terrorist act. That suggests a form of connexion with terrorism well beyond the reasonable ambit of such a serious offence.

On a more technical level, subsec 101.4(5) would presumably better convey the intentions of the legislature if the active voice rather than passive voice were employed. The evidential burden sought to be imposed is presumably that the accused did not intend his or her possession of the thing to facilitate preparation for etc a terrorist act. While such a redraft assists clarity, the clarity exposes an uncomfortable aspect of the whole provision. Is it consistent with Article 14 paragraph 2 of ICCPR? Does it cast too great a requirement on an accused to give some evidence of his or her own innocence? Or does the nature of an evidential burden sufficiently preserve the presumption of innocence? These are important issues, to be examined in 2012 including by reference to comparative law.

¹³⁷ subsec 101.4(5)

¹³⁸ sec 13.3

¹³⁹ *Benbrika v R* (2010) 247 FLR 1 at 71-78 esp at [314]-[323]

It is an offence to collect or make a document, knowingly or recklessly, that is connected with preparation for etc a terrorist act, punishable respectively for 15 or 10 years.¹⁴⁰ These provisions follow the same pattern as the sec 101.4 possessing of things etc offences, and raise the same issues for consideration by the INSLM.

The offences under Div 101 of the Code are capable of being substantive offences for the purposes of conspiracies, which are offences under sec 11.5 of the Code. In their statutory form, they require an agreement of two or more people, an intention by at least two to commit a substantive offence pursuant to the agreement and at least two of the people to have committed an overt act pursuant to the agreement.¹⁴¹ This is not the time or place to expound aspects or difficulties of the law of conspiracy, and it suffices presently to note that it is a very important element in any criminal code.

Attached to offences like doing acts in preparation for the doing of an unspecified or undetermined terrorist act, the scope of conspiracy as an offence is formidable. So, perhaps, it should be in order to address adequately the evil of terrorist plotting. In principle, early prevention by criminal investigation, prosecution and punishment should not be viewed less favourably than punishment after a lethal act has been committed.

Some technical if important questions about the combination of conspiracy and acts in preparation have already been explored in the New South Wales Court of Criminal Appeal. In *R v B*, the court rejected arguments that there was duplicity (or multiplicity) that rendered charges of this kind defective.¹⁴² Research to be carried out by the INSLM in 2012 may include revisiting the question whether, in practice, the daunting complexity of permutations thrown up by these conspiracy charges were, as they were held in prospect to be, in fact tolerable and amenable to fair trial procedures.

The net sought to be cast by the Code as part of Australia's implementation of its international counter-terrorism obligations extends to involvement in terrorist organizations. The provisions of Div 102 of the Code present themselves as quite urgent in the priorities for the work of the INSLM. It is premature in this report to detail all the many aspects of Div 102 that will be considered in 2012. It suffices to note the arguably invidious vagueness of some of the stipulated links with others that could render a person guilty of serious criminal offences.

By way of illustration only, the definition of "member" of an organization includes an "informal" member.¹⁴³ The definition of "terrorist organisation" includes an organization "indirectly" engaged in preparing etc the doing of a terrorist act.¹⁴⁴ The same provisions include "fostering" the doing of a terrorist act.

140 sec 101.5 of the Code

141 subsec 11.5(2)

142 (2008) 76 NSWLR 533. I was senior counsel for unsuccessful appellants in this case.

143 subsec 102.1(1), para (a) of the definition, in the Code

144 subsec 102.1(1), para (a) of the definition

Under Div 102, a person associates with another person if the first meets or communicates with the second.¹⁴⁵ Literally, this includes just once.

An organization “advocates” the doing of a terrorist act if, among other things, it directly praises that conduct in circumstances where there is “a substantial risk” that the praise “might” have the effect of leading someone to engage in such conduct.¹⁴⁶ Why have “might” follow the concept of “risk”, unless to reduce the substance of what needs to be shown below the usual “risk ... that something will ...”?

The offences in subdiv B of Div 102 of the Code have to be seen in the context of Australia’s international counter-terrorism obligations. Few people would contest the importance and likely effectiveness of disrupting terrorism by the investigation, prosecution and punishment of these offences. Hitting organizations through their members and supporters is calculated to prevent and deter the most insidious characteristic of anti-social activities like terrorism, being their diffusion among many individuals. Group activities justify offences being created to attack group aspects of those activities. And some terrorists apparently appreciate the force of this approach, and seek to counter it by self-contained cell organization designed to prevent wholesale disruption of a complete group.

On the other hand, because of the fundamental importance of rights of association, opinion, religion and other social liberties, it is vital that Australia honours at the same time its international human rights obligations. Striking the balance of these imperatives in the definition of offences in relation to terrorist organizations is therefore a critical matter.

The INSLM work to date includes incomplete study of the relatively small practical experience of these offences in Australia. Comparative international law and experience are likely to be informative on the topic. Checking whether there are principled objections or technical defects in Australia’s drafting of these important criminal offences is a high priority for the INSLM during 2012.

The same reasons and priority apply to the provisions of Div 103, concerning the financing of terrorism.

145 subsec 102.1(1)

146 para 102.1(1A)(c)

CHAPTER VIII

DEFENCE ACT 1903

Utilisation of Defence Force to protect Commonwealth interests and States and self-governing Territories

It is difficult to overstate the importance to any civilized nation of the subjection to the rule of law of its military forces. In the tradition Australia inherited and has practised, it is an inseparable if assumed part of our common freedoms. The brevity of the comments by the INSLM in this first report about these provisions governing the callout of Australia's military forces to meet emergencies presented by terrorism (among other things) should not be taken as indicating any failure to appreciate the gravity of the subject matter.

Happily, and long may it continue, there is no practical experience in the use of force under these provisions. It would be inappropriate for a number of reasons including lack of research by the INSLM to comment on practice exercises or other forms of preparation.

On their face, these provisions present an abundance of safeguards for the exigency that may lead to a military callout. No serious gaps or defects appear in the statutory provisions. At most, it might be said by some who prefer practicalities to legalities that there is an air of unreality or bureaucracy about the provisions as a whole. The INSLM does not share, as a preliminary position, any such view.

It is hoped that the INSLM may acquire more insight into the possible operation of these provisions from investigations during 2012. In advance of that experience, there is no priority to be given to consideration of the detail of the *Defence Act* provisions.

CHAPTER IX

NATIONAL SECURITY INFORMATION (CRIMINAL AND CIVIL PROCEEDINGS) ACT 2004

The provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (“**NSI Act**”) have the potential to be a striking feature of trials for terrorist offences. They could also, very plausibly, loom large in civil judicial proceedings of a kind necessary to maintain the principle of legality in relation to the exercise of the extraordinary powers contained in the CT Laws.

The NSI Act has survived a challenge to its constitutional validity.¹⁴⁷ That status is the bare minimum to be considered as to the legislation’s compliance with Australia’s international human rights obligations, its appropriateness and its necessity. Being constitutional does not of itself provide favourable answers to questions about these qualities of the NSI Act.

The INSLM has commenced but is a fair distance from concluding investigations into the practical operation of the NSI Act in the criminal proceedings concluded to date in Australia. In general terms, there is a widely held view among practitioners that the potential difficulties for the fair and efficient running of a criminal trial posed by a full-blooded application of the NSI Act are obvious, but have so far been avoided. Indeed, a view encountered from different quarters is to the effect that the awful prospect of the NSI Act operating to its full extent in a contested way has had the effect of producing in nearly every such case agreements in place of contested adjudications.¹⁴⁸

These anecdotal and incomplete soundings by the INSLM vindicate the earlier published comment by Justice Whealy as the trial judge in *Lohdi* that “a considerable degree of co-operation between experienced counsel for the prosecution and the defence” “prevented ... delays from intruding unfairly on the trial process”.¹⁴⁹ It is reassuring, of course, and gratifying to legal practitioners, that such conduct by colleagues has had this apparently beneficial outcome. There may be more to this aspect of the NSI Act, however, for the INSLM to investigate.

¹⁴⁷ *R v Lohdi* (2006) 163 A Crim R 448

¹⁴⁸ under sec 22 of the NSI Act

¹⁴⁹ “Difficulty in obtaining a fair trial in terrorism cases” (2007) 81 *ALJ* 743 at 748-749

In principle, there is some perversity in approving the operation of a complicated law by observing that the unpalatable prospect of its application has produced prudent negotiation and agreement. Agreement among adversaries in litigation is not an unalloyed good thing. Rights and obligations may both be compromised by most such agreements. If the rights pertain to fundamental aspects of fair trial, it is in principle a bad thing for them not to be enjoyed to their full prescribed measure.

The scheme of the NSI Act in its application to adducing and testing evidence in a terrorist trial has been well sketched by Justice Whealy in his paper delivered at the Supreme and Federal Court Judges Conference in January 2007.¹⁵⁰ The features that justify early attention by the INSLM are, first, the intrusion of the Attorney-General as a kind of party with an interest in national security but not the prosecution as such. Second, the procedures including compulsory adjournments are manifestly calculated to fragment and delay criminal process – an outcome usually and correctly regarded as wrong in principle and as policy.

Third, the introduction of requirements for security clearances in certain circumstances even for defence counsel is fraught with problems, including delay. Its impact on a reasonable freedom of choice of counsel by an accused has to be considered. Fourth, the exigencies sought to be addressed by the NSI Act throw up possibilities such as so-called special counsel, with some resemblance to the United Kingdom special advocate system.¹⁵¹ It cannot be presumed that this bifurcation of defence representation is all smooth sailing. Considerable investigation by the INSLM will be necessary in order to evaluate whether such a system may improve or render worse the position presently obtained under the NSI Act.

The beneficial value of secrecy for information the disclosure of which would imperil national security is probably self-evident. Unlike the complementary counter-terrorism and human rights obligations, which are not truly contradictory of each other, secrecy is a contradictory notion to the conduct of a fair trial. The endeavour of Australia by the NSI Act and by other comparable jurisdictions using other means including special courts represent a diverse range of national responses to the internationally recognized need to conduct fair terrorist trials without endangering national security.

That desirable balance is recognized by Article 14 paragraph 1 of ICCPR in its reference to the exclusion of the press and public from all or part of a trial for reasons of national security in a democratic society. It requires proper weight to be given to the minimum guarantees provided in Article 14 paragraph 3 for an accused to have adequate facilities for the preparation of his defence and to communicate with counsel of his own choosing, to be tried without undue delay and to examine the witnesses against him (amongst others).

So far in Australian practical experience of these provisions in use (including by encouraging agreements), it does not appear there has been departure from the standards required of a fair trial. Preliminary consideration by the INSLM strongly suggests this is not due to, or

¹⁵⁰ *ibid* at 745-748

¹⁵¹ *ibid* at 750-751; *R v Lohdi* [2006] NSWSC 586

to the credit of, the provisions of the NSI Act itself. It is therefore relatively urgent for these provisions to be examined as to their appropriate balance between legitimate national security concerns and crucial fair trial values.

A non-exhaustive catalogue of some particular points of interest for the INSLM includes the scheme for Attorney-General's federal criminal proceedings certificates in Part 3 Div 2 of the NSI Act,¹⁵² the multiple possibilities for trial-fragmenting appeals by the Attorney-General, and the offence provisions contained in Part 5.

An overarching concern is whether the NSI Act truly bestows any benefit or advantage over and beyond the common law technique of claims for public interest immunity, decided by the court and not by executive certificate.

A fair comment about the NSI Act in general remains that of Justice Whealy in 2007:

It is quite a complicated piece of legislation. It may be respectfully observed that it gives the appearance of having been drafted by persons who have little knowledge of the function and processes of a criminal trial.

...

This legislation poses a very significant challenge to the efficient running of a criminal trial.

...

Delay and disturbance to the trial process is perhaps the most significant potential problem created by the legislation.¹⁵³

The legitimate interest of the Commonwealth, and its citizens and inhabitants, to protect national security information by appropriate measures of secrecy and non-disclosure has to be acknowledged. The INSLM investigations of the extraordinary provisions of the NSI Act will be premised on the legitimacy of this interest. The real questions probably lie in the area of balance and scrutiny, with ancillary issues concerning the protection for vigorous adversarial defence of persons accused of terrorism offences.

Secrecy laws have been thoroughly considered in principle and in detail by the Australian Law Reform Commission.¹⁵⁴ The INSLM will be attempting to build on that work in reaching conclusions about the NSI Act.

It would be fatuous to suppose there could be a correct, ideal or even best approach to the dilemma of national security secrecy and the open administration of criminal justice. Different times and places throw up a broad array of choices.¹⁵⁵ Has the approach chosen by Australia, manifest in the NSI Act, been a good one?

¹⁵² especially their conclusiveness under eg subsec 27(1) of the NSI Act

¹⁵³ 81 ALJ 745, 748

¹⁵⁴ *Review of Secrecy Laws* IP34 and DP74, *Secrecy Laws and Open Government in Australia* ALRC 112

¹⁵⁵ eg Louis Fisher "State Secrets and Democratic Values" in *Courts and Terrorism – Nine Nations Balance Rights and Security* Volcansek and Stack (eds) 2011; David Cole *Enemy Aliens* 2003 esp Chapter 12

APPENDICES

APPENDIX 1 *INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR ACT 2010 SECTION 4*

Counter-terrorism and national security legislation means the following provisions of Commonwealth law:

- (a) Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* and any other provision of that Act as far as it relates to that Division;
- (b) Part 4 of the *Charter of the United Nations Act 1945* and any other provision of that Act as far as it relates to that Part;
- (c) the following provisions of the *Crimes Act 1914*:
 - (i) Division 3A of Part IAA and any other provision of that Act as far as it relates to that Division;
 - (ii) sections 15AA and 19AG and any other provision of that Act as far as it relates to those sections;
 - (iii) Part IC, to the extent that the provisions of that Part relate to the investigation of terrorism offences (within the meaning of that Act), and any other provision of that Act as far as it relates to that Part;
- (d) Chapter 5 of the *Criminal Code* and any other provision of that Act as far as it relates to that Chapter;
- (e) Part IIIAAA of the *Defence Act 1903* and any other provision of that Act as far as it relates to that Part;
- (f) the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

APPENDIX 2 PERSONS AND ORGANISATIONS CONSULTED AND EVENTS ATTENDED

Persons and organisations consulted during the reporting period

Solicitors and counsel

Christopher Boyce, Victorian Bar
 Lachlan Carter, Victorian Bar
 Michael Croucher, Victorian Bar
 Desmond Lane, Victorian Bar
 Ben Lindner, Victorian Bar
 Judge Richard Maidment SC
 Julian McMahon, Victorian Bar
 Grace Morgan, Robert Stary Lawyers
 Michael O'Connell SC, Victorian Bar
 Nicholas Robinson SC, Victorian Bar
 Robert Stary, Robert Stary Lawyers
 Lesley Taylor, Victorian Bar
 Tony Trood, Victorian Bar
 Remy van de Wiel QC, Victorian Bar
 Trevor Wraight, Victorian Bar

Non-government sector

Gillian Davy, Western Suburbs Legal Service
 Dr Patrick Emerton, Monash University
 Gilbert + Tobin Centre of Public Law: Prof George Williams; Prof Andrew Lynch; Keiran Hardy and Nicola McGarrity
 Prof Sarah Joseph, Castan Centre for Human Rights
 Law Council of Australia
 Prof HP Lee, Monash University
 Dr Pete Lentini, Global Terrorism Research Centre
 Philip Lynch, Human Rights Law Centre
 Dr Ben MacQueen, Global Terrorism Research Centre
 Dr Christopher Michaelson, University of New South Wales
 Prof Suri Ratnapala, University of Queensland
 Associate Prof Gregory Rose, University of Wollongong
 Prof Kim Rubenstein, Centre for International and Public Law, Australian National University
 Prof Ben Saul, University of Sydney
 Ben Schokman, Human Rights Law Centre

APPENDIX 2

Government

Australian Defence Force

Australian Federal Police

Australian Security Intelligence Organisation

The Hon Catherine Branson QC, Australian Human Rights Commission

Commonwealth Attorney-General's Department

Commonwealth Director of Public Prosecutions

Department of Defence

Department of Foreign Affairs and Trade

Mark Duckworth, Department of Premier and Cabinet Victoria

Inspector-General of Intelligence and Security

Parliamentary Joint Committee on Intelligence and Security

Deputy Commissioner Kieran Walshe, Victoria Police

Events attended

16th Annual Public Law Weekend, Centre for International and Public Law,
Australian National University

Kokoda Foundation Closed Colloquium on Deradicalisation Approaches Within the
Australian Criminal Justice System

APPENDIX 3 ISSUES FOR CONSIDERATION

The following list contains abbreviated headings for topics that the INSLM will work on in 2012. The form of the questions posed is not intended to indicate that the INSLM leans in any direction as to the appropriate answers. (The numerical references are to pages where these topics are raised in the body of the report.)

1. Was the CT Laws' criminalization of terrorism necessary given Australia's pre-existing criminal laws against murder etc? (5)
2. Are there features special to terrorism that justify extraordinary treatment of terrorist offences concerning investigation, proof and punishment? (9-11)
3. Is the UN Security Council Resolution 1373 a secure foundation for Australia's international counter-terrorism obligations? (15-17)
4. Is there practical consensus internationally on the definition of terrorism? (16, 24-25, 49-54)
5. Should hostage-taking be explicitly within Australia's definition of terrorism? (21, 53)
6. Does the use of religious motivation in the definition of terrorism inappropriately risk enlisting anti-Muslim prejudice? (22-25, 52-53)
7. Is the last resort requirement for a questioning warrant under the ASIO Act too demanding? (29-30)
8. Are the time limits (eg 7 days detention for 24 hours questioning) applicable to questioning warrants too long, too short or about right? (30-32)
9. Are the time limits for questioning warrants where interpreters have been used commensurate with the limits applying otherwise? (31-32)
10. Are there sufficient safeguards including judicial review in relation to the surrender or cancellation of passports, in connexion with questioning warrants? (32)
11. Is the 5 years imprisonment for failing to answer questions truthfully etc under a questioning warrant appropriate and comparable to penalties for similar offences? (32)
12. Is the abrogation of privilege against self-incrimination under a questioning warrant sufficiently balanced by the use immunity? (32-33)
13. Do the conditions permitting use of lethal force in enforcing a warrant sufficiently clearly require reasonable apprehension of danger to life or limb? (33)
14. Are the three several conditions for issuing a questioning and detention warrant stringent enough? (34-35)

APPENDIX 3

15. Should the risk of non-appearance as a condition for issuing a questioning and detention warrant require assessment by a judicial officer? (34)
16. Does the possible resort either to a questioning and detention warrant or to arrest for the same person for the same circumstances give an inappropriate discretion to officers of the executive? (35)
17. Should the issuing authority, being a judicial officer, rather than the Attorney-General, or as well as the Attorney-General, determine the existence of a condition for the issue of a questioning and detention warrant? (35)
18. Should the offence of failing to produce records or things under a warrant explicitly extend to deliberate destruction? (35)
19. Is the disparity between length of imprisonment for offences against security obligations in relation to questioning warrants and for offences of deliberate contravention of safeguards in relation to questioning warrants appropriate? (35)
20. Is the degree and nature of permitted contact by a person being questioned under a warrant sufficient? (35-36)
21. Should questioning and detention warrants remain available at all? (11-12, 34-35)
22. Is the requirement that regulations under the UN Charter Act for listing decisions in relation to freezing assets etc merely relate to terrorism too loose? (38)
23. Should the Minister be required rather than empowered to revoke a listing when satisfied it is no longer necessary? (38-39)
24. Does the once yearly obligation for the Minister to consider a listing revocation application give too much discretion or create undesirable inflexibility? (39)
25. Should there be wider judicial review of listing decisions including revocation applications? (39-40)
26. Are the provisions for compensation for loss caused by mistaken listing generous enough? (39-40)
27. Is the injunction power in aid of asset-freezing etc too easily available? (40)
28. Do secrecy provisions hamstringing judicial review of listing decisions? (40)
29. Is the offence of making an asset available to a listed person broader than culpability justifies? (40-41)
30. Is the defence of mistake reasonably available in relation to listing offences? (40-41)
31. Is bail justifiably more difficult for terrorism offences than for others? (42)
32. Should non-parole provisions be stricter for terrorism offences than for others? (42)
33. Does the *Crimes Act* inappropriately confine judicial discretion as to bail and non-parole for terrorism offences? (42)

34. Is the test that a police officer suspects a person might commit a terrorist act strict enough to empower search and arrest under the *Crimes Act*? (43-44)
35. Should senior police officers or other officials be included in the test for empowering search and arrest? (44)
36. Does the Minister require reasonable grounds for declaring a prescribed security zone, and should they be required? (44)
37. Should it be mandatory for the Minister to consider revocation, and to revoke when satisfied a prescribed security zone is no longer required? (44-45)
38. Are these emergency powers appropriate for indefinite or permanent availability, without a sunset clause? (44-45)
39. Are the stipulations governing investigation of terrorism offences under the *Crimes Act* accessible to those trying to observe them? (45)
40. Is the longer time limit (20 hours rather than 8 hours) for questioning in relation to terrorism offences justified? (45)
41. Should anything be done about doubtful aspects of the constitutional validity of control orders and preventative detention orders under the *Criminal Code*? (47-49)
42. Do international comparators support or oppose the effectiveness and appropriateness of control orders and preventative detention orders? (48-49)
43. Does non-use of control orders and preventative detention orders suggest they are not necessary? (48-49)
44. Should control orders and preventative detention orders be more readily available? (49)
45. Should control orders and preventative detention orders require a relevant prior conviction and unsatisfactory rehabilitation? (48-49)
46. In light of 1373 and international usage, international comparisons and scholarship, is the definition of "terrorist act" in the Code able to be improved? (50-54)
47. Are there criticisms by the Special Rapporteurs of Australia's definition of terrorism of which further account should be taken? (52-53)
48. Should hostage-taking be explicitly included as a terrorist act? (21, 53)
49. Does the separate requirement for a motive (including the intention of advancing a religious cause) produce avoidable disadvantages including prejudicial trial evidence? (22-25, 52-54)
50. Should terrorist acts or threats of them be defined always to involve dangers to life and limb as opposed only to property or infrastructure damage? (54)

APPENDIX 3

51. Are the offences of preparation for or planning a terrorist act, including by a sole person, too early in a course of wrongdoing to justify the prescribed punishment? (54-56)
52. Does the offence of preparing for or planning terrorism comprehend too broad a range of conduct for one offence? (55-56)
53. Are the penalties provided for training and possession offences, knowingly or recklessly committed, appropriately weighted? (55-56)
54. Should the only possible alternative verdict of reckless rather than knowing terrorist training be explicit? (55-56)
55. Is the requisite connexion of a possessed thing with terrorism too vague? (56-57)
56. Is the evidential burden as to a lack of intention to facilitate terrorism for the possession offences fair and appropriate? (57)
57. Are there any remaining issues concerning conspiracies and acts in preparation for terrorism, such as being too inchoate? (57-58)
58. Does the definition of membership of a terrorist organization extend too broadly? (58)
59. Does the definition of advocacy of terrorism in relation to praise of conduct permit too loose or slight a connexion? (58-59)
60. Has the operation of the NSI Act excessively impeded terrorism trials? (61-63)
61. Has the resort to agreements under the NSI Act been a healthy development? (61-62)
62. What, if any, resort would be appropriate to security clearance for defence counsel and to special defence counsel? (62)
63. Are Attorney-General's certificates appropriate in place of judicial determination of national security matters? (63)

APPENDIX 4 SUNSET PROVISIONS

Australian Security Intelligence Organisation Act 1979

Questioning and detention powers

The *ASIO Legislation Amendment (Terrorism) Act 2002* introduced Division 3 of Part III into the *ASIO Act*, which established questioning and detention powers for ASIO. A sunset provision in the Act provided Division 3 of Part III of the *ASIO Act* would cease to be in force from 23 July 2006 (section 34Y of the *ASIO Act*). In 2005, the Parliamentary Joint Committee on ASIO, ASIS and DSD conducted a review of Division 3 of Part III of the *ASIO Act*. The Parliamentary Joint Committee recommended that section 34Y be maintained but be amended to encompass a sunset clause to come into effect on 22 November 2011.¹⁵⁶ The Government accepted the recommendation in part. It agreed that there should be a sunset clause and further review by the Committee, however, the Government did not accept the Committee's recommendation of an extension of the sunset and review period by 5½ years, and instead extended the period by 10 years.

The *ASIO Legislation Amendment Act 2006* introduced a further sunset clause which provides that Division 3 of Part III of the *ASIO Act* 'ceases to have effect on 22 July 2016' (section 34ZZ). The Act also amended paragraph 29(1)(bb) of the *Intelligence Services Act 2001* to require the Parliamentary Joint Committee to review the operation, effectiveness, and implications of the Division 3 powers and for the Committee to report to the Parliament by 22 January 2016. The Government explained this decision as follows:

The experience of recent statutory reviews has shown that such reviews are resource-intensive and impact on operational priorities. Given these considerations and the fact that the Government is continuously reviewing the effectiveness of legislation, the Government does not consider that an earlier review is warranted. State and Territory Governments were of the same view about the time needed to properly make an assessment of the recent anti-terrorism legislation. A longer period is also consistent with the period the Government assesses there is likely to be a need for this legislation.¹⁵⁷

As stated above, Division 3 of Part III of the *ASIO Act* will cease to have effect on 22 July 2016.

Criminal Code Act 1995 and Crimes Act 1914

The *Anti-Terrorism Act (No. 2) 2005* introduced provisions into the *Code* for the issuing of control orders and preventative detention orders. The Act also introduced provisions into

¹⁵⁶ Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers – Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979*, Recommendation 19

¹⁵⁷ Explanatory Memorandum, *ASIO Legislation Amendment Bill 2006*, 17

APPENDIX 4

the *Crimes Act* for police stop and search powers in relation to terrorist acts and terrorism offences. All of these provisions are subject to a 10-year sunset clause.¹⁵⁸ A 10-year sunset clause was agreed to by the Council of Australian Governments (COAG) at its meeting of 27 September 2005.¹⁵⁹

Control orders

Criminal Code Act 1995 – Chapter 5, Part 5.3, Division 104, section 104.32 contains the following sunset provision:

- (1) A control order that is in force at the end of 10 years after the day on which this Division commences cease to be in force at that time.
- (2) A control order cannot be requested, made or confirmed after the end of 10 years after the day on which this Division commences.

Unlike most sunset provisions which state that the Division will cease to have effect after a period of time, this provision does not repeal the Division. The sunset provision states that a control order ceases after 10 years, and a control order cannot be requested, made or confirmed after 10 years. The Explanatory Memorandum states:

The sunset provision acknowledges that there are a number of machinery type provisions that must continue in operation despite the intention that the Division providing for control orders should cease to have effect at the end of 10 years. These provisions include, for example, the requirement to destroy identification material.¹⁶⁰

The Division commenced on 15 December 2005 and will expire on 16 December 2015.

Preventative detention orders

Criminal Code Act 1995 – Chapter 5, Part 5.3, Division 105, section 105.53 contains the following sunset provision:

- (1) A preventative detention order, or a prohibited contact order, that is in force at the end of 10 years after the day on which this Division commences ceases to be in force at the time.
- (2) A preventative detention order, and a prohibited contacts order, cannot be applied for, or made, after the end of 10 years after the day on which this Division commences.

Unlike most sunset provisions which state that the Division will cease to have effect after a period of time, this provision does not repeal the Division. The sunset provision states that

¹⁵⁸ *Anti-Terrorism Act (No. 2) 2005*, Schedule 4, Part 1, Division 104, Subdivision H, s 104.32, Schedule 4, Part 1, Division 105, Subdivision F, s. 105.53, Schedule 5, Division 3A, Subdivision D, s. 3UK

¹⁵⁹ Council of Australian Governments' *Communiqué, Special Meeting on Counter-Terrorism 27 September 2005* and Explanatory Memorandum, *Anti-Terrorism Bill (No. 2) 2005*

¹⁶⁰ Explanatory Memorandum, *Anti-Terrorism Bill (No. 2) 2005*, 36

a preventative detention order or prohibited contact order ceases after 10 years and that neither a preventative detention order nor a prohibited contact order can be applied for or made after 10 years. The Explanatory Memorandum states:

The sunset provision acknowledges that there are a number of machinery type provisions that must continue in operation despite the intention that the Division providing for preventative detention should cease to have effect at the end of 10 years. These provisions include, for example, the requirement to destroy identification material and the offence for disclosing information overheard by an AFP member or interpreter while monitoring discussions between the person and their lawyer.¹⁶¹

The Division commenced on 15 December 2005 and will expire on 16 December 2015.

Crimes Act 1914

Powers in relation to terrorist acts and terrorism offences

Part IAA, Division 3A – Subdivision D, section 3UK contains the following sunset provision:

- (1) A police officer must not exercise powers or perform duties under this Division (other than under section 3UF) after the end of 10 years after the day on which the Division commences.
- (2) A declaration under section 3UJ that is in force at the end of 10 years after the day on which this Division commences ceases to be in force at that time.
- (3) A police officer cannot apply for, and the Minister cannot make, a declaration under section 3UJ after the end of 10 years after the day on which this Division commences.

The sunset provision does not expressly provide for provisions in Division 3A to cease to have effect after 10 years. Rather, certain powers and duties are unable to be exercised after the end of the sunset period. The Explanatory Memorandum states:

New subsection 3UK(1) provides that a police officer must not exercise powers or perform duties under new Division 3A after the end of 10 years after the day on which the Division commences. The exceptions relating to powers and duties under sections 3UF and 3UG acknowledges the machinery type provisions that must continue in operation despite the intention that this new Division should cease to have effect at the end of 10 years. These provisions deal with how seized items are to be dealt with and must continue to operate beyond the end of the 10 year period.¹⁶²

The Division commenced on 15 December 2005 and will expire on 16 December 2015.

¹⁶¹ Explanatory Memorandum, *Anti-Terrorism Bill (No. 2) 2005*, 73

¹⁶² Explanatory Memorandum, *Anti-Terrorism Bill (No. 2) 2005*, 80

APPENDIX 5 OFFICIAL ASSESSMENT OF THE THREAT OF TERRORISM

The Australian Government's Counter-Terrorism White Paper (2010) stated:

The threat of terrorism to Australia and our interests is real. Terrorism has become a persistent and permanent feature of Australia's security environment. It threatens Australians and Australian interests both at home and overseas. The Government's intelligence agencies assess that further terrorist attacks could occur at any time.

Over the past century the world has seen a succession of terrorist campaigns supporting various ideological or nationalist causes. Methods of attack have evolved and terrorists have proved innovative, adaptive and ruthless in pursuing their goals.

Terrorism affected Australia before the 11 September 2001 attacks against the United States. Various overseas terrorist groups have long had a presence in Australia – focused largely on fundraising and procurement, occasionally escalating to violence. But prior to the rise of self-styled jihadist terrorism fostered by al-Qa'ida, Australia itself was not a specific target. We now are.¹⁶³

163 Australian Government, *Counter-Terrorism White Paper*, 2010, 7

APPENDIX 6 SENTENCING REMARKS ON MOTIVATION

In sentencing five men for terrorism related offences, Whealy J stated that:

The mindset evinced by all this material may be summarised as follows: First, a hatred of the “KUFR”, that is those Muslims and non-Muslims who did not share their extremist views. Secondly, an intolerance towards the democratic Australian Government and its policies. Thirdly, a conviction that Muslims are obligated by their religion to pursue violent jihad for the purposes of overthrowing liberal democratic societies and to replace them with Islamic rule and Sharia law. This criminal enterprise was not in any sense motivated, as criminal activities so often are, by a need for financial gain or simply private revenge. Rather, an intolerant and inflexible fundamentalist religious conviction was the principal motivation for the commission of the offence. This is the most startling and intransigent feature of the crime. It sets it apart from other criminal enterprises motivated by financial gain, by passion, anger or revenge.¹⁶⁴

¹⁶⁴ *R v Elomar* [2010] NSWSC 10 per Whealy J at [63]

APPENDIX 7 HOMICIDE STATISTICS

Since 2001, there have been 111 Australians killed in terrorist attacks including 88 Australians killed in the 12 October 2002 Bali bombing.¹⁶⁵ The statistics show that the greatest danger of wrongful death in Australia is being killed by a family member at home.¹⁶⁶

Year	2007–08	2006–07	2005–06
Number of Australian victims of homicide	273	266	301
Percentage of domestic homicides (homicide incidents where there was a family or intimate partner relationship between the victim and offender)	52%	39%	40%
Percentage of homicide incidents which occurred in a residential location	70%	61%	63%

¹⁶⁵ Australian Government, *Counter-Terrorism White Paper*, 2010 at 10

¹⁶⁶ Australian Institute of Criminology, *National Homicide Monitoring Program Annual Reports: 2007–08, 2006–07 and 2005–06*. Homicide is defined for the purposes of these statistics as being all cases resulting in a person or persons being charged with murder or manslaughter. Other driving-related fatalities are excluded from the definition unless the death immediately follows a criminal event such as armed robbery. The statistics also include deaths classed by police as homicides, and murder-suicides classed as murder by police. Deaths resulting from criminal negligence, such as medical negligence or industrial accidents involving criminal negligence, are excluded from the definition unless a charge of manslaughter is laid.

APPENDIX 8 RESOLUTION 1373 (2001) (S/RES/1373 (2001))

Adopted by the Security Council at its 4385th meeting, on 28 September 2001

The Security Council,

Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001,

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that all States shall:
 - (a) Prevent and suppress the financing of terrorist acts;
 - (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
 - (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
 - (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;
2. *Decides also* that all States shall:
 - (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
 - (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
 - (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
 - (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
 - (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;
 - (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;
3. *Calls upon* all States to:
- (a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;
 - (b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;
 - (c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;
 - (d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;
 - (e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

- (f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts;
 - (g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;
4. *Notes* with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard *emphasizes* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;
 5. *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;
 6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;
 7. *Directs* the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;
 8. *Expresses* its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;
 9. *Decides* to remain seized of this matter.

APPENDIX 9

DRAFT COMPREHENSIVE CONVENTION ON INTERNATIONAL TERRORISM¹²

...

Article 2

1. Any person commits an offence within the meaning of present Convention if that person, by any means, unlawfully and intentionally, causes:
 - (a) Death or serious bodily injury to any person; or
 - (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
 - (c) Damage to property, places, facilities or systems referred to in paragraph 1(b) of the present article resulting or likely to result in major economic loss,

When the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

Article 3 [18]

1. Nothing in the present Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, and international humanitarian law.
2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by the present Convention.
3. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by the present Convention.
4. Nothing in the present article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws; acts which would amount to an offence as defined in article 2 of the present Convention remain punishable under such laws.
5. The present Convention is without prejudice to the rules of international law applicable in armed conflict, in particular those rules applicable to acts lawful under international humanitarian law.

...

¹⁶⁷ Informal text of articles 2 and 3 of the draft Comprehensive Convention on International Terrorism (A/C.6/65/L.10, Annex II and III)

APPENDIX 10 UNITED NATIONS A/RES/60/288

60/288. The United Nations Global Counter-Terrorism Strategy

The General Assembly, Guided by the purposes and principles of the Charter of the United Nations, and reaffirming its role under the Charter, including on questions related to international peace and security, Reiterating its strong condemnation of terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security, Reaffirming the Declaration on Measures to Eliminate International Terrorism, contained in the annex to General Assembly resolution 49/60 of 9 December 1994, the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, contained in the annex to General Assembly resolution 51/210 of 17 December 1996, and the 2005 World Summit Outcome,¹ in particular its section on terrorism,

Recalling all General Assembly resolutions on measures to eliminate international terrorism, including resolution 46/51 of 9 December 1991, and Security Council resolutions on threats to international peace and security caused by terrorist acts, as well as relevant resolutions of the General Assembly on the protection of human rights and fundamental freedoms while countering terrorism,

Recalling also that, in the 2005 World Summit Outcome, world leaders rededicated themselves to support all efforts to uphold the sovereign equality of all States, respect their territorial integrity and political independence, to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations, to uphold the resolution of disputes by peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which remain under colonial domination or foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion, international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and the fulfilment in good faith of the obligations assumed in accordance with the Charter,

Recalling further the mandate contained in the 2005 World Summit Outcome that the General Assembly should develop without delay the elements identified by the Secretary-General for a counter-terrorism strategy, with a view to adopting and implementing a strategy to promote comprehensive, coordinated and consistent responses, at the national, regional and international levels, to counter terrorism, which also takes into account the conditions conducive to the spread of terrorism,

Reaffirming that acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental

freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments, and that the international community should take the necessary steps to enhance cooperation to prevent and combat terrorism,

Reaffirming also that terrorism cannot and should not be associated with any religion, nationality, civilization or ethnic group,

Reaffirming further Member States' determination to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism, including by resolving the outstanding issues related to the legal definition and scope of the acts covered by the convention, so that it can serve as an effective instrument to counter terrorism,

Continuing to acknowledge that the question of convening a high-level conference under the auspices of the United Nations to formulate an international response to terrorism in all its forms and manifestations could be considered,

Recognizing that development, peace and security, and human rights are interlinked and mutually reinforcing,

Bearing in mind the need to address the conditions conducive to the spread of terrorism,

Affirming Member States' determination to continue to do all they can to resolve conflict, end foreign occupation, confront oppression, eradicate poverty, promote sustained economic growth, sustainable development, global prosperity, good governance, human rights for all and rule of law, improve intercultural understanding and ensure respect for all religions, religious values, beliefs or cultures,

1. *Expresses its appreciation* for the report entitled "Uniting against terrorism: recommendations for a global counter-terrorism strategy" submitted by the Secretary-General to the General Assembly;
2. *Adopts* the present resolution and its annex as the United Nations Global Counter-Terrorism Strategy ("the Strategy");
3. *Decides*, without prejudice to the continuation of the discussion in its relevant committees of all their agenda items related to terrorism and counterterrorism, to undertake the following steps for the effective follow-up of the Strategy:
 - (a) To launch the Strategy at a high-level segment of its sixty-first session;
 - (b) To examine in two years progress made in the implementation of the Strategy, and to consider updating it to respond to changes, recognizing that many of the measures contained in the Strategy can be achieved immediately, some will require sustained work through the coming few years and some should be treated as long-term objectives;

- (c) To invite the Secretary-General to contribute to the future deliberations of the General Assembly on the review of the implementation and updating of the Strategy;
 - (d) To encourage Member States, the United Nations and other appropriate international, regional and subregional organizations to support the implementation of the Strategy, including through mobilizing resources and expertise;
 - (e) To further encourage non-governmental organizations and civil society to engage, as appropriate, on how to enhance efforts to implement the Strategy;
4. *Decides* to include in the provisional agenda of its sixty-second session an item entitled "The United Nations Global Counter-Terrorism Strategy".

99th plenary meeting

8 September 2006

Annex

Plan of action

We, the States Members of the United Nations, resolve:

1. To consistently, unequivocally and strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security;
2. To take urgent action to prevent and combat terrorism in all its forms and manifestations and, in particular:
 - (a) To consider becoming parties without delay to the existing international conventions and protocols against terrorism, and implementing them, and to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism;
 - (b) To implement all General Assembly resolutions on measures to eliminate international terrorism and relevant General Assembly resolutions on the protection of human rights and fundamental freedoms while countering terrorism;
 - (c) To implement all Security Council resolutions related to international terrorism and to cooperate fully with the counter-terrorism subsidiary bodies of the Security Council in the fulfilment of their tasks, recognizing that many States continue to require assistance in implementing these resolutions;
3. To recognize that international cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law, including the Charter of the United Nations and relevant international

conventions and protocols, in particular human rights law, refugee law and international humanitarian law.

I. Measures to address the conditions conducive to the spread of terrorism

We resolve to undertake the following measures aimed at addressing the conditions conducive to the spread of terrorism, including but not limited to prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of the rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance, while recognizing that none of these conditions can excuse or justify acts of terrorism:

1. To continue to strengthen and make best possible use of the capacities of the United Nations in areas such as conflict prevention, negotiation, mediation, conciliation, judicial settlement, rule of law, peacekeeping and peacebuilding, in order to contribute to the successful prevention and peaceful resolution of prolonged unresolved conflicts. We recognize that the peaceful resolution of such conflicts would contribute to strengthening the global fight against terrorism;

2. To continue to arrange under the auspices of the United Nations initiatives and programmes to promote dialogue, tolerance and understanding among civilizations, cultures, peoples and religions, and to promote mutual respect for and prevent the defamation of religions, religious values, beliefs and cultures. In this regard, we welcome the launching by the Secretary-General of the initiative on the Alliance of Civilizations. We also welcome similar initiatives that have been taken in other parts of the world;

3. To promote a culture of peace, justice and human development, ethnic, national and religious tolerance and respect for all religions, religious values, beliefs or cultures by establishing and encouraging, as appropriate, education and public awareness programmes involving all sectors of society. In this regard, we encourage the United Nations Educational, Scientific and Cultural Organization to play a key role, including through inter-faith and intra-faith dialogue and dialogue among civilizations;

4. To continue to work to adopt such measures as may be necessary and appropriate and in accordance with our respective obligations under international law to prohibit by law incitement to commit a terrorist act or acts and prevent such conduct;

5. To reiterate our determination to ensure the timely and full realization of the development goals and objectives agreed at the major United Nations conferences and summits, including the Millennium Development Goals. We reaffirm our commitment to eradicate poverty and promote sustained economic growth, sustainable development and global prosperity for all;

6. To pursue and reinforce development and social inclusion agendas at every level as goals in themselves, recognizing that success in this area, especially on youth unemployment, could reduce marginalization and the subsequent sense of victimization that propels extremism and the recruitment of terrorists;

7. To encourage the United Nations system as a whole to scale up the cooperation and assistance it is already conducting in the fields of rule of law, human rights and good governance to support sustained economic and social development;

8. To consider putting in place, on a voluntary basis, national systems of assistance that would promote the needs of victims of terrorism and their families and facilitate the normalization of their lives. In this regard, we encourage States to request the relevant United Nations entities to help them to develop such national systems. We will also strive to promote international solidarity in support of victims and foster the involvement of civil society in a global campaign against terrorism and for its condemnation. This could include exploring at the General Assembly the possibility of developing practical mechanisms to provide assistance to victims.

II. Measures to prevent and combat terrorism

We resolve to undertake the following measures to prevent and combat terrorism, in particular by denying terrorists access to the means to carry out their attacks, to their targets and to the desired impact of their attacks:

1. To refrain from organizing, instigating, facilitating, participating in, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that our respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens;

2. To cooperate fully in the fight against terrorism, in accordance with our obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or perpetration of terrorist acts or provides safe havens;

3. To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of national and international law, in particular human rights law, refugee law and international humanitarian law. We will endeavour to conclude and implement to that effect mutual judicial assistance and extradition agreements and to strengthen cooperation between law enforcement agencies;

4. To intensify cooperation, as appropriate, in exchanging timely and accurate information concerning the prevention and combating of terrorism;

5. To strengthen coordination and cooperation among States in combating crimes that might be connected with terrorism, including drug trafficking in all its aspects, illicit arms trade, in particular of small arms and light weapons, including man-portable air defence systems, money-laundering and smuggling of nuclear, chemical, biological, radiological and other potentially deadly materials;

6. To consider becoming parties without delay to the United Nations Convention against Transnational Organized Crime 3 and to the three protocols supplementing it, and implementing them;

7. To take appropriate measures, before granting asylum, for the purpose of ensuring that the asylum-seeker has not engaged in terrorist activities and, after granting asylum, for the purpose of ensuring that the refugee status is not used in a manner contrary to the provisions set out in section II, paragraph 1, above;

8. To encourage relevant regional and subregional organizations to create or strengthen counter-terrorism mechanisms or centres. Should they require cooperation and assistance to this end, we encourage the Counter-Terrorism Committee and its Executive Directorate and, where consistent with their existing mandates, the United Nations Office on Drugs and Crime and the International Criminal Police Organization, to facilitate its provision;

9. To acknowledge that the question of creating an international centre to fight terrorism could be considered, as part of international efforts to enhance the fight against terrorism;

10. To encourage States to implement the comprehensive international standards embodied in the Forty Recommendations on Money-Laundering and Nine Special Recommendations on Terrorist Financing of the Financial Action Task Force, recognizing that States may require assistance in implementing them;

11. To invite the United Nations system to develop, together with Member States, a single comprehensive database on biological incidents, ensuring that it is complementary to the biocrimes database contemplated by the International Criminal Police Organization. We also encourage the Secretary-General to update the roster of experts and laboratories, as well as the technical guidelines and procedures, available to him for the timely and efficient investigation of alleged use. In addition, we note the importance of the proposal of the Secretary-General to bring together, within the framework of the United Nations, the major biotechnology stakeholders, including industry, the scientific community, civil society and Governments, into a common programme aimed at ensuring that biotechnology advances are not used for terrorist or other criminal purposes but for the public good, with due respect for the basic international norms on intellectual property rights;

12. To work with the United Nations with due regard to confidentiality, respecting human rights and in compliance with other obligations under international law, to explore ways and means to:

- (a) Coordinate efforts at the international and regional levels to counter terrorism in all its forms and manifestations on the Internet;
- (b) Use the Internet as a tool for countering the spread of terrorism, while recognizing that States may require assistance in this regard;

13. To step up national efforts and bilateral, subregional, regional and international cooperation, as appropriate, to improve border and customs controls in order to prevent and

detect the movement of terrorists and prevent and detect the illicit traffic in, inter alia, small arms and light weapons, conventional ammunition and explosives, and nuclear, chemical, biological or radiological weapons and materials, while recognizing that States may require assistance to that effect;

14. To encourage the Counter-Terrorism Committee and its Executive Directorate to continue to work with States, at their request, to facilitate the adoption of legislation and administrative measures to implement the terrorist travel-related obligations and to identify best practices in this area, drawing whenever possible on those developed by technical international organizations, such as the International Civil Aviation Organization, the World Customs Organization and the International Criminal Police Organization;

15. To encourage the Committee established pursuant to Security Council resolution 1267 (1999) to continue to work to strengthen the effectiveness of the travel ban under the United Nations sanctions regime against Al-Qaida and the Taliban and associated individuals and entities, as well as to ensure, as a matter of priority, that fair and transparent procedures exist for placing individuals and entities on its lists, for removing them and for granting humanitarian exceptions. In this regard, we encourage States to share information, including by widely distributing the International Criminal Police Organization/United Nations special notices concerning people subject to this sanctions regime;

16. To step up efforts and cooperation at every level, as appropriate, to improve the security of manufacturing and issuing identity and travel documents and to prevent and detect their alteration or fraudulent use, while recognizing that States may require assistance in doing so. In this regard, we invite the International Criminal Police Organization to enhance its database on stolen and lost travel documents, and we will endeavour to make full use of this tool, as appropriate, in particular by sharing relevant information;

17. To invite the United Nations to improve coordination in planning a response to a terrorist attack using nuclear, chemical, biological or radiological weapons or materials, in particular by reviewing and improving the effectiveness of the existing inter-agency coordination mechanisms for assistance delivery, relief operations and victim support, so that all States can receive adequate assistance. In this regard, we invite the General Assembly and the Security Council to develop guidelines for the necessary cooperation and assistance in the event of a terrorist attack using weapons of mass destruction;

18. To step up all efforts to improve the security and protection of particularly vulnerable targets, such as infrastructure and public places, as well as the response to terrorist attacks and other disasters, in particular in the area of civil protection, while recognizing that States may require assistance to this effect.

III. Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard

We recognize that capacity-building in all States is a core element of the global counter-terrorism effort, and resolve to undertake the following measures to develop State

capacity to prevent and combat terrorism and enhance coordination and coherence within the United Nations system in promoting international cooperation in countering terrorism:

1. To encourage Member States to consider making voluntary contributions to United Nations counter-terrorism cooperation and technical assistance projects, and to explore additional sources of funding in this regard. We also encourage the United Nations to consider reaching out to the private sector for contributions to capacity-building programmes, in particular in the areas of port, maritime and civil aviation security;
2. To take advantage of the framework provided by relevant international, regional and subregional organizations to share best practices in counter-terrorism capacity-building, and to facilitate their contributions to the international community's efforts in this area;
3. To consider establishing appropriate mechanisms to rationalize States' reporting requirements in the field of counter-terrorism and eliminate duplication of reporting requests, taking into account and respecting the different mandates of the General Assembly, the Security Council and its subsidiary bodies that deal with counter-terrorism;
4. To encourage measures, including regular informal meetings, to enhance, as appropriate, more frequent exchanges of information on cooperation and technical assistance among Member States, United Nations bodies dealing with counter-terrorism, relevant specialized agencies, relevant international, regional and subregional organizations and the donor community, to develop States' capacities to implement relevant United Nations resolutions;
5. To welcome the intention of the Secretary-General to institutionalize, within existing resources, the Counter-Terrorism Implementation Task Force within the Secretariat in order to ensure overall coordination and coherence in the counterterrorism efforts of the United Nations system;
6. To encourage the Counter-Terrorism Committee and its Executive Directorate to continue to improve the coherence and efficiency of technical assistance delivery in the field of counter-terrorism, in particular by strengthening its dialogue with States and relevant international, regional and subregional organizations and working closely, including by sharing information, with all bilateral and multilateral technical assistance providers;
7. To encourage the United Nations Office on Drugs and Crime, including its Terrorism Prevention Branch, to enhance, in close consultation with the Counter-Terrorism Committee and its Executive Directorate, its provision of technical assistance to States, upon request, to facilitate the implementation of the international conventions and protocols related to the prevention and suppression of terrorism and relevant United Nations resolutions;
8. To encourage the International Monetary Fund, the World Bank, the United Nations Office on Drugs and Crime and the International Criminal Police Organization to enhance cooperation with States to help them to comply fully with international norms and obligations to combat money-laundering and the financing of terrorism;

APPENDIX 10

9. To encourage the International Atomic Energy Agency and the Organization for the Prohibition of Chemical Weapons to continue their efforts, within their respective mandates, in helping States to build capacity to prevent terrorists from accessing nuclear, chemical or radiological materials, to ensure security at related facilities and to respond effectively in the event of an attack using such materials;

10. To encourage the World Health Organization to step up its technical assistance to help States to improve their public health systems to prevent and prepare for biological attacks by terrorists;

11. To continue to work within the United Nations system to support the reform and modernization of border management systems, facilities and institutions at the national, regional and international levels;

12. To encourage the International Maritime Organization, the World Customs Organization and the International Civil Aviation Organization to strengthen their cooperation, work with States to identify any national shortfalls in areas of transport security and provide assistance, upon request, to address them;

13. To encourage the United Nations to work with Member States and relevant international, regional and subregional organizations to identify and share best practices to prevent terrorist attacks on particularly vulnerable targets. We invite the International Criminal Police Organization to work with the Secretary- General so that he can submit proposals to this effect. We also recognize the importance of developing public-private partnerships in this area.

IV. Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism

We resolve to undertake the following measures, reaffirming that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing, and stressing the need to promote and protect the rights of victims of terrorism:

1. To reaffirm that General Assembly resolution 60/158 of 16 December 2005 provides the fundamental framework for the “Protection of human rights and fundamental freedoms while countering terrorism”;

2. To reaffirm that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law;

3. To consider becoming parties without delay to the core international instruments on human rights law, refugee law and international humanitarian law, and implementing them, as well as to consider accepting the competence of international and relevant regional human rights monitoring bodies;

4. To make every effort to develop and maintain an effective and rule of law-based national criminal justice system that can ensure, in accordance with our obligations under international law, that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, on the basis of the principle to extradite or prosecute, with due respect for human rights and fundamental freedoms, and that such terrorist acts are established as serious criminal offences in domestic laws and regulations. We recognize that States may require assistance in developing and maintaining such effective and rule of law-based criminal justice systems, and we encourage them to resort to the technical assistance delivered, *inter alia*, by the United Nations Office on Drugs and Crime;

5. To reaffirm the important role of the United Nations system in strengthening the international legal architecture by promoting the rule of law, respect for human rights and effective criminal justice systems, which constitute the fundamental basis of our common fight against terrorism;

6. To support the Human Rights Council and to contribute, as it takes shape, to its work on the question of the promotion and protection of human rights for all in the fight against terrorism;

7. To support the strengthening of the operational capacity of the Office of the United Nations High Commissioner for Human Rights, with a particular emphasis on increasing field operations and presences. The Office should continue to play a lead role in examining the question of protecting human rights while countering terrorism, by making general recommendations on the human rights obligations of States and providing them with assistance and advice, in particular in the area of raising awareness of international human rights law among national law enforcement agencies, at the request of States;

8. To support the role of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The Special Rapporteur should continue to support the efforts of States and offer concrete advice by corresponding with Governments, making country visits, liaising with the United Nations and regional organizations and reporting on these issues.

APPENDIX 11 UNITED NATIONS QUOTES ON OBSERVING INTERNATIONAL OBLIGATIONS IN COUNTERING TERRORISM

Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/16/51), paras 8 and 12 (footnotes omitted).

In the United Nations Global Counter-Terrorism Strategy, reaffirmed most recently by the General Assembly in its resolution 64/297, the States Members of the United Nations recognize that terrorist acts are aimed at the destruction of human rights, fundamental freedoms and democracy. Measures to combat terrorism may also prejudice the enjoyment of – or may violate – human rights and the rule of law. Recognizing that compliance with human rights is necessary to address the long-term conditions conducive to the spread of terrorism, and that effective counter-terrorism measures and the protection of human rights are complementary and mutually reinforcing goals

...

Together with the responsibility of States to protect those within their jurisdiction from acts of terrorism, States have an obligation to comply with international law, including human rights law, refugee law and humanitarian law. These legal obligations stem from customary international law, applicable to all States, and international treaties, applicable to States parties. Compliance with all human rights while countering terrorism represents a best practice because not only is this a legal obligation of States, but it is also an indispensable part of a successful medium- and long-term strategy to combat terrorism. The Global Counter-Terrorism Strategy therefore identifies respect for human rights for all and the rule of law as one of its four pillars and as the fundamental basis of the fight against terrorism (thus applicable to all aspects of the Strategy). In pillar I, the Strategy also recognizes that compliance with human rights is necessary in order to address the long-term conditions conducive to the spread of terrorism, which include lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance. While making it clear that none of these conditions can excuse or justify terrorism, the Strategy represents a clear affirmation by all States Members of the United Nations that effective counter-terrorism measures and the protection of human rights are not conflicting, but rather complementary and mutually reinforcing goals. This also reflects the flexibility of human rights law. Through the careful application of human rights law it is possible to respond effectively to the challenges involved in the countering of terrorism while complying with human

rights. There is no need in this process for a balancing between human rights and security, as the proper balance can and must be found within human rights law itself. Law is the balance, not a weight to be measured... .

General Assembly resolution 64/168 (2009) (A/RES/64/168), para 6.

Urges States, while countering terrorism:

(a) To fully comply with their obligations under international law, in particular international human rights, refugee and humanitarian law, with regard to the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment

...

(f) To protect all human rights, including economic, social and cultural rights, bearing in mind that certain counter-terrorism measures may have an impact on the enjoyment of these rights

...

(k) To ensure that their laws criminalizing acts of terrorism are accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international law, including human rights law.

Report of the Secretary-General, Uniting against terrorism: recommendations for a global counter-terrorism strategy (2006) (A/60/825), para 5.

Inherent to the rule of law is the defence of human rights – a core value of the United Nations and a fundamental pillar of our work. Effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing ones. Accordingly, the defence of human rights is essential to the fulfilment of all aspects of a counter-terrorism strategy.

Commission on Human Rights resolution 2004/87 (E/CN.4/RES/2004/87), preamble and para 1.

Reaffirming also the fundamental importance, including in response to terrorism and the fear of terrorism, of respecting all human rights and fundamental freedoms and the rule of law.

...

Reaffirms that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.

Security Council resolution 1456 (2003) (S/RES/1456), annex.

States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law.

APPENDIX 12 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

Entry into force 23 March 1976, in accordance with Article 49

...

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are

APPENDIX 12

not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

...

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

...

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

...

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons

awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

...

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

...

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

APPENDIX 12

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

...

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

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3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (order public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

...

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

...

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

...

APPENDIX 13 UNITED NATIONS QUOTES ON HOSTAGE TAKING

United Nations Security Council resolution 1566 (2004) (S/RES/1566), para 3.

Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.

United Nations General Assembly resolution 65 (2010) (A/RES/65/34), para 8.

Expresses concern at the increase in incidents of kidnapping and hostage taking with demands for ransom and/or political concessions by terrorist groups, and expresses the need to address this issue.

United Nations Security Council resolution 638 (1989), para 6.

Urges the further development of international cooperation among States in devising and adopting effective measures which are in accordance with the rules of international law to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of terrorism.

International Convention against the Taking of Hostages (New York, 1979), Article 1(1).

Any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (New York, 1973), Article 2(1)(a).

The intentional commission of:

- (a) A murder, kidnapping or other attack upon the person or liberty of an internationally protected person ... shall be made by each State Party a crime under its internal law.

APPENDIX 14 DESCRIPTIONS OF THE MATTERS FOR WHICH SOME DEFENDANTS WERE CONVICTED AND SENTENCED

Operation Pendennis (Melbourne)

Thirteen men were arrested in Melbourne following Operation Pendennis. These men were alleged to be part of a Melbourne-based terrorist group that planned to wage violent jihad against the Australian Government. By an indictment laid on 7 December 2006, these men were accused of a series of offences against Part 5.3 of the *Criminal Code*.

One man pleaded guilty in July 2007 to two terrorism offences and was subsequently sentenced. The trial of the remaining twelve men commenced before a jury in early February 2008. On 15 and 16 September 2008, seven of those twelve accused were found guilty of knowingly being members of a terrorist organisation. Some of those seven were also convicted of other terrorism offences. Four of the remaining five accused were totally acquitted and in respect of the other the jury could not reach a verdict. Bongiorno J passed sentence on each of the seven prisoners who were convicted by the jury.¹⁶⁸

Bongiorno J described the Crown case as follows:

The terrorist organisation to which these men belonged was an unincorporated body which was directly or indirectly engaged in preparing or fostering the doing of a terrorist act: that is to say, preparing or fostering an action or threat of action involving the use of explosives, incendiary devices or weapons intended to advance a religious cause, namely the pursuit of violent jihad in the advancement of Islam. The Crown alleged that this action or threat of action was intended to coerce or influence a government or governments and/or to intimidate the public or a section of the public.¹⁶⁹

In sentencing one man for directing the activities of a terrorist organisation, Bongiorno J made the following observations:

The organisation which Benbrika directed may indeed have been only an embryonic terrorist organisation. His leadership may have been less than what would have been expected had he been a trained soldier or even a trained terrorist, and his and his followers' capacity to carry out a terrorist act may have been less than professional. They may never have got to the point of carrying out a terrorist act. But all of these considerations are of little moment. By its existence, its nature and its activities the organisation fostered and encouraged its members to engage in violent jihad – to perform a terrorist act. By its collection and circulation of terrorist material it prepared, however indirectly, the doing of a terrorist act. These constitute the substance of the criminality in this case....Indeed, it might be said that terrorist acts as they have

¹⁶⁸ *R v Benbrika* [2009] VSC 21

¹⁶⁹ [2009] VSC 21 at [11]

been experienced in modern times are often carried out by amateurs whose principal attribute has not been skill but rather a zealous or fanatical belief in some ideology or other which seeks to promote itself by the use of violence. Benbrika clearly had such a belief and fanaticism, and imparted it to his younger associates. They shared such a belief to varying degrees, even if they might have been less than expert in putting it into effect.¹⁷⁰

In sentencing the men, Bongiorno J held:

Specifically, the prisoners will be sentenced on the basis that they were members of a terrorist organisation which, although it had encouraged them to perform a terrorist act or acts in the future and had taken steps towards that end, no target or targets had been selected and no explosives or other material had been obtained to carry out such an attack.

To be guilty of the offence of membership it was not necessary that the terrorist organisation to which they belonged had gone as far as selecting a particular target. The organisation became a terrorist organisation in the terms of the indictment in this case once it engaged in any activity which could be characterised as fostering or preparing the doing of a terrorist act. An organisation may become a proscribed terrorist organisation long before it selects a target, obtains bomb-making or similar materials, or plans an attack.¹⁷¹

In determining criminal culpability, Bongiorno J held:

They will all be sentenced on the basis that they knew the jemaah [*a group, or, in Arabic, a "jemaah"*] led by Benbrika encouraged and/or took some act towards the commission of a terrorist act some time in the future on an as yet undetermined target.

This is not to say that their criminality is to be regarded as trivial. The existence of the jemaah as a terrorist organisation constituted a significant threat that a terrorist act would be or would have, by now, been committed here in Melbourne. The absence of an imminent, let alone an actual, terrorist attack does not mean that condign punishment is not warranted in this case.¹⁷²

Operation Pendennis (Sydney)

Nine men were arrested in Sydney as a result of Operation Pendennis (Sydney). Four of these men pleaded guilty to a range of terrorism offences. The remaining five men were charged with, and tried for, conspiracy to do an act in preparation for a terrorist act.

170 [2009] VSC 21 at [65]-[68]

171 [2009] VSC 21 at [43] and [44]

172 [2009] VSC 21 at [46]-[48]

In describing the jury verdict against the five men, Whealy J stated:

Further, the verdict necessarily meant that the jury was satisfied that, first, each offender intended that acts in preparation would be for an action or threat of action to be carried out or threatened in Australia involving either or both the detonation of one or more explosive devices, or the use of firearms. Secondly, the jury must have been satisfied to the requisite degree that the action or threat of action would itself carry the intention or object of advancing the cause of violent jihad so as to coerce or influence by intimidation the Australian Government to alter or abandon its policies of support for the United States and other western powers in Middle Eastern and other areas involving Muslims. Thirdly, each offender must have intended that the acts in preparation would be for an action or threat of action which, if carried out, would have caused at the very least serious damage to property and would have carried the further risk of physical harm to members of the public, danger to the lives of the public or a section of the public, and the creation of a serious risk to the health or safety of the public or a section of it. Each of these intentions was necessarily established beyond reasonable doubt to the satisfaction of the jury. That is to be recognised in the jury verdict against each offender.¹⁷³

Whealy J further described the criminal enterprise of the men as follows:

The task required by the criminal enterprise was to equip the conspirators individually and jointly, with the knowledge, the ability and the means to prepare for or to enable a terrorist act or acts to be carried out in Australia. The intended purpose of that act or those acts would be to instil terror and panic in the Australian community, and thereby to force the Australian Government to change its alliances and policies overseas. The terrorist act or acts contemplated involved the detonation of one or more explosive devices, or the use of firearms, or both. It was plainly intended that this act or those actions would be of a major kind and that they would be effective to secure the objects of the enterprise.

Now, it is true that the evidence does not establish that any firm conclusion had been reached as to matters such as the precise nature of the action which was to be carried out, or its target or targets. Moreover, the evidence does not establish who would actually prepare the bomb or bombs in its or their final form. Nor does it establish who would detonate the explosive or explosives or in what circumstances that would occur. The prompt action by the authorities meant that the enterprise was interrupted at a relatively early stage of its implementation.¹⁷⁴

¹⁷³ *R v Elomar* [2010] NSWSC 10 per Whealy J at [14]

¹⁷⁴ [2010] NSWSC 10 at [57–58]

Whealy J held the following in regards to the intentions of the offenders:

A consideration of those matters satisfies me beyond a reasonable doubt that each offender intended that the terrorist act or acts, for which preparation was being undertaken, would involve action that, at the very least, was intended to cause serious damage to property. Such act or acts, involving the use of assault ammunition and explosives, would be highly likely to endanger the life of members of the community and, at the very least, create a very serious risk to the health and safety of members of the public. While I cannot be satisfied beyond reasonable doubt that any of the offenders intended directly to kill or take human life, it is clear beyond argument that the fanaticism and extremist position taken by each offender countenanced the possibility of loss of life, if that were to occur. The offenders' collective disdain for the Australian Government and their intolerant animosity towards members of the community who were not of a like mind to themselves made such an attitude inevitable, even if the proposed act or action were limited to an explosion or explosions directly intended to cause serious damage to property. There is not the slightest justification for thinking that the contemplated act or action might have been limited to the setting off of an explosion in some isolated rural area. Each conspirator intended that the ultimate act or terrorist act was to be an effective one, one that would make a significant difference to the Government and the community. It would also be a meaningful expression of their own anger and frustration, as they saw it, directed towards the Australian people's unfair attitude to Muslims.¹⁷⁵

Whealy J also stated the following in regards to the criminal enterprise:

The criminal enterprise was carried out in a manner, which reflected considerable pre-meditation, determination and commitment. It is true that in some respects the attempts to obtain materials were sometimes amateurish and often lacking in cleverness. On occasions, they were inept and clumsy. Those factors did not make the conspiracy any the less dangerous. I accept the Crown's submission that the arrangements were relatively well advanced and were characterised by a clear and logical inevitability, namely that, but for the intervention of the authorities, such arrangements would have been put into effect sooner rather than later. In that sense, the conspiracy was advanced to such an extent that it could not be said its outcome was remote. More work needed to be done, of course, but there is no reason to doubt that, absent the intervention of the authorities, the plan might well have come to fruition in early 2006 or thereabouts. The materials were to hand and recipes for the construction of explosives were available. It certainly could not be said that the prospect of a terrorist act or acts was completely indeterminate as to when it would occur. The driving fanaticism behind the collective mindset of the conspiracy would have ensured that events moved quickly once sufficient material had been assembled, and the authorities' surveillance thwarted or at least diminished.¹⁷⁶

175 [2010] NSWSC 10 at [60]

176 [2010] NSWSC 10 at [68]

APPENDIX 15 AUSTRALIAN GOVERNMENT AND ASIO STATEMENTS ON EXTREME AND VIOLENT ISLAMISM

The Australian Government's Counter-Terrorism White Paper (2010) stated:

The main source of international terrorism and the primary terrorist threat to Australia and Australian interests today comes from people who follow a distorted and militant interpretation of Islam that calls for violence as the answer to perceived grievances. This broad movement comprises al-Qa'ida, groups allied or associated with it, and others inspired by a similar worldview but not formally linked to al-Qa'ida networks. Their constituency, while small in global terms, shows every sign of persisting even if al-Qa'ida's current senior leadership were to be killed or captured.

So far, terrorist attempts in Australia have been disrupted by the coordinated and highly professional efforts of Australia's security agencies and police services, with support from international partners. But this success should not give us any false confidence that all plots here can be discovered and disrupted.

There remain a significant number of Australian extremists radicalised to the point of being willing to engage in violence to advance their political aims. There is also a wider, but still small, group sympathetic to al-Qa'ida's beliefs, some of whom may be further radicalised in the years ahead. Australians sympathetic to terrorist causes also continue to provide financial support for terrorist groups overseas.

Some have travelled overseas, or facilitated the travel of others, to engage in terrorist training and fighting— and it is likely that others will seek to do so in the future. It is also possible that Australians travelling or living overseas will be exposed to extremist ideas, become radicalised, connect to terrorist networks and engage in terrorism. Regardless of where radicalisation occurs, Australian extremists have engaged in terrorist activity, not only in Australia but also in other countries. We expect this to continue.

A number of Australians are known to subscribe to the violent jihadist message. Many of these individuals were born in Australia and they come from a wide range of ethnic backgrounds. The pool of those committed to violent extremism in Australia is not static, over time some move away from extremism while others become extreme.¹⁷⁷

177 Australian Government, *Counter-Terrorism White Paper*, 2010, 8 and 14

APPENDIX 15

ASIO has stated:

Jihadist terrorism remains the most immediate threat. Australia is a terrorist target. We have seen Australians and Australian interests deliberately targeted overseas and, in the past ten years, four mass casualty attacks within Australia have been disrupted only because of the work of intelligence and law enforcement agencies. The people involved have been inspired by an ideology imported from overseas – from the Middle-East and South Asia – but largely they are Australians. Three of these planned attacks would have been the work of groups with little or no contact with al-Qa'ida or its overseas affiliates. Of the nearly 40 individuals prosecuted for terrorism-related offences in Australia, 37 were Australian citizens and 34 were either born here or lived here since childhood.”¹⁷⁸

¹⁷⁸ *ASIO Report to Parliament 2010–11*, 5

APPENDIX 16

JURY DIRECTION TO REDUCE THE RISK OF PREJUDICE

Whealy J, the trial judge in *R v Lodhi* [2006] NSWSC 571 and *R v Elomar* [2010] NSWSC 10, addressed the issue of prejudice and bias in his article “Difficulty in obtaining a fair trial in terrorism cases” (2007) 81 *ALJ* 743. He noted that in selecting the jury for the trial of Lodhi, a Muslim man accused of terrorism offences, more than a dozen people asked to be excused on the basis that they felt they could not judge the matter other than with a prejudiced mind. Justice Whealy observed at 744 that:

I had come to realise 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. One only has to reflect on the frequent barrage of articles and commentary in the media ... involving terrorism and terrorists to know that this is so. In addition, there are endless articles and commentaries in relation to 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 informed.

In *R v Lodhi*, Whealy J gave the following direction to the jury panel:

HIS HONOUR: Members of the jury panel, the process of selection of the jury will commence shortly. Before that happens, however, it is my task to direct the prosecutor to inform you of certain matters relating to the trial. These include the nature of the charge, the identity of the accused, the identity of the principal witnesses who will be called on behalf of the prosecution.

When that is done, my further task is to call on you, as the panel members for the jury, and to ask whether any of you wish to be excused, on the basis that you may consider that you are not able to give impartial consideration to the case.

As you would expect, it is a matter of fairness, commonsense and justice that the 12 members of the panel who are Ultimately selected to be the jury in a criminal trial, and in particular this criminal trial, must be persons who consider that they are capable of giving completely impartial consideration to the trial and to the issues that will arise in it. That is the reason I will be directing the prosecutor to inform you of the nature of the case and to identify the names of witnesses who are to be called.

For example, it might turn out that you know one of the witnesses well. It might turn out that you have worked with one of the witnesses. Or that a member of your family knows one of the witnesses, or has worked with one of the witnesses.

Whatever be the situation, it will be necessary for you to let me know if you feel that your acquaintance with a witness, for example, might prevent you from giving impartial consideration to the issues in the trial. If that were so, you would be entitled

to ask to be excused from the jury panel on that basis, and I would have to make a decision whether I should excuse you or not.

This is a very important part of the process that takes place before the selection of a jury commences. Sometimes it happens, and this has been my experience in a number of trials, that a jury of 12 is selected and, on the following day, or a few days after the trial has been running, one of the jurors comes forward to say: I did not realise that X was going to be a witness in the case, and I am now embarrassed about that situation.

The unfortunate consequence, if that were to happen, members of the jury panel, is that the jury might have to be discharged and the whole process of selection would have to be gone through again. So, for that reason, it is very important that you each give very careful consideration as to whether you are able to give impartial consideration to the trial and to the issues that will arise in the trial.

You have heard the charges brought against the accused that have been read out to you. They were contained in a document which is known, in the law, as the indictment. There are four charges. They were quite lengthy. I will not repeat them in detail again here. However, in shorthand fashion, the accused is charged with the following offences.

First, he is charged that, on 3 October 2003, he collected documents, namely two maps of the Australian electricity supply system, which were connected with the preparation for a terrorist act, namely causing serious damage to the electricity supply system, or part thereof, by the detonation of an explosive or incendiary device or devices, knowing the said connection.

Secondly, he is charged that, on or about 10 October 2003, he did an act in preparation for a terrorist act. The allegation is that he did an act, namely seeking information concerning the availability of materials capable of being used for the manufacture of explosive or incendiary devices in preparation for a terrorist act, and that he did so intentionally.

Thirdly, the accused is charged that, on or about 24 October 2003, he made documents, namely a set of aerial photographs of certain Australian defence establishments, which were connected with preparation for a terrorist act, namely the causing of serious damage to one or other of the establishment by detonation of an explosive or incendiary device or devices, knowing the said connection.

Finally, the fourth charge. On or about 26 October 2003, the accused is charged that he possessed a document containing information concerning the ingredients for and the method of manufacture of poisons, explosives, detonators and incendiary devices, and concerning intelligence connected with preparation for a terrorist act, namely an

action or threat of action involving the detonation of an explosive or incendiary device or devices or the use of a poison or poisons, knowing the said connection.

It is important, members of the jury panel, for me to remind you that the accused has pleaded not guilty to all these charges. This means that he has, in his favour, the presumption of innocence, and it will be necessary, in those circumstances, for the Crown to prove that he is guilty of these offences, and to prove that beyond reasonable doubt.

The accused here is entitled to expect that the jury to be selected in this trial will approach the issues relating to these charges bearing in mind the presumption of innocence he has in his favour and the onus that is placed on the Crown to prove each of the charges beyond reasonable doubt. For that reason, the accused is entitled to expect the jury that is to try him will so do with a collective mind that is impartial and free from prejudice, bias or prejudice.

For that reason, members of the jury, I would ask you to consider very carefully whether, if you were selected, you would be able to approach the particular issues that arise in this trial impartially and without prejudice of any kind. You are to be, if selected, the judges of fact in this trial, and judges throughout the world, and in this country particularly, are required to act impartially and without prejudice of any kind.

I would ask you, therefore, each of you, to examine your own conscience in determining whether or not you are able to act impartially. If, when you have done so, you consider that, for any reason at all, you may not be able to approach the issues in this trial impartially, it will be your duty to come forward, on an individual basis, and ask to be excused.

May I say this to you: Please do not be embarrassed or feel awkward or shy or reluctant about making an application to be excused, if you feel that you should do so. It is far better that we sort out any problems in that regard at this stage, rather than after the selection of the jury and the commencement of the trial.

I will do my best to deal with any applications to be excused sympathetically, and I will do so on a confidential basis, if necessary. In a practical sense, all you have to do is put up your hand. You will be asked to come forward and speak to me from the witness box. As I say, that can be down confidentially, if you wish, but you should not, in any way, feel awkward or hesitant about coming forward and making such an application.

I will now call on the Crown to tell you something of the nature of the case and of the principal witnesses to be called.¹⁷⁹

179 "Difficulty in obtaining a fair trial in terrorism cases" (2007) 81 ALJ 743, Appendix A

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Richard Maiment SC, (as his Honour then was) who was leading counsel for the Crown in *R v Lodhi*, *R v Elomar* and *R v Benbrika* [2009] VSC 21, observed the following in regards to the directions given to the jury in those trials:

[In *Lodhi*] Whealy J fashioned and repeated careful directions to the jury designed to reduce the risk of such prejudice intruding upon their task.....Whealy J has taken a similar approach in presiding over the trial of *R v Elomar* and others.

In the trial of *R v Benbrika* and others which concluded in 2008, Bongiorno J gave and often repeated similar directions to the jury throughout the trial.

It is noteworthy, and perhaps encouraging, that in the trial of *R v Benbrika* and others the jury acquitted four of the accused. The verdicts seemed to be based purely upon the relative strengths and weaknesses of the evidence. The jury acquitted each of those accused against whom there was no direct evidence of knowledge that the relevant organisation was a terrorist organisation. Had the approach of the jury been influenced by prejudice, they had sound bases in the circumstantial evidence upon which they could have convicted each of those four accused, without criticism.¹⁸⁰

¹⁸⁰ Richard Maiment SC, *Reviewing Australia's anti-terrorism laws*, 36th Australian Legal Convention, Perth, 17–19 September 2009, 10.

APPENDIX 17 UNITED NATIONS QUOTES ON MOTIVATION FOR TERRORIST ACTS

United Nations General Assembly resolution 65/34 (2010) (A/RES/65/34), para. 4.

Reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.

United Nations General Assembly resolution 49/60 (1994) (A/RES/49/60), Annex, para. 1 and 2.

The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States.

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.

Security Council resolution 1963 (2010) (S/RES/1963)

Reaffirming that terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed and remaining determined to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level.

Security Council resolution 1822 (2008) (S/RES/1822), preamble.

Reaffirming that terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed.

United Nations Human Rights Council resolution 7/7 (2008)
(A/HRC/RES/7/7), para. 3.

Reaffirms its unequivocal condemnation of all acts, methods and practices of terrorism in all its forms and manifestations, wherever and by whomsoever committed, regardless of their motivation, as criminal and unjustifiable, and renewing its commitment to strengthen international cooperation to prevent and combat terrorism, and in that regard calls upon States and other relevant actors, as appropriate, to continue to implement the United Nations Global Counter-Terrorism Strategy, which, inter alia, reaffirms respect for human rights for all and the rule of law to be the fundamental basis of the fight against terrorism.

United Nations Commission on Human Rights resolution 2004/44
(E/CN.4/RES/2004/44), preamble.

Convinced that terrorism, in all its forms and manifestations, wherever and by whomever committed, can never be justified in any instance, including as a means to promote and protect human rights,

Bearing in mind that the most essential and basic human right is the right to life,

Bearing in mind also that terrorism in all its forms and manifestations creates an environment that destroys the ideal of free human beings enjoying freedom from fear and want, and makes it difficult for States to promote and protect human rights and fundamental freedoms.

APPENDIX 18
WARRANTS ISSUED UNDER DIV 3 OF PART III
OF THE *AUSTRALIAN SECURITY INTELLIGENCE*
ORGANISATION 1979

Year	Questioning Warrant	Questioning and Detention Warrant
2010-11	0	0
2009-10	1	0
2008-09	0	0
2007-08	0	0
2006-07	0	0
2005-06	1	0
2004-05	11	0
2003-04	3	0

APPENDIX 19

LIST OF OFFENCES AND PENALTIES UNDER PART 5.3 OF THE *CRIMINAL CODE ACT 1995*

Offence	Penalty
Criminal Code Act 1995 Part 5.3 Division 101 – Terrorism	
101.1 Terrorist acts	101.1(1) Penalty: Imprisonment for life.
101.2 Providing or receiving training connected with terrorist acts	101.2(1) Penalty: Imprisonment for 25 years (Where the person knows the connection between the training and a terrorist act). 101.2(2) Penalty: Imprisonment for 15 years (Where the person is reckless as to the connection between the training and a terrorist act).
101.4 Possessing things connected with terrorist acts	101.4(1) Penalty: Imprisonment for 15 years (Where the person knows the connection between the thing and a terrorist act). 101.4(2) Penalty: Imprisonment for 10 years (Where the person is reckless as to the connection between the thing and a terrorist act).
101.5 Collecting or making documents likely to facilitate terrorist acts	101.5(1) Penalty: Imprisonment for 15 years (Where the person knows the connection between the document and a terrorist act). 101.5(2) Penalty: Imprisonment for 10 years (Where the person is reckless as to the connection between the document and a terrorist act).
101.6 Other acts done in preparation for, or planning, terrorist acts	101.6(1) Penalty: Imprisonment for life.
Criminal Code Act 1995 Part 5.3 Division 102 – Terrorist organisations offences	
102.2 Directing the activities of a terrorist organisation	102.2(1) Penalty: Imprisonment for 25 years (Where the person knows the organisation is a terrorist organisation). 102.2(2) Penalty: Imprisonment for 15 years. (Where the person is reckless as to whether the organisation is a terrorist organisation).
102.3 Membership of a terrorist organisation	Penalty: Imprisonment for 10 years.
102.4 Recruiting for a terrorist organisation	102.4(1) Penalty: Imprisonment for 25 years. (Where the person doing the recruiting knows the organisation is a terrorist organisation). 102.4(2) Penalty: Imprisonment for 15 years. (Where the person doing the recruiting is reckless as to whether the organisation is a terrorist organisation).

Offence	Penalty
102.5 Training a terrorist organisation or receiving training from a terrorist organisation	<p>102.5(1) Penalty: Imprisonment for 25 years. (This offence relates to organisations not specified by regulations but who otherwise meet the definition of terrorist organisation in paragraph (a) of the definition of terrorist organisation in subsection 102.1(1)).</p> <p>102.5(2) Penalty: Imprisonment for 25 years. (This offence relates to organisations covered by paragraph (b) of the definition of terrorist organisation in subsection 102.1(1) i.e. those proscribed by regulations).</p>
102.6 Getting funds to, from or for a terrorist organisation	<p>102.6(1) Penalty: Imprisonment for 25 years. (Where the person knows the organisation is a terrorist organisation).</p> <p>102.6(2) Penalty: Imprisonment for 15 years. (Where the person is reckless as to whether the organisation is a terrorist organisation).</p>
102.7 Providing support to a terrorist organisation	<p>102.7(1) Penalty: Imprisonment for 25 years. (Where the person knows the organisation is a terrorist organisation).</p> <p>102.7(2) Penalty: Imprisonment for 15 years. (Where the person is reckless as to whether the organisation is a terrorist organisation).</p>
102.8 Associating with terrorist organisations	<p>102.8(1) Penalty: Imprisonment for 3 years.</p> <p>102.8(2) Penalty: Imprisonment for 3 years. (If a person has previously been convicted of an offence under 102.8(1) any further association may attract the offence again, even if it does not occur on 2 or more occasions).</p>
Criminal Code Act 1995 Part 5.3 Division 103- Financing terrorism offences	
103.1 Financing terrorism	Penalty: Imprisonment for life.
103.2 Financing a terrorist	Penalty: Imprisonment for life.

