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Keywords

counter-terrorism, Australia, law, federal

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Australian counter-terrorism offences: Necessity and clarity in federal criminal law reforms

Gregory Rose and Diana Nestorovska*

This article analyses the wide-ranging reform of Australian criminal law related to terrorism. It compares the definition of terrorism utilised in recent legislation to the emerging international standard and tests the new federal crimes against the criteria of legislative necessity and clarity. It concludes that the reforms were in fact necessary in the sense of filling prior gaps and inadequacies in the criminal law but that some of the new provisions lack clarity and will pose conundrums for law enforcement.

INTRODUCTION

This article explores one facet of Australia's complex new system of counter-terrorism laws, namely, the new criminal laws. The objective is to critically examine them against the criteria of necessity and clarity. In relation to each major reform, we seek to apply a legal technical eye to see whether it is duplicative or utile, obscure or clear. In order to do so, we describe and explain the new criminal laws and areas of overlap with extant criminal laws, incidentally providing an overview of the field. Thus, the definition of terrorism is examined, together with proscriptions of specific terrorist acts and proscriptions on participation in terrorist organisations. Also considered are the terrorism preventative orders introduced in 2005 (which formulate new criminal procedures), and certain offences that implement counter-terror treaties, as well as recently reviewed crimes directly against the State such as sedition and treason.

Scope

The body of criminal laws is distinguishable from that of national security laws, which have also been substantially reformed to combat terrorism at a furious pace since 11 September 2001. The broader function of national security laws concerning terrorist activities is mostly preventative, providing diverse powers to gather intelligence, guard national boundaries and secure infrastructure. That wider range of national security laws is located across a diverse range of social management sectors. Elsewhere, we have examined security intelligence powers. Here, our focus is on criminal laws. Criminal laws focus on largely post hoc law enforcement functions, although they do also have preventive functions, through prosecutions of preliminary acts and their deterrent effect, as well as through the issue of specific preventative orders.

This article will not test the reforms against supposedly universally authoritative standards of political morality.¹ That exercise would need first to embark upon an academically impossible demonstration of what those universal standards are. Commentaries assessing Australia's counter-terror law reforms have tended to use as their universal benchmarks the human rights formulations in United Nations instruments.² Those formulations, however, are of uncertain applicability in the counter-terrorism context, as fundamental questions arise as to their own universality, immutability,

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¹ Nor does this article seek to examine the reforms from the standpoint of the moral or political perspectives of the authors, whose personal opinions may diverge respecting the new provisions.

² For example, Michaelsen C, "International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11" (2003) 25 *Sydney Law Review* 275.

interpretation and application.³ Further, even if not fully consistent with provisions of international human rights instruments, effective criminal laws properly adopted within a liberal democracy might well pose a lesser evil than ineffective action, consistent with international human rights instruments, against private coercion through acts of terrorism.⁴ We suggest that a rough but reasonable measure of the legitimacy of counter-terror laws is the extent of their collective approval through a democratic process that enfranchises and effectively reflects the values of the majority of persons who are addressed by those laws.⁵

Analytical method

The criteria against which the counter-terrorism criminal laws are assessed in this article are necessity and clarity.

Necessity

Liberal democracies eschew unnecessary laws.⁶ It is asserted by some that dedicated counter-terrorism measures are not needed, simply because terrorism is the commission of common crimes already proscribed by law.⁷ Within Australia it is no doubt true that some potential terrorist actions are already illegal under criminal law.⁸ These common crimes include murder, kidnapping, assault, grievous bodily harm, hostage taking, hijacking, malicious damage to property, interference with communications, conspiracy, treason, smuggling and fraud. Thus, it can be generalised that a special definition of terrorist crimes is merely an exercise in political relabeling of common crimes. Their differences in scale and motive can be argued not to alter the character of the offensive acts, even if they should affect the sentencing.

We consider that motive and scale can change the character of a violent act. Moreover, a careful examination is more reliable than a generalisation concerning whether criminal laws contain problematic gaps that could be fixed. The purpose of this inquiry is to assess whether the new laws are duplicative, or overlap substantially and inconsistently with existing laws. In assessing the necessity of the new terrorism crimes, we do not pretend to investigate the deeper policy questions concerning whether they are necessary for national security. That is primarily a matter for balanced decision by

³ For a general discussion of institutional manipulation of human rights notions, see Ignatieff M, *Human Rights as Politics and Idolatry* (Princeton University Press, 2001). A deontological approach to human rights, that relies on doctrinaire resort to the moral authority of the United Nations, is especially fraught with moral risk in the field of counter-terrorism due to that institution's longstanding ambivalence concerning the immorality of terrorism.

⁴ National democratic approval often offers a better indicator of legitimacy than compliance with human rights instruments, see Rose G, "The United Nations as a source of legal authority", *Upholding the Australian Constitution*, Vol 17 (2005 Proceedings of the Samuel Griffith Society) pp 163-174. As to an ethical approach to counter-terrorism formulated through a national political process, see Ignatieff M, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton University Press, 2004).

⁵ Regular election of popular representatives forms the usual method of democratic enfranchisement. Following introduction of the 2002, 2003 and 2004 counter-terror law reform packages into the Australian Commonwealth Parliament, the incumbent government was re-elected in 2004 with an increased majority in the lower house and a majority in the upper house (the first government majority in the upper house in 20 years). A public poll conducted later indicated that a 62% majority of Australians supported expansion of the counter-terrorism powers of national security agencies (Interview with Prime Minister John Howard, *Meet The Press*, Channel Ten Television, 24 July 2005, transcript available at <http://www.ten.com.au/library/documents/MTP24075.doc> viewed 19 May 2006).

⁶ Freedom from excessive government regulation, ie negative freedom, is a central tenet of liberalism. "There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism." See Mill JS, "On Liberty" in Robson JM (ed), *Collected Works of John Stuart Mill*, Vol XVIII (University of Toronto Press, Routledge & Kegan Paul, 1977) p 220.

⁷ See, eg Commonwealth, Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 (No 2); Suppression of the Financing of Terrorism Bill 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002; Border Security Legislation Amendment Bill 2002; Telecommunications Interception Legislation Amendment Bill 2002* (2002). The Law Council of Australia argues that a separate terrorist offence is not necessary: p 20. The Senate Committee also lists all the other submissions that argued that the need for a new terrorism offence had not been demonstrated and that existing offences were adequate: Ch 3, fn 1.

⁸ Examples are given in Ricketts A, "Freedom of Association or Guilt by Association: Australia's New Anti-Terrorism Laws and the Retreat of Political Liberty" (2002) 6 *Southern Cross University Law Review* 133 at 145.

democratically representative government. The roles of security policy experts, law enforcement agencies and civil liberties specialists is to advise in their areas of competence rather than to pronounce public policy.

Clarity

To assess clarity, individual legislative provisions are examined to determine whether they are sufficiently specific, certain, readily understood and practicable to precisely achieve their stated objects. This involves analysis of the actus reus (conduct) and mens rea (intention) requirements of the new crimes for clarity of definition. If not specific and certain, the law is open to abuse, and if not readily understood and practicable, it is not utile.

Commentators have articulated profound misgivings over the opportunities that the reforms present for “unprecedented powers to outlaw, interrogate and jail opponents of the ruling political establishment”.⁹ While it should not be assumed that the government of a liberal democracy such as Australia would seek to abuse its powers, it is true that “eternal vigilance is the price of liberty”. Commentators’ fears make clear delimitation of the new laws all the more important.

DEFINITION OF TERRORISM

A legal definition of terrorism is necessary to provide a reference for the triggering of criminal law enforcement powers. However, terrorism has been difficult to define in practice because it has been plagued by political and ideological controversy in public discourse. Many argue that “one man’s terrorist is another man’s freedom fighter”.¹⁰ While this aphorism might legitimately be employed to withhold judgments of the political ideologies that motivate violence, it should never be used as a shield from prosecution for the actual acts of violence. To do so allows massacres with impunity and undermines any legal order that protects public security and human dignity.

While highly politicised, the question of what constitutes terrorism is not as legally complex as supposed. The central principles emerging in international practice are that an act of terrorism is distinct from other violent crimes committed by private individuals due to its contextual elements of political conflict. The requisite elements, all of which must be present, can be analysed into categories of violent crime and political conflict, set out in the following table:

| Violent Crime | Political Conflict |
|-----------------------------------|-------------------------------|
| Use or threat of violence | Part of a campaign |
| Conducted by non-State actors | Strategically generating fear |
| Directed against civilian targets | For a political purpose |

These elements form into the following formulation: “the use or threat of violence, directed at civilians and not overtly conducted by an official arm of State, as part of a strategic campaign aimed to induce a state of fear for the purpose of gaining political advantage”.

This general definition applies to acts that are transnational in nature as well as to domestic acts. It describes the violent conduct, while recognising without prejudging its motivating political purpose. Its essence has been adopted by the United Nations, albeit only to combat the financing of terrorist

⁹ Head M, “Counter-terrorism Laws Threaten Fundamental Democratic Rights” (2002) 27(3) *Alternative Law Journal* 125. To that effect, “[c]ounter-terrorism is frequently a Trojan horse for state terror in the form of police violence, torture, sexual assault, illegal arrest and detention, and legal arrest and detention based on ethnicity, race, religion or class background. States, through the military and the police, have enormous capacity to coerce citizens and inflict violence on individuals: it should not be assumed that this power will be used benevolently”. See also McCulloch J, “War at Home: National Security Arrangements Post 11 September 2001” (2002) 27(2) *Alternative Law Journal* 90.

¹⁰ Ganor B, *Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter?*, International Policy Institute for Counter-Terrorism website, <http://www.ict.org.il/aecommerce/c1410/1540.php> viewed 16 January 2007.

activities, rather than to proscribe the activities themselves.¹¹ It is consonant with the national definitions adopted in Australia and other jurisdictions, such as Canada¹² and the United Kingdom.¹³

The specification of non-State actors and of civilian targets warrants some explanation. The political use of violent force by a State against a civilian population is a breach of well established international law. When conducted by a State in an armed conflict, such violent acts against civilians constitute war crimes under international law.¹⁴ Outside of armed conflict, violent acts conducted by a State against civilians are also categorised under international laws, although as crimes against humanity or breaches of human rights or breaches of State responsibility, depending on the circumstances.¹⁵ These breaches of international law cannot be prosecuted against the State itself in foreign national courts, where impugned State actors enjoy sovereign immunity, but may be the subject of other international legal processes.¹⁶

In contrast, a wide range of terrorist acts, ie the political uses of violent force by private individuals against civilians, is not yet specifically proscribed under international law¹⁷ but can be prosecuted in national courts under applicable national laws. Emerging international consensus on the definition of terrorism still relies on its criminalisation under various national laws¹⁸ and terrorist acts are, therefore, by definition committed by non-State actors.

Australian counter-terrorism laws

The Commonwealth Parliament has no general power under s 51 of the *Constitution* to legislate across the Australian States and Territories with respect to crime. However, other direct or indirect powers, such as the defence, external affairs, aliens and trade and commerce powers, can support legislation dealing with crime. Under s 51(xxxvii) of the *Constitution*, States and Territories are able to refer legislative powers to the Commonwealth and, in 2002, State and Territory leaders enacted legislation to refer their powers relating to terrorist acts to the Federal Government.¹⁹ This gave the

¹¹ See *International Convention for the Suppression of the Financing of Terrorism* [2002] ATS 23 (9 December 1999), Art 2.1, which provides: "Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the Annex; or (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act." The Security Council provides a general definition of terrorism as criminal acts committed by individuals, albeit only within the range of criminal activities proscribed by United Nations treaties. See Resolution 1566 (8 October 2004) [3].

¹² See Canadian *Criminal Code*, Pt II.1 and notably, the definition of "terrorist activity" in s 83.01. Like Australia, Canada also excludes "advocacy, protest, dissent or stoppage of work" that is not intended to cause death or serious injury, endanger life or pose a significant risk to public health or safety.

¹³ *Terrorism Act 2000* (UK), s 1 (see n 37).

¹⁴ As to the legal nature of the circumstances that give rise to a state of armed conflict, see the *Tadic Case* (IT-94-1) discussed in Cassese A, *International Criminal Law* (Oxford University Press, 2003) p 52. To the extent that an armed conflict is an international or civil war, the State's commission of violence against civilians acts falls under the international laws of armed conflict.

¹⁵ These international laws are addressed to the State and its officials and not to private persons. Enforcement can be by international or domestic tribunals. For more detailed discussion of this matter, see Rose G and Nestorovska D, "Towards an ASEAN counter-terrorism treaty" (2005) 9(1) *Singapore Yearbook of International Law* 157.

¹⁶ For example, immunity is suspended in prosecutions before the International Criminal Court, which has jurisdiction over crimes against humanity (*Statute of the International Criminal Court*, Arts 5, 7, 25-28).

¹⁷ A subgroup of terrorist acts are proscribed, such as crimes against humanity and transnational actions proscribed by the United Nations counter-terrorism treaties.

¹⁸ Security Council Resolution 1566 (8 October 2004), referred to at n 11.

¹⁹ State and Territory referring Acts: *Terrorism (Commonwealth Powers) Act 2002* (NSW); *Terrorism (Northern Territory Request) Act 2003* (NT); *Terrorism (Commonwealth Powers) Act 2002* (Qld); *Terrorism (Commonwealth Powers) Act 2002* (SA); *Terrorism (Commonwealth Powers) Act 2002* (Tas); *Terrorism (Commonwealth Powers) Act 2003* (Vic); and *Terrorism (Commonwealth Powers) Act 2002* (WA).

Commonwealth the legislative power to amend the *Criminal Code* to include counter-terrorism laws and to apply those laws in the States and Territories.²⁰ On 27 September 2005, the Council of Australian Governments (COAG) held a special meeting to consider expanding Australia's counter-terrorism laws to encompass, inter alia, the use of control and preventative detention orders to restrict the movement of suspected terrorists.²¹ COAG unanimously agreed to the introduction of such laws, as set out in the COAG Communiqué,²² and State and Commonwealth leaders have since prepared legislation to give effect to the agreement.²³

The majority of the current counter-terrorism laws are located in a new Pt 5.3 of the *Criminal Code*, which applies to referring States not only by virtue of s 51(xxxvii) of the *Constitution* but also other Constitutional heads of power.²⁴ For any non-referring States, therefore, Pt 5.3 applies by virtue of Constitutional heads of power other than s 51(xxxvii).²⁵ Thus, Pt 5.3 applies to all terrorist acts and preliminary acts occurring within Commonwealth and State jurisdictions.²⁶ The *Criminal Code* was enacted largely as a model for States and Territories to follow for the purpose of achieving uniform criminal laws across all jurisdictions in Australia. Because terrorist networks and acts often span different jurisdictions, the enactment of directly applicable national laws is appropriate. That said, the National Counter-Terrorism Plan (NCTP) stipulates that jurisdictional differences in the laws of criminal procedure that affect prosecutions will be considered at the outset of an investigation.²⁷ *Criminal Code* s 100.6(1) provides that Pt 5.3 is to be read concurrently with State and Territory laws. However, in the event of any inconsistency it can be assumed that s 109 of the *Constitution* will operate to invalidate the State laws to the extent of the inconsistency.

Australian definition of terrorist acts

Until 2002, the expression "terrorism" appeared in only a handful of Commonwealth statutes of marginal relevance.²⁸ Prior to 1986, the term was included in a list of matters that related to security under s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (the ASIO Act).²⁹ But in 1986, matters of terrorism and subversion were deleted from that Act and merged into the broad crime

²⁰ *Criminal Code*, s 100.2(1) and (3). The *Criminal Code* is set out in the Schedule to the *Criminal Code Act 1995* (Cth). The referral procedure that was followed is discussed in O'Neill J, Rice S and Douglas R, *Retreat from Injustice: Human Rights Law in Australia* (2nd ed, Federation Press) pp 252-254.

²¹ See COAG website: <http://www.coag.gov.au/meetings/270905/#Strengthening> viewed 22 November 2005. These laws are discussed below at nn 152ff. State authority for amendment did not require amendments to State referral laws.

²² See COAG website: <http://www.coag.gov.au/meetings/270905>.

²³ See COAG website: <http://www.coag.gov.au/meetings/270905> and *Proposals to strengthen Australia's counter-terrorism laws – 2005*, Current Issues, Parliament of Australia website: <http://www.aph.gov.au/library/intguide/LAWTerrorismLaws.htm> viewed 13 December 2005. Acts that have been passed by the State Parliaments include *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW); *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) Amendment Act 2005* (Vic); and *Terrorism (Extraordinary Powers) Act 2005* (WA). The *Terrorism (Extraordinary Police Powers) Bill 2006* is before the Australian Capital Territory Parliament.

²⁴ *Criminal Code*, s 100.3(1).

²⁵ *Criminal Code*, s 100.3(2). However, as can be seen in n 19, all States have referred their powers.

²⁶ *Criminal Code*, s 100.4(2).

²⁷ National Counter-Terrorism Plan, Item 6. See National Security Australia home page, Commonwealth Attorney-General's Department website: <http://www.ag.gov.au/www/nationalsecurityHome.nsf/HeadingPagesDisplay/Home?OpenDocument> viewed 30 November 2004.

²⁸ For example, *Telecommunications Act 1997* (Cth), *Petroleum (Submerged Lands) Act 1967* (Cth), *Crimes Regulations 1990* (Cth) and *Air Navigation Regulations 1947* (Cth). Indeed, the only piece of legislation in Australia that specifically dealt with "terrorism" as a criminal act was the Northern Territory *Criminal Code*. See Hancock N, *Terrorism and the Law in Australia: Legislation, Commentary and Constraints*, Research Paper No 12 2001-2002, Law and Bills Digest Group, 19 March 2002, Parliament of Australia website: <http://www.aph.gov.au/library/pubs/rp/2001-02/02rp12.htm> viewed 22 November 2005.

²⁹ Parliament of Australia, Bills Digest No 128 2001-02, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, Parliament of Australia website: <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd128.htm> viewed 19 May 2005.

of “politically motivated violence”.³⁰ In 2003, “politically motivated violence” was redefined to explicitly include “acts that are terrorism offences”.³¹ Notably, in the primary relevant policy, the National Counter-Terrorism Plan, “terrorism” was, until recently, defined simplistically as “an extreme form of politically motivated violence”.³²

The terrorist attacks of 2001 in New York and 2002 in Bali forced an initial critical reassessment of Australia’s counter-terrorism measures.³³ A major concern was that existing legal offences and powers were not drafted specifically to address terrorism and, if utilised, could be vulnerable to legal challenge for being inapplicable.³⁴ For example, it is most unlikely that the existing statutory offence of murder would have supported Australian prosecutions if the suspects in the case of the murder of 88 Australians in the Bali bombings came into Australian custody,³⁵ given that the perpetrators were not Australian nationals and all events occurred extraterritorially. The 2002-2003 reforms were followed by further reviews in the wake of the Madrid 2004 and London 2005 terrorist bombings.

The *Security Legislation Amendment (Terrorism) Act 2002* (Cth) amended the *Criminal Code*, to define a “terrorist act” and make it an offence.³⁶ The amended Code’s definition was adapted from the *Terrorism Act 2000* (UK)³⁷ and conforms in its essence to the model definition discussed above. Thus, it defines serious acts of violence while placing them in the context of political conflict. In the amended *Criminal Code*, “terrorist act” means any action or threat of action that falls into s 1(2) of the provision, but does not fall under s 1(3). An act falls within s 1(2) if the action or the threat of action

³⁰ Bills Digest No 128, n 29. See also Hancock, n 28.

³¹ See *Australian Security Intelligence Organisation (Terrorism) Amendment Act 2003* (Cth), Sch 1, cl 4.

³² Bills Digest No 128, n 29. Also, National Counter-Terrorism Plan, n 27, Item 4 now defines “terrorist act” as “an act or threat, intended to advance a political, ideological or religious cause by coercing or intimidating an Australian or foreign government or the public, by causing serious harm to people or property, creating a serious risk of health and safety to the public, disrupting trade, critical infrastructure or electronic systems.” This definition more or less adopts the definition of “terrorist act” introduced under the *Criminal Code*, s 100.1.

³³ The introductory section of the *Report of Australia to the Counter-Terrorism Committee of the United Nations Security Council pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001* noted that, following the events of 11 September 2001, Australia “convened taskforces to review Australia’s systemic and legislative preparedness to prevent or to respond to such an attack in Australia and to freeze any Australian assets of terrorists and their sponsors”. See Department of Foreign Affairs and Trade website: http://www.dfat.gov.au/icat/report_un_securitycouncil_21_december_2001.html viewed 22 November 2005.

³⁴ Hancock, n 28.

³⁵ Contra, see the submission to the Senate Legal and Constitutional Legislation Committee of the Law Council of Australia, that argued that existing crimes like murder would cover acts of terrorism and that a specific offence of terrorism was not necessary: *Consideration of Legislation Referred to the Committee*, n 7.

³⁶ *Criminal Code*, s 101.1. The *Terrorism (Police Powers) Act 2002* (NSW), *Terrorism (Emergency Powers) Act 2003* (NT) and *Terrorism (Community Protection) Act 2003* (Vic) adopt the Commonwealth definition of “terrorist act”.

³⁷ See *Terrorism Act 2000* (UK). Section 1 states that terrorism is an act falling within s 1(2), which is designed to further a political, religious or ideological cause and the use or threat of which also “is designed to influence the government or to intimidate the public or a section of the public”. Section 1(2) includes serious violence against a person or property, or that endangers a person’s life, creates a serious risk to the health and safety of the public or seriously interferes with systems. Unlike the Commonwealth *Criminal Code* and its Canadian counterpart (see n 12), the United Kingdom provision does not entail any exemptions to protect civil liberties. Since the passage of the *Terrorism Act 2000* (UK), other counter-terrorism legislation has been promulgated in the United Kingdom. The *Anti-Terrorism, Crime and Security Act 2001* (UK) introduced provisions relating to freezing terrorist assets, the detention of “international terrorists” in Pt 4, and strengthening controls over the nuclear and aviation industries as well as dangerous substances: see Explanatory Notes for the *Anti-Terrorism, Crime and Security Act*, Office of Public Sector Information: <http://www.opsi.gov.uk/acts/en2001/2001en24.htm> viewed 22 November 2005. The power to impose control orders over all terror suspects, whether citizens or non-citizens, domestic or international, was enacted in the *Prevention of Terrorism Act 2005* (UK) – see Home Office website: <http://security.homeoffice.gov.uk/counter-terrorism-strategy/legislation/pta/> viewed 22 November 2005. Finally, the *Terrorism Bill 2005* (UK) was introduced in the United Kingdom Parliament on 12 October 2005. If enacted, it would create the offence of glorifying terrorism, give the authorities powers to strip naturalised citizens of citizenship for engaging in extremist conduct, extend the use of control orders as well as allow the pre-charge detention of a terrorist suspect for up to 90 days. The House of Commons rejected the Bill: see Explanatory Note to the *Terrorism Bill 2005* at Office of Public Sector Information: <http://www.publications.parliament.uk/pa/cm200506/cmbills/055/en/06055x--htm> and Home Office: <http://security.homeoffice.gov.uk/counter-terrorism-strategy/legislation/proposed-legislation/> viewed 22 November 2005.

would cause death or serious physical harm to a person or serious damage to property, endanger another person’s life, create a serious health or safety risk to the public or seriously interfere with, disrupt or destroy an electronic system. The political conflict context is set by requiring that the act also must be done with the intention of advancing a political, religious or ideological cause as well as with the intention of coercing or intimidating the government of the Commonwealth or a State, or intimidating sections of the public. This definition eschews partisan exceptions for particular political, religious or ideological causes. Section 1(3) includes a safeguard for civil liberties. It excludes advocacy, protest, dissent or industrial action from the operation of the Act, so long as such action is not intended to cause serious harm or death to a person, endanger another person’s life or create a serious health or safety risk to the public.

Commonwealth Criminal Code, s 100.1

| Legal Characterisation | Terrorist activity (s 100.1(2)) | Legitimate political action (s 100.1(3)) |
|-------------------------------|--|--|
| Action | <ul style="list-style-type: none"> • serious physical harm to a person; OR • cause death or endanger another’s life; OR • serious property damage; OR • serious public health or safety risk; OR • serious interference, disruption or destruction of an electronic system. | <ul style="list-style-type: none"> • advocacy; • protest; • dissent; • industrial action. |
| Intention | <ul style="list-style-type: none"> • advancing a political, religious or ideological cause; AND • coercing or intimidating the government; OR • intimidating sections of the public. | <ul style="list-style-type: none"> • NOT intended to cause serious harm or death to a person, endanger another person’s life or create a serious health or safety risk to the public. |

The intention of the perpetrators to coerce governments and intimidate the public was considered by Parliament to pose sufficient threat to the fabric of the social and democratic system for related acts of violence to be labeled as crimes more immoral than other more common random societal tendencies to violence. This consideration reflects a wider trend in Commonwealth legislation to relabel some violent crimes as particularly odious. The offences of genocide and crimes against humanity recently introduced into the *Criminal Code* by the *International Criminal Court Act 2002* (Cth) are examples.³⁸ The offences relabel violent acts otherwise criminalised, inter alia, as murder, instead as genocide or crimes against humanity if committed, respectively, with the intention to destroy a particular national, ethnical, racial or religious group, or with the intention or knowledge that the murder is part of a widespread or systematic attack directed against a civilian population.³⁹ These most heinous crimes share a similar mens rea, that is, the motivation includes intention to violently change a social order. In that respect, they do not overlap with other extant crimes of violence.

Weaknesses in clarity and specificity in the above definition arise due to its failure to confine its operation to non-State actors and to specifically exclude the political use of violent force by States

³⁸ Triggs G, “Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law”, (2003) 25(4) *Sydney Law Review* 507.

³⁹ A person who kills one or more persons from a particular national, ethnical, racial or religious group with the intention to destroy that group is described as committing genocide (*Criminal Code*, s 268.3) and a person who murders one or more persons with the intention or knowledge that the murder is part of a widespread or systematic attack directed against a civilian population, commits a crime against humanity (s 268.8).

themselves. This failure leads to ambiguity concerning the implicit application of proscriptions against terrorist crimes to foreign and Australian armed service personnel or senior officials. Foreign personnel and officials are protected by sovereign immunity (and are more appropriately subject to international law constraints), rendering prosecution of them impracticable and inappropriate.⁴⁰ Conversely, it would not have been the wish of Parliament that Australian personnel engaged overseas on government-authorised military operations should be vulnerable to prosecution by the Director of Public Prosecutions (as discussed below in relation to extraterritoriality). Although these examples are far-fetched, legislative efforts to promote certainty of application by specifying safeguards against executive abuse of the law and by specifying the circumstances of extraterritorial application have not been as thorough as they could be.

Safeguards

Concern has been expressed that the Australian definition of a terrorist act encompasses “a wide range of political activity, such as planning or participating in a protest outside government buildings or facilities where damage is alleged to have occurred”.⁴¹ In response, it should be noted that the damage must be “serious”. Although the term “serious” is not unusually ambiguous, the provision is silent as to its meaning and uncertainty does arise.⁴² For example, if a computer hacker programmed the graffiti “No War!” on the Department of Defence home website would the person properly be regarded as committing a terrorist act? How serious is it? Further, the absence from the exemption for legitimate political protest (in *Criminal Code*, s 100.1(3)) of damage to “property or to an electronic system” excludes the hacker’s graffiti from the safeguard. Thus, if the damage is considered “serious” because the website crashes, there is no exemption from having committed a terrorist act under s 100.1(2). It seems incongruous that there is no exemption for unintentional serious damage to property or an electronic system, but that there is an exemption for unintentionally causing serious injury, death or a public health or safety risk. On this aspect, s 100.1(3) appears unclear and unsatisfactory.

Extraterritoriality

Section 100.4 of the *Criminal Code* gives the definition of terrorist acts extraterritorial application. The terrorist act need not be committed in Australia and any reference to the public includes any public outside of Australia. This would mean that, should foreign terrorists who have committed terrorist acts in other countries enter Australian territory, the Commonwealth government has the power to arrest and prosecute them. The extraterritorial reach of the provision is clearly necessary. The 105 Australians killed by terrorists since the year 2000 were all murdered in foreign jurisdictions.⁴³

Extraterritorial application also creates a technical ambiguity, however, due to the implied inclusion of State actors. For example, Australian military action undertaken overseas may cause death, harm, damage, etc, and fall within the definition and outside the exception, irrespective of whether it is legitimately conducted (eg military operations causing property damage that had the unintended effect of intimidating those elements of the Iraqi public supporting the Baathist insurgency in 2003). Although the defence of lawful authority would apply,⁴⁴ it is unfortunate that Australian

⁴⁰ See International Court of Justice, *Arrest warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, <http://www.icj-cij.org/iccjwww/idocket/iCOBE/iCOBEframe.htm> viewed 14 May 2006; Boister N, “The ICJ in the Belgian Arrest Warrant Case: Arresting the Development of International Criminal Law”, (2002) 7 *Journal of Conflict and Security Law* 293-314; Cassese A, “The Belgian Court of Cassation v the International Court of Justice: the Sharon and others case” (2003) 1(2) *Journal of International Criminal Justice* 437.

⁴¹ Head, n 9, p 122.

⁴² These concerns were noted in the *Consideration of Legislation Referred to the Committee*, n 7, p 35.

⁴³ There was one Australian killed in the terrorist attack on the Sbarro Restaurant in Jerusalem on 9 August 2001; 10 in the World Trade Centre attacks on 11 September 2001; 88 in the Bali attacks on 12 October 2002; one in the Jakarta Marriott bombing on 5 August 2003; one in the London bombing on 7 July 2005 and four in the Bali bombings on 1 October 2005. Further analogy may be drawn with the extraterritorial reach of war crimes legislation: a war criminal who resides in Australia may never have committed crimes against Australians, but it is accepted that he or she could be prosecuted in Australia for those acts overseas.

⁴⁴ *Criminal Code*, s 10.5.

military action might nevertheless otherwise fall within the definition of terrorist acts.⁴⁵ In relation to foreign personnel located within Australian jurisdiction, on the other hand, it is possible that the current Commonwealth formulation of extraterritorial application could see the Director of Public Prosecutions called upon to bring to reluctant Australian courts the invidious task of judging whether foreign ministers and military personnel, as sovereign actors, are culpable for terrorist acts.⁴⁶

To clarify the scope of the definition, an elaboration to the exception in s 100.4(3) needs to be inserted to exclude legitimately conducted military acts. The more effective approach would be to confine the definition to non-State actors by specifically excluding armed service personnel and officials acting overtly in an official State capacity.⁴⁷

Proscribed terrorist acts

The Australian definition of terrorist acts in s 100.1 of the *Criminal Code* provides the key to a toolbox that contains more severe penalties, preliminary and related offences and stronger preventative powers than for common acts of violence considered less threatening to social democratic institutions. Inside the toolbox, the defined terrorist acts are proscribed as offences and severe penalties are set out. In addition, subsidiary categories of supporting preliminary acts, as well as violence acts against Australians overseas and hoaxes, are proscribed. Also related to preparations for terrorist acts are additional crimes concerning terrorist organisations and funding terrorist activities. Due to the complex process of listing terrorist organisations and the separate specific provisions enacted concerning funding, these offences are separately discussed below.

Acts of or preliminary to violence

Under s 101.1, the commission of any act or threat of action set out in the definition of terrorism in s 100.1 is an offence attracting life imprisonment.⁴⁸

Related preliminary acts are set out as lesser offences. These include supporting acts that relate to terrorist acts but do not themselves mature into terrorist acts. They are giving or receiving training or advice connected with terrorist acts,⁴⁹ possessing things related to terrorist acts,⁵⁰ collecting or making documents to facilitate terrorist acts⁵¹ or any other action in the planning or preparation of a terrorist act.⁵² A person commits the preliminary offence even if a terrorist attack does not actually eventuate, the training and preparation is not connected with a specific terrorist act, or the training and

⁴⁵ As demonstrated above, breaches of international humanitarian law by sovereign actors would more appropriately be dealt with as crimes against humanity or war crimes. In practice, allegations against Australian Defence Forces personnel would usually be dealt with as matters of military discipline by Australian courts martial rather than the Director of Public Prosecutions. Concerning Australian prosecution of its own military personnel, see Report of the Senate Foreign Affairs, Defence and Trade Committee, *Effectiveness of Australia's Military Justice System*, 2005 http://www.aph.gov.au/SENATE/committee/FADT_CTTE/miljustice/index.htm viewed 14 May 2006. Application of the definition to Australian nationals engaged in foreign armies or militias has been specifically addressed with greater clarity in the legislative reforms.

⁴⁶ See n 40.

⁴⁷ Another approach would be to qualify the definition's application to extraterritorial acts causing death, harm, damage, etc, so that only those acts deliberately directed against non-military targets are covered. That is, attacks overseas directed primarily against military targets would not be covered, but attacks directed primarily against civilians and civilian infrastructure would fall within the extraterritorial application of the *Criminal Code* definition. Both approaches are adopted in the Canadian *Criminal Code*, Pt II.1. Unlike the Australian definition of "terrorist act", the Canadian definition excludes from its scope "an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law".

⁴⁸ *Criminal Code*, s 101.1.

⁴⁹ *Criminal Code*, s 101.2.

⁵⁰ *Criminal Code*, s 101.4.

⁵¹ *Criminal Code*, s 101.5.

⁵² *Criminal Code*, s 101.6.

preparation or engagement is connected with more than one terrorist act.⁵³ Thus, general preparations are proscribed even though a specific target and date have not been fixed upon.⁵⁴

These provisions bear an indirect relationship to the extant common laws of attempt, conspiracy and accessorial liability because they entail complicity and common purpose.⁵⁵ Although the preparatory acts provisions overlap aspects of the extant laws of attempt, conspiracy and accessorial liability, the new provisions are not redundant. A major point of departure between them is that, generally, attempt, conspiracy and accessorial liability require specific, identified acts to be planned or attempted,⁵⁶ whereas criminal acts preparatory to terrorism do not. In contrast, preparatory terrorist acts, such as acquiring information on potential targets, attract criminal responsibility even though they take place before a concrete plan to execute a specific terror act has been set. Further, when compared to the common law, delimitation of the preliminary acts crimes is more precise and utile.

On first examination, a shortcoming in the preliminary acts provisions concerns a lack of clarity as to whether responsibility extends to anyone who assists in the commission of a terrorist act, no matter how remote their connection. However, the requirement of mens rea would seem to provide a practical limit to the extension of criminal responsibility. There is a presumption that mens rea is an essential ingredient in every statutory offence.⁵⁷ The presumption is displaced only where a court construes the wording and subject matter of the statute as indicating that absolute liability was to be imposed.⁵⁸ Given the explicit importance of mens rea in the definition of terrorism, courts are unlikely to find that the legislative purpose was to impose liability irrespective of mens rea. Thus, in practice, increasing remoteness of the supporting act is likely to be directly proportional to the increasing difficulty of proving mens rea. If no mens rea is established, then it is clear that no offence is proved.

A layer of confusion as to the outer limits of the offences relating to preliminary acts is added when the extant formulations of the common law crimes of attempt, conspiracy and accessorial liability are applied to the preparatory crimes. The scope of liability for inchoate acts would be extended to unprecedented and unworkable levels. For example, if a person were charged with conspiracy to receive training for a terrorist act under s 101.2(1) of the *Criminal Code*,⁵⁹ the prosecution would need only to prove an agreement to receive training together with some kind of overt act for the purpose of receiving training.⁶⁰ In practice, however, the outer limits of the crimes of

⁵³ *Criminal Code*, ss 101.2(3), 101.4(3)-101.6(3). The provisions that a terrorist attack need not occur, that training and preparation need not be connected with a specific terrorist act or the training, and that preparation or engagement can be connected with more than one terrorist act, were introduced into *Criminal Code*, ss 101.2(3), 101.4(3)-101.6(3) by the *Anti-Terrorism Act 2005* (Cth).

⁵⁴ The *Anti-Terrorism Act 2005* (Cth) amendments made possible the arrests on 8 November 2005 of 15 men in Sydney and Melbourne charged with preparing to commit a terrorist act although the actual time and location of the anticipated attack had not yet crystallised. See Silvester J, Munro I and Gibbs S, "Enough to build 15 bombs", *Sydney Morning Herald Online* (10 November 2005), <http://www.smh.com.au/articles/2005/11/09/1131407700481.html?from=top5> viewed 22 November 2005.

⁵⁵ *Criminal Code*, ss 11.1, 11.2, 11.5. "Attempt" covers two situations: the accused "has performed acts in pursuance of the planned crime but, before completing all the required acts, is interrupted and prevented from completing the remaining acts" or the accused "has performed all the acts considered necessary to commit the planned crime but fails in his/her execution". Conspiracy is committed when two or more people agree to commit a crime. Accessorial liability exists where a person does not agree to commit a crime but "aids, abets, counsels or procures" the commission of a crime by another person. See Brown D, Farrier D, Egger S and McNamara L, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (3rd ed, Federation Press, 2001) pp 1261, 1278, 1324.

⁵⁶ The formulations of the outer limits of these common law crimes are not especially firm but a good example is the crime of attempt. The *Criminal Code* states that a person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed (s 11.1(1)). However, for the person to be guilty, the conduct must be more than merely preparatory (s 11.1(2)).

⁵⁷ *He Kaw Teh* (1985) 15 A Crim R 203 extracted in Brown et al, n 55, p 385.

⁵⁸ Brown et al, n 55.

⁵⁹ Brown et al, n 55, p 1310.

⁶⁰ Under the *Criminal Code*, a person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months is guilty of the offence of conspiracy to commit that offence and is punishable as if the substantive offence had been committed (s 11.5(1)). To be convicted of conspiracy, at least two people must have made an agreement, intended to

attempt, conspiracy and accessorial liability, as applied to the preliminary acts offences, would be marked by the impracticability of proving mens rea which must be proved beyond a reasonable doubt.

Finally, in relation to preparatory acts, we note that overlap with the longstanding crime of espionage, discussed below, is very limited.

Extraterritorial violence against Australians

Criminal jurisdiction over terrorist acts extends extraterritorially, as noted above.⁶¹ Where it is not possible to prove the full political intention necessary for the mens rea of a terrorist act, then the evidence might yet be sufficient to establish intention to commit common crimes of violence causing death or injury. Thus, the *Criminal Code Amendment (Offences Against Australians) Act 2002* (Cth) inserted various offences in the *Criminal Code* relating to the murder or injury of Australians overseas. It is now an offence for a person to engage in conduct that kills an Australian citizen or resident, where the accused so intends, or is reckless as to causing the death.⁶² Similar offences exist in relation to manslaughter,⁶³ intentionally causing serious harm⁶⁴ and recklessly causing serious harm.⁶⁵ These provisions are not counter-terror laws per se, but are apt in light of the transnational and globalised nature of contemporary crime and given that the places where Australians have recently been victims of terrorist acts are all extraterritorial.

Common law criminal jurisdiction is traditionally premised on locale and does not extend beyond the limits of territory.⁶⁶ The extraterritorial nature of these new offences take a big step towards broader, nationality-based jurisdiction in Australian criminal law,⁶⁷ which is based on the “passive personality” principle accepted in international law.⁶⁸ The Commonwealth Attorney-General’s written consent is required prior to commencing this new type of proceeding.⁶⁹ The new offences do not duplicate others and are clear enough. However, the new legislation’s silence is curious concerning attacks committed overseas causing serious damage to Australian public property or electronic systems, in parallel with the definition of terrorist acts. Although international law would permit the proscription of such acts on the basis of the “protective principle” of extraterritorial jurisdiction, deliberate property damage is not covered by the new legislation.⁷⁰

carry out the offence and committed an overt act pursuant to the agreement (s 11.5(2)). Often, the substantive offence and conspiracy to do it are charged together, as the prosecution might succeed on conspiracy if unable to prove the substantive offence (Brown et al, n 55, p 1310).

⁶¹ See n 43.

⁶² *Criminal Code*, s 104.1.

⁶³ *Criminal Code*, s 104.2.

⁶⁴ *Criminal Code*, s 104.3.

⁶⁵ *Criminal Code*, s 104.4.

⁶⁶ *Lipohar v The Queen* (1999) 200 CLR 485; [1999] HCA 65. See also Lanham D, *Cross-Border Criminal Law* (Pearson Professional, Melbourne, 1997) p 27.

⁶⁷ There are other specified statutory examples, such as for terrorism, mercenary activities, child sex tourism, foreign bribery, cybercrime, etc. However, those activities are by nature extraterritorial, whereas s 104 gives extraterritorial reach to common crimes of violence. Australian law enforcement agencies cannot take enforcement against these offences unless the offender enters Australian territory or the offender’s country and Australia come to a cooperative enforcement arrangement.

⁶⁸ The international legitimacy of nationality-based jurisdiction is analysed in the *Lotus* case (*Case of the ss Lotus (France v Turkey)* 4 ILR 153; PCIJ Reports Series A No 10). There, Turkey convicted a Frenchman for the death of a Turkish national abroad on a Turkish vessel on the high seas. The case is extracted in Harris DJ, *Cases and Materials on International Law* (5th ed, Sweet & Maxwell, London, 1998) p 267.

⁶⁹ *Criminal Code*, s 104.6.

⁷⁰ At international law, the “protective principle” permits extraterritorial prescriptions of law to protect and secure nationals and their property. See generally Blay S, Piotrowicz R and Tsamenyi B, *Public International Law: An Australian Perspective* (Oxford University Press, South Melbourne, 1997). The *Crimes Act 1914* (Cth), (*Crimes Act*) s 29, does provide for a limited offence in respect of destroying Commonwealth property. The provision provides that any person that intentionally destroys real or personal property of the Commonwealth or of its agencies commits an offence carrying a maximum 10-year prison term. This

Threats and hoaxes

Less directly related to the commission of terrorist acts but associated with coercing or intimidating the government or sections of the public, were other new offences inserted into the *Criminal Code* by the *Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002* (Cth). These concern using postal services to make threats,⁷¹ hoaxes⁷² or send dangerous articles.⁷³ The maximum penalty is 10 years for each offence. Postal offences already existed in Pt VIIA of the *Crimes Act 1914* (Cth) (*Crimes Act*), but these relate to forgery of postage stamps and the like. The relevant provisions in State and Territory laws formed an uneven patchwork.⁷⁴ The amendments sought to fill the lacunae in the law, to provide uniform national coverage and “to specifically target those who seek to terrorise others by exploiting their fear of terrorism”.⁷⁵ There is no apparent reason to suggest that they are unnecessary or unclear.

Parallel to offences for postal threats and hoaxes are offences for telecommunications threats and hoaxes. The *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No 2) 2004* (Cth) inserted these into the *Criminal Code* and repealed the narrower telecommunications offences in Pt VIIB of the *Crimes Act*.⁷⁶ It creates the offences of using telecommunications carriers to make death or hoax threats or to engage in menacing, harassing or offensive conduct.⁷⁷ Whether the conduct is menacing, harassing or offensive is objectively determined.⁷⁸ It was submitted to Parliament that the additional provision for menacing, harassing or offensive conduct was unnecessary because that conduct is already covered in the criminal law of assault.⁷⁹ A weakness in that submission is that general threats against institutions and communities would not be covered by the law of assault, which require the identification of a specific victim.

offence does not appear to operate extraterritorially, as *Criminal Code Act 1995* (Cth), Div 15, is not expressed to apply and thus extend the geographical jurisdiction of the offence. In light of the bombing of the Australian embassy in Jakarta on 9 September 2004, the Parliament should review this provision with a view to filling any lacunae in the law.

⁷¹ *Criminal Code*, s 471.11.

⁷² *Criminal Code*, s 471.10.

⁷³ *Criminal Code*, s 471.15.

⁷⁴ Other than South Australia, each State and Territory has general criminal law provisions relating to the unlawful use and possession of explosives, see: *Crimes Act 1900* (ACT), s 27(3)(e); *Crimes Act 1900* (NSW), ss 545E, 931H, 931I, *Criminal Code of the Northern Territory*, s 253; *Criminal Code 1899* (Qld), ss 239, 321A, 334, 469, 470, 470A, 540, 683; *Criminal Code Act 1924* (Tas), s 181; *Crimes Act 1958* (Vic), ss 317, 317A; and *Criminal Code* (WA), ss 312, 557, 715. There are also provisions relating to the contamination of goods and bomb hoaxes: *Crimes Act 1900* (ACT), ss 137, 138; *Crimes Act 1900* (NSW), ss 931B, 931C, 931D; *Criminal Code of the Northern Territory*, ss 134, 139, 148B, 148D; *Criminal Law Consolidation Act 1935* (SA), ss 260, 261; *Criminal Code Act 1924* (Tas), ss 287D, 287E, 287F; *Crimes Act 1958* (Vic), ss 249, 250, 251, 317A. Following the 2002 anthrax scares, some States and Territories strengthened their powers to crack down on such hoaxes: *Sentencing (Emergency Services) Act 2001* (Vic); *Criminal Legislation Amendment Act 2001* (NSW), *Criminal Code Amendment Act 2001* (WA), *Crimes Act 1900* (ACT). The Northern Territory is still deficient. The provisions in this paragraph have all been noted in Parliament of Australia, Bills Digest No 89 2001-02, *Criminal Code Amendment (Anti-Hoax and Other Measures) Bill 2002* (Cth), notes 7-21 and 34-36, Parliament of Australia website: <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd089.htm> viewed 15 November 2003.

⁷⁵ Prime Minister John Howard, 16 October 2001, cited in Bills Digest No 89, n 74.

⁷⁶ It also inserted provisions concerning misuse of telecommunications carriers to commit “serious offences”, which are offences punishable by more than five years’ imprisonment or offences against foreign laws that would be serious offences in Australia: *Criminal Code*, s 471.14. See also Parliament of the Commonwealth of Australia, Bills Digest No 29 2004-05, *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No 2) Bill 2004* (Cth), p 8, Parliament of Australia website: <http://www.aph.gov.au/library/pubs/bd/2004-05/05bd029.htm> viewed 13 December 2005.

⁷⁷ *Criminal Code*, s 471.15-471.17.

⁷⁸ *Criminal Code*, s 471.17(1)(b).

⁷⁹ Bills Digest No 29, n 76. It was also submitted that the objective test would render political activities on the internet illegal insofar as they incite violence (Electronic Frontiers Australia Submission, p 9; Senator Alston, Minister for Communications, Information Technology and the Arts and Senator Ellison, Minister for Justice and Customs, Joint Media Release 153/03, 20 August 2003, p 9).

Participation in terrorist organisations

A major innovation in the legislative reform package was the ban on participation in terrorist organisations. The participation offences, namely membership, directing, recruiting, supporting, training and associating, are analysed here first and then the processes for identifying terrorist organisations are discussed in detail. The funding offences are considered in this article under the heading of “Acts criminalised pursuant to international conventions”.

Direction, recruitment, membership

It is an offence to intentionally direct or recruit for any terrorist organisation.⁸⁰ For the directing and recruiting offences, the prosecution must prove that the accused knew or was reckless as to whether the organisation was a terrorist organisation.⁸¹ Proof of recklessness is a lesser evidentiary burden for the prosecution than actual knowledge and the maximum penal terms are less than where actual knowledge is proved. It is also an offence for a person intentionally to be a member of a terrorist organisation.⁸² It is a defence in relation to membership if the accused can prove that he or she took all reasonable steps to cease being a member as soon as he or she discovered that the organisation was a terrorist organisation.⁸³

The membership, direction and recruitment offences are original and do not significantly overlap extant laws (see the discussion of conspiracy, attempt and accessories above). They apply to all terrorist organisations and are distinct from the preparatory offences because they are not predicated at all upon the doing of terrorist acts. In relation to their clarity, the membership offence is problematic because it is not apparent what the indicators of membership are.⁸⁴ In practice, formal membership records (and corresponding prosecutions) are unlikely. Overlaps also occur with other new offences, especially with the offence of “associating” with a terrorist organisation enacted two years later. However, the membership offence applies to both organisations that are listed by regulation and those that are not,⁸⁵ generates a higher penalty than the association offence (10 years’ imprisonment as compared to three years’)⁸⁶ and bail is not available for membership, unlike associating.⁸⁷

The provisions on supporting, training or associating with a terrorist organisation are structured slightly differently, distinguishing between different ways of identifying terrorist organisations.

Support

The offence of supporting a terrorist organisation does not apply to listed terrorist organisations but is instead limited to organisations that are actually engaged in the doing of terrorist acts. It applies in circumstances where the accused knew or was reckless as to what the organisation was doing.⁸⁸ The provision is unique. However, the meaning and limits of “support or resources that would help the organisation” to engage in a terrorist act are not defined and are uncertain. While the requirement of actual knowledge as to the organisation’s engaging in terrorist acts limits the practical scope of the provision (as actual knowledge requires clear criminal intent and is likely to be difficult to prove), the

⁸⁰ *Criminal Code*, ss 102.2, 102.4, 102.7.

⁸¹ *Criminal Code*, ss 102.2(1)(c), 102.2(2)(c), 102.4(1)(c), 102.4(2)(c), 102.7(1)(c), 102.7(2)(c).

⁸² *Criminal Code*, s 102.3(1).

⁸³ *Criminal Code*, s 102.3(2).

⁸⁴ The definitions section for terrorist organisations (*Criminal Code*, s 102.1) merely “includes” as members persons who are informal members and persons who have taken steps to become members of the organisation and, in the case of an organisation that is a body corporate, a director or an officer of the body corporate.

⁸⁵ See *Criminal Code*, ss 102.3 and 102.8(1)(b), respectively.

⁸⁶ *Criminal Code*, ss 102.3 and 102.8 respectively.

⁸⁷ *Crimes Act 1914* (Cth), s 15AA(2)(a). This provision was introduced as part of the *Anti-Terrorism Act 2004* (Cth) legislative package, and was the first time that the Commonwealth prescribed bail limitations for particular offences (personal communication, Geoff MacDonald, Assistant Secretary, Criminal Justice Branch, Attorney-General’s Department, 8 February 2006).

⁸⁸ *Criminal Code*, s 102.7.

requirement of mere recklessness to prove mens rea does not impose the same practical limits.⁸⁹ The provision of supporting resources could occur in a very wide range of circumstances. What might the indicators of terrorist activity be that should make a person so suspicious that it would be reckless to provide support?⁹⁰ Thus, although the new crime is practicable, it lacks certainty.

Training

The offence of intentionally providing training to or receiving training from a terrorist organisation was inserted into the *Criminal Code* by the *Anti-Terrorism Act 2004* (Cth).⁹¹ The full mens rea requirement for training is met if a person is simply reckless as to whether the organisation is a terrorist organisation.⁹² In addition, for listed organisations⁹³ strict liability is imposed⁹⁴ unless the defendant proves that he or she did not actually know and was innocent of recklessness that it was a terrorist organisation.⁹⁵ The imposition of strict liability means that recklessness is presumed unless the defendant can point to evidence that would establish a reasonable possibility that the defendant was not reckless, following which the burden falls back to the prosecution to prove beyond a reasonable doubt that the defendant was indeed reckless.⁹⁶ The offence of training is an original one that does not duplicate other extant laws. That terrorist training is treated as a severe preliminary offence is evident in the imposition of strict liability. Training in the conduct of political violence involves a relatively limited set of potential circumstances and does not raise significant uncertainty as to the scope of the offence. However, the unusual mens rea proof requirements in the provision are confusingly drafted and could be reviewed to improve their simplicity.⁹⁷

Associating

The *Anti-Terrorism Act (No 2) 2004* (Cth) inserted into the *Criminal Code* the further offence of “associating” with terrorist organisations. It carries the lightest maximum penal term of the participation offences, ie three years’ imprisonment.⁹⁸ Not all organisations are covered – only those that are listed by regulation.⁹⁹ A person commits the offence if on two or more occasions he or she intentionally associates with another person who is a member of, or promotes or directs, an organisation, and the association is intended to and in fact provides support to the organisation, and the person knows that it is a terrorist organisation. The same penalty applies when the person is reckless as to whether it is a listed terrorist organisation, in which case strict liability applies and the

⁸⁹ Actual knowledge entails a 25-year maximum sentence, as compared to 15 years for recklessness (*Criminal Code*, s 102.7).

⁹⁰ *Criminal Code*, s 5.4 provides that a person is reckless: (1) with respect to a circumstance if: (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk; or (2) is reckless with respect to a result if: (a) he or she is aware of a substantial risk that the result will occur; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

⁹¹ *Criminal Code*, s 102.5.

⁹² *Criminal Code*, ss 102.5(1)(c), 102.5(4).

⁹³ The offence distinguishes between terrorist organisations listed pursuant to s 102.1(1)(a) and terrorist organisations otherwise identified under the current s 102.1(1)(b). Section 102.5(1) states a person commits an offence if he or she intentionally provides training to, or intentionally receives training from a terrorist organisation and the person is reckless as to whether the organisation is a terrorist organisation. Section 102.5(2)(b) also states that a person commits an offence if, inter alia, the organisation is a listed as a terrorist organisations by the Regulations. However, s 102.5(2) does not apply unless a person is reckless as to the circumstances covered in s 102.5(2)(b): *Criminal Code*, s 102.5(4). Where s 102.5(2) is applicable, strict liability applies to s 102.5(2)(b).

⁹⁴ *Criminal Code*, s 13.3(3).

⁹⁵ *Criminal Code*, s 102.5(c).

⁹⁶ Submission of the Attorney-General’s Department to the Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill 2004* (Department of Senate, Parliament House, Canberra, May 2004) p 37.

⁹⁷ The submission of the Australian Lawyers for Human Rights argued that the mens rea requirement should have required actual knowledge, rather than recklessness, as people might unwittingly engage in training. The Senate Legal and Constitutional Legislation Committee recommended that the provision proceed without amendment: n 96, p 39.

⁹⁸ *Criminal Code*, s 102.8(1).

⁹⁹ The provisions (*Criminal Code*, ss 102.8(1)(b), 102.8(2)(g)) distinguish between terrorist organisations actually engaged in terrorist acts (identified pursuant to s 102.1(1)(a)) and terrorist organisations (listed by regulation under s 102.1(1)(b)).

defendant carries an evidentiary burden to displace the presumption of recklessness.¹⁰⁰ There are exceptions to the crime of associating that apply to the following categories: close family members associating on matters of domestic or family concern;¹⁰¹ associations in places of worship; and associations providing humanitarian aid and legal advice.¹⁰² There is also an exception to reflect the implied constitutional freedom of political communication¹⁰³ that might be invoked as a defence for journalists. The burden of proving each exception claimed falls to the defendant.¹⁰⁴ There is a similar offence and identical punishment where a person has already been convicted of associating with a terrorist organisation,¹⁰⁵ apparently to circumvent arguments that an association is a continuous one rather than repeat offending. Conversely, a person cannot be charged with the offence of terrorist association in relation to other conduct that occurred within seven days of the conduct for which a person was already convicted for association.¹⁰⁶

Offences concerning criminal associations are not new to the law and have long been part of State laws to combat consorting among petty criminals.¹⁰⁷ However, the scope of the offence of terrorist association is far broader than that of criminal association. The State laws on criminal association are largely summary offences or otherwise, found in the vagrancy statutes, and are limited to punishing the “habitual consorting” with “reputed thieves, prostitutes or persons without any visible lawful means of support” or persons who have been convicted of indictable offences.¹⁰⁸ Nevertheless, a question arises as to whether the association offence is necessary, having regard to the fact that it is already an offence to support a terrorist organisation (under *Criminal Code*, s 102.7) and having regard to the broad overlap of the terms “association” and “support”.¹⁰⁹ Yet the “support” offence in s 102.7 is distinguishable because it requires a causal link between the support and the actual doing of terrorist acts by an organisation, rather than mere support for the existence of an organisation.¹¹⁰ Additional distinctions between the crimes of support and association parallel those between membership and association, discussed above.¹¹¹

Consternation over the association offence concerned its perceived wide scope and low threshold for proving mens rea.¹¹² However, examination of the provisions for the offence demonstrate that it seeks to penalise terrorist support networks but sets out appropriate exceptions and also provides substantial thresholds for mens rea (ie intentionally associating with a listed terrorist organisation’s

¹⁰⁰ Strict liability applies if the presumption of recklessness is not displaced (*Criminal Code*, ss 102.8(3), 102.8(5)).

¹⁰¹ *Criminal Code*, s 102.8(4)(a). The Commonwealth Attorney-General’s Department expressed government reluctance to extend the exception to encompass extended family members because of the stringent mens rea elements that the prosecution must positively prove: see Submission of the Attorney-General’s Department to the Senate Legal and Constitutional Legislation Committee, n 96, p 29.

¹⁰² *Criminal Code*, s 102.8(4)(b) and (d).

¹⁰³ *Criminal Code*, ss 102.8(4), 102.8(6).

¹⁰⁴ *Criminal Code*, s 102.8(4).

¹⁰⁵ *Criminal Code*, s 102.8(2). It is questionable why, if the person has already been convicted for the same offence, he or she does not suffer a greater penalty for committing it again.

¹⁰⁶ *Criminal Code*, s 102.8(7).

¹⁰⁷ Parliament of the Commonwealth of Australia, Bills Digest No 6 2004-05, *Anti-Terrorism Bill (No 2) 2004*, Parliament of Australia website: <http://www.aph.gov.au/library/pubs/bd/2004-05/05bd006.htm> viewed 19 November 2004.

¹⁰⁸ See Bills Digest No 6, n 107, which cites the following State and Territory laws at note 17: *Crimes Act 1900* (NSW), s 564A; *Summary Offences Act* (NT), ss 56-57; *Summary Offences Act 1953* (SA), s 13; *Police Offences Act 1935* (Tas), s 6; *Police Act 1892* (WA), s 65; *Vagrants, Gaming and other Offences Act 1931* (Qld), s 4; and *Vagrancy Act 1966* (Vic), s 6.

¹⁰⁹ For example, see submission of Mr Bret Walker SC in Senate Legal and Constitutional Legislation Committee, n 96, p 21.

¹¹⁰ Submission of the Attorney-General’s Department in Senate Legal and Constitutional Legislation Committee, n 96, p 22.

¹¹¹ See nn 85-87.

¹¹² The Senate Committee rejected the argument put by Commissioner Keelty, of the Australian Federal Police, that police and court discretion are sufficient safeguards against abuse: see Submission of the Australian Federal Police in Senate Legal and Constitutional Legislation Committee, n 96, pp 23-24. The Commissioner submitted that the associating offence did not go far enough because terrorist groups use people from outside their membership structure in carrying out their activities.

supporters, the association is intended to and in fact provides support to the organisation, and the person knows or is reckless that it is a terrorist organisation). Nevertheless, the provision setting it out needs simplification to avoid the confusion that it generates.

Identifying terrorist organisations

Procedures to properly identify a terrorist organisation, as distinct from legitimate political organisations, were among the most difficult and debated new criminal provisions. As at May 2006, 19 terrorist organisations were listed.¹¹³

Australian-listed terrorist organisations (May 2006)

| |
|--|
| Abu Sayyaf Group (listed 14 November 2002 and re-listed 5 November 2004) |
| Al Qaida (listed 21 October 2002 and re-listed 1 September 2004) |
| Ansar Al-Islam (listed 27 March 2003 and re-listed 23 March 2005) |
| Armed Islamic Group (listed 14 November 2002 and re-listed 5 November 2004) |
| Asbat al-Ansar (listed 11 April 2003 and re-listed 11 April 2005) |
| Egyptian Islamic Jihad (listed 11 April 2003 and re-listed 11 April 2005) |
| HAMAS (military wing) (listed 9 November 2003 and re-listed 5 June 2005) |
| Harakat UI-Mujahideen (now known as Jamiat ul-Ansar) (listed 14 November 2002 and re-listed 5 November 2004) |
| Hizbollah External Security Organisation (listed 5 June 2003 and re-listed 5 June 2005) |
| Islamic Army of Aden (listed 11 April 2003 and re-listed 11 April 2005) |
| Islamic Movement of Uzbekistan (listed 11 April 2003 and re-listed 11 April 2005) |
| Jaish-I-Mohammed (listed 11 April 2003 and re-listed 11 April 2005) |
| Jemaah Islamiyah (listed 27 October 2002 and re-listed 1 September 2004) |
| Kurdistan Workers Party (PKK) (listed 15 December 2005) |
| Lashkar I Jhangvi (listed 11 April 2003 and re-listed 11 April 2005) |
| Lashkar-e-Tayyiba (listed 9 November 2003 and re-listed 5 June 2005) |
| Palestinian Islamic Jihad (listed 34 May 2004 and re-listed 5 June 2005) |
| Salafist Group for Call & Combat (listed 14 November 2002 and re-listed 5 November 2004) |
| Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (al-Zarqawi network) (listed 26 February 2005) |

As a preliminary issue, some commentators have suggested that the provisions on listing terrorist organisations may be unconstitutional.¹¹⁴ Analogy has been drawn to the *Australian Communist Party Case*, where a 6-1 majority of the High Court struck down the *Communist Party Dissolution Act 1950* (Cth), largely because it did not come within the scope of the defence power under s 51(vi) of the

¹¹³ The list of terrorist organisations is set out on the Commonwealth Attorney-General's Department website: <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument> viewed 15 May 2006.

¹¹⁴ Head, n 9, p 124 and Williams G, "One Year On: Australia's Legal Response to September 11" (2002) 27(5) *Alternative Law Journal* 213.

Constitution.¹¹⁵ As now, it was not then a time of war.¹¹⁶ However, the argument today seems spurious and the defence power largely irrelevant as a sound constitutional base was established when the States referred their counter-terrorism powers to the Commonwealth.¹¹⁷

As to whether it was necessary to adopt provisions to list terrorist organisations, it should be noted that the *Crimes Act* also contains provisions that may be used to outlaw terrorist organisations. Section 30A of the *Crimes Act* declares unlawful any “association” that directly or indirectly by its constitution, propaganda or otherwise advocates or encourages the overthrow of the *Constitution* of the Commonwealth by revolution or sabotage; the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilised country or of organised government; or the destruction or injury of property of the Commonwealth or of property used in trade or commerce with other countries or among the States. Under s 30AA, the Federal Court may declare such an organisation unlawful on the instigation of the Attorney-General. Subsequent provisions impose restrictions on any organisation deemed to be unlawful, including the forfeiture of its property.¹¹⁸ The application of these provisions to the varied objectives of terrorist organisations would be extremely uncertain. Given the past difficulties in applying these *Crimes Act* provisions at all, it is arguable that they are redundant and should be repealed.¹¹⁹ The provisions in the *Crimes Act* are narrowly focused and their overlap in actual application with the broader provisions of the *Criminal Code* is not likely. Therefore, they do not render the new *Criminal Code* provisions unnecessary.

In the reform package, three approaches to identifying a terrorist organisation were adopted under s 102.1. A terrorist organisation is defined to include: (a) an organisation that is “directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act”; or (b) an organisation that is specified in regulations adopted pursuant to the relevant subsections; or (c) an organisation specifically listed in amendments to the *Criminal Code*. Each of these approaches is dealt with below.

Judicial identification process

The first process for identifying a terrorist organisation, ie approach (a) above, is set out in s 102.1(a) of the *Criminal Code*. It simply states that an organisation is a terrorist organisation if it is “directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act”. However, it does not specify who determines whether the organisation is in fact “directly or indirectly engaged in ... a terrorist act”. In the event that a person is prosecuted for a terrorist act, a court is empowered to deem any organisation that assisted in the commission of that act as a terrorist organisation.¹²⁰ The implication is that it is a court that decides that an organisation is engaged in a terrorist act. Certainly, the meaning would be clearer if the implication and its consequences were made explicit.

¹¹⁵ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. In that case, s 4 of the *Communist Party Dissolution Act 1950* (Cth) dissolved the Communist Party and provided for the forfeiture of its property. Sections 5 and 6 allowed for the dissolution of bodies associated with Communism, subject to a declaration by the Governor-General “that the continued existence of that body or persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the *Constitution* or of the laws of the Commonwealth”.

¹¹⁶ Dixon J stated that “only the supreme emergency of war itself would extend the operation of the [defence] power so far as to support a legislative provision which on a subject not by its own nature within the defence power affects the status, property and civil rights of persons nominatim”: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 197-198. The majority held (at 6) that the defence power may be broader in scope in times of war than in times of peace, but that the *Communist Party Dissolution Act 1950* (Cth) dealt with the dissolution of a voluntary association; subject matter that is properly within the legislative capacity of the States.

¹¹⁷ See n 19.

¹¹⁸ *Crimes Act 1914* (Cth), s 30G.

¹¹⁹ See Douglas R, “Keeping the Revolution at Bay: the Unlawful Associations Provisions of the Commonwealth Crimes Act” (2001) 22 *Adelaide Law Review* 259.

¹²⁰ *Criminal Code*, s 102.1(a). See Parliament of the Commonwealth of Australia, Bills Digest No 170 2002-03, *Criminal Code Amendment (Hizbollah) Bill 2003*, Parliament of Australia website: <http://www.aph.gov.au/library/pubs/bd/2002-03/03bd170.htm> viewed 19 May 2004.

We note in passing that, recalling that the s 102.1(1)(a) process was one of the two ways of identifying a terrorist organisation for the purposes of the membership offence,¹²¹ it has been argued that s 102.5 limits the general right to free association, given that no one could ever be sure in advance that an organisation is a terrorist one.¹²² To the contrary, however, in order for the membership offence to be made out, the prosecution must prove that the defendant knew it was a terrorist organisation.

Regulatory listing

In relation to approach (b), concerning specification by regulation, there has been a history fraught by controversy. The original 2002 *Criminal Code* reform package was amended. Section 102.1(2) and (4) of the *Criminal Code*, as adopted in 2002, provided that organisations could be listed in regulations if they were identified as terrorist organisations by the United Nations Security Council (UNSC). The Governor-General already had a power to list these organisations by regulation under s 15 of the *Charter of the United Nations Act 1945* (Cth)¹²³ but did not have the power under that Act to ban these organisations and freeze their assets. There was, therefore, a gap in the law prior to 2002 in relation to banning and freezing assets, as well as a gap before and after 2002 for listing organisations not identified by the UNSC.

The government had wanted to be able to list organisations in the regulations independently of whether they had been listed by the UNSC.¹²⁴ For example, Hizbollah, HAMAS, Islamic Jihad, and the Lashkar-e-Tayyiba, widely regarded as terrorist organisations, are not so described by the UNSC. The political willingness of the Security Council to ban some of these organisations is doubtful.¹²⁵ The Australian Government's aspiration to list independently of the UNSC was blocked in Parliament due to concerns to protect the freedom of political organisation.¹²⁶ The limits of the UNSC list necessitated resorting to a clumsy third approach to listing that required Commonwealth Parliamentary approval of any listing of additional organisations, via direct amendments to the *Criminal Code*.¹²⁷ Consequent upon two amendments being adopted to list additional organisations in the first year of operation of the procedure,¹²⁸ the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth) was enacted in March 2004 to revise the process for listing by regulation.

The revised process for listing by regulation (approach (b)) now allows the Governor-General to list by regulation terrorist organisations, on the advice of the Attorney-General, independent of the UNSC.¹²⁹ To provide such advice, the Attorney-General must be satisfied "on reasonable grounds" that the organisation is "directly or indirectly engaged in, preparing, planning, assisting in or fostering

¹²¹ The prohibition on membership of a terrorist organisation applies to membership of organisations as declared by a court or as listed by regulation: see *Criminal Code*, s 102.1(1).

¹²² See Parliament of the Commonwealth of Australia, Bills Digest No 120 2003-04, *Anti-Terrorism Bill 2004*, Parliament of Australia website: <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd120.htm> viewed 29 November 2004. Williams G, *A Bill of Rights for Australia* (UNSW Press, Sydney, 2000) at p 18 notes that *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 might support a right to associate for political purposes, freedom of movement or assembly. O'Neill et al, n 20, p 345 notes that the Commonwealth's attempt to limit the freedom of political association may be unconstitutional pursuant to the case law on the implied freedom of political communication. However, the right to free association has never been guaranteed in the Australian *Constitution* and this area is by no means settled.

¹²³ The provision allows the Governor-General to make regulations to ban organisations that the Security Council has listed.

¹²⁴ Australia, House of Representatives, *Hansard*, Hon Phillip Ruddock MP, Attorney-General (5 November 2003) *Criminal Code Amendment (HAMAS and Lashkar-e-Tayyiba) Bill 2003*, Second Reading Speech, p 22066.

¹²⁵ The political and ideological turmoil manifest in Security Council decision-making obfuscates a functional approach to combating terrorism in that forum. For example, Syria is a major sponsor of Hizbollah and was President of the Security Council at the time the Australian Parliament acted to amend the legislation to list Hizbollah as a terrorist organisation. See Australia, House of Representatives, *Hansard*, Peter Andren, MP for Calare (3 June 2003) *Criminal Code Amendment (Terrorist Organisation) Bill 2003: Cognate Bill – Criminal Code Amendment (Hizbollah) Bill 2003*, Second Reading Speech, p 15816.

¹²⁶ The federal government's preferred procedure was criticised for giving the executive too much discretionary power, eg Williams, n 122.

¹²⁷ See *Criminal Code Amendment (Hizbollah) Act 2003* (Cth) and *Criminal Code Amendment (HAMAS and Lashkar-e-Tayyiba) Act 2003* (Cth) cited at nn 139 and 140.

¹²⁸ See n 127.

¹²⁹ Parliament of Australia, Bills Digest No 174 2002-03, *Criminal Code Amendment (Terrorist Organisations) Bill 2003*,

the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)”¹³⁰ or that the organisation “advocates” the doing of a terrorist act.¹³¹ The term “advocates” is defined as counseling or urging, providing instruction on or directly praising the doing of a terrorist act.¹³² The ground of “advocating” can be thought to detract from the clarity of this provision, due to uncertainty as to who does the advocating and how. The Senate Legal and Constitutional Legislation Committee usefully recommended including criteria to clarify the circumstances in which an organisation may be considered to have advocated terrorism, ie official media releases or statements by an acknowledged leader.¹³³

Several safeguards increase the transparency and accountability of the regulatory listing process. The Attorney-General must arrange for the Parliamentary Opposition Leader to be briefed in relation to a proposed listing.¹³⁴ The listed organisation itself can make an application stating a case for its de-listing that the Attorney-General must review.¹³⁵ As before, the listing is initially valid for a period of only two years,¹³⁶ but new sections provide that an organisation may be de-listed if the Attorney-General is satisfied that it is no longer engaged in terrorist activities.¹³⁷ The Joint Parliamentary Committee on Intelligence (ASIO, ASIS and DSD) will review the new listing procedure under approach (b) and report to both Houses of Parliament three years after the commencement of the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth) (ie in 2007).¹³⁸

Listing by statute

In relation to approach (c), the *Criminal Code* allowed the specific listing of terrorist organisations if the organisations have been specifically identified by Parliament in the *Criminal Code*. This approach is now of primarily historical interest. Prior to revision of the procedure for listing by regulation, two separate amending Acts had been passed by Parliament concerning three organisations not listed by the Security Council. The *Criminal Code Amendment (Hizbollah) Act 2003* (Cth) amended the *Criminal Code* in June 2003 to include the Hizbollah External Security Organisation in the definition

Parliament of Australia website: <http://www.aph.gov.au/library/pubs/bd/2002-03/03bd174.htm> viewed 19 May 2004.

¹³⁰ *Criminal Code*, s 102.1(2).

¹³¹ *Criminal Code*, s 102.1(2)(b), introduced by the *Anti-Terrorism Act (No 2) 2005* (Cth).

¹³² *Criminal Code*, s 102.1(1A).

¹³³ Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (Department of Senate, Parliament House, Canberra, November 2005), Recommendation 32. The Committee also sought to clarify the connection between advocacy through praise and the actual risk of terrorism. Thus, it recommended that the definition of “advocates” be amended to define praise to mean praising a terrorist act where such praise is likely to create a substantial risk of a terrorist act occurring (Recommendation 31 and commentary on p 129). However, the threshold at which praise would create a substantial risk of a hypothetical event is impossible to predetermine. It would require a court to define the point at which it is reasonably foreseeable that extremist violence is predictable, despite the facts that extremism is not well understood and that the predicted violence will not necessarily occur,

¹³⁴ *Criminal Code*, s 102.1(2A).

¹³⁵ *Criminal Code*, s 102.1(17). As to whether this Executive review should not be judicial, there is no privative clause in the *Criminal Code* denying the opportunity for judicial review of a listing on grounds including unreasonableness, lack of supportive evidence, bias and improper intent. See *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5; Douglas R, Douglas and Jones *Administrative Law* (4th ed, Federation Press, 2002), Chs 13, 15 and 19. As to matters of justiciability of judicial review, see n 187. Incorporating a member of the federal judiciary as persona designata in the Executive review might satisfy some critics, but compatibility with judicial functions would need to be considered. See *Wilson v Minister for Aboriginal Affairs* (1996) 189 CLR 1. Note that a privative clause has been inserted into the *Criminal Code* (see s 105.51) in respect of preventative detention orders by the *Anti-Terrorism Bill (No 2) 2005* (Cth), as will be discussed below.

¹³⁶ *Criminal Code*, s 102.1(3).

¹³⁷ *Criminal Code*, s 102.1(4) and (6).

¹³⁸ *Criminal Code*, s 102.1A.

of terrorist organisation.¹³⁹ The *Criminal Code Amendment (HAMAS and Lashkar-e-Tayyiba) Act 2003* (Cth) outlawed both the military wing of HAMAS and the Lashkar-e-Tayyiba organisations in November 2003.¹⁴⁰

That the Australian Parliament needed to pass legislative amendments to list Hizbollah, HAMAS and Lashkar-e-Tayyiba indicates that the government had inadequate powers to list terrorist organisations before the procedure for listing by regulation was revised. The detailed, apolitical intelligence on objectives, activities and structures that is needed to keep an up-to-date list of terrorist organisations, which frequently have multiple roles, shadow groups, particular event incarnations or umbrella alliances, is the proper work of government.¹⁴¹ Parliament is ill-equipped for such vigilance and unfortunately failed to achieve clarity in two of its three efforts. The “Hizbollah External Security Organisation” identified in the amendment to the *Criminal Code* on 5 June 2003 is not considered by experts to be a separate organisation from Hizbollah proper.¹⁴² On 7 November 2003 Parliament similarly listed the HAMAS military wing Izz al-Din al-Qassam Brigades, but not HAMAS, again despite the fact that the Brigades are an integral part of HAMAS under a unified leadership.¹⁴³ Both the United States of America and Canada have banned HAMAS and Hizbollah in their entirety.¹⁴⁴ Yet, in both cases, Australia’s Parliament demurred to the respective organisation’s non-terrorist activities.¹⁴⁵ The *Anti-Terrorism Act (No 2) 2005* (Cth) removed the HAMAS, Hizbollah and Lashkar-e-Tayyiba organisations from the definition of terrorist organisation in the *Criminal Code* because they are instead now listed as banned under the *Criminal Code Regulations 2002* (Cth).¹⁴⁶ Nevertheless, as a relic of the earlier *Criminal Code* ban, Hizbollah and HAMAS remain only partially listed.

The partial listing of Hizbollah and HAMAS confounds the workability of the offences. To illustrate, Al Manar, the global broadcasting arm of Hizbollah, through a licensed cable television

¹³⁹ *Criminal Code*, s 102.1(1).

¹⁴⁰ It amended Pt 5.3 of the *Criminal Code* on 8 November 2003 to enable the Governor-General to make regulations that were passed the following day. This was noted in a speech delivered by Attorney-General, Phillip Ruddock, at the National Forum on the War on Terrorism and the Rule of Law (10 November 2003). Paper available from the Gilbert & Tobin Centre for Public Law website: <http://www.gtcentre.unsw.edu.au/Conference-Papers-National-Forum-2003.asp> viewed 19 May 2004.

¹⁴¹ It is noteworthy that Canada, which has a similar legal system but also a Charter of Rights and Freedoms and is usually seen as being very careful to guard civil liberties, was not so constrained. See Canadian *Criminal Code*, s 83.05(1), which stipulates that the “Governor in Council may, by regulation, establish a list on which the Governor in Council may place any entity if, on the recommendation of the Solicitor General of Canada, the Governor in Council is satisfied that there are reasonable grounds to believe that: (a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or (b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a)”. The Canadian Solicitor General may only make a recommendation pursuant to subs (1) if the Solicitor General has “reasonable grounds to believe” that the entity has acted pursuant to paras (1)(a) or (b): s 83.05(1.1). Similar legal situations prevail in the United Kingdom, United States and New Zealand: see Bills Digest No 174, n 129.

¹⁴² Hizbollah engages in a range of activities and services, including education, politics, religious observance and terrorism. Hizbollah often shells Israeli civilians and also engages in kidnappings and bombings. In a 1994 operation in Buenos Aires it killed 86 people and injured 300. Hizbollah is financed by Iran, supported by Syria, headquartered in Lebanon and has global operations. Some say Hizbollah is as internationally capable as Al Qaeda. A good overview of the Hizbollah organisation is provided by Levitt M, *Hizbollah: A Case Study of Global Reach*, Remarks to the International Policy Institute for Counter-Terrorism conference on *Post-Modern Terrorism: Trends, Scenarios, and Future Threats*, 8 September 2003 at Herzliya, Israel. The article is located on the Washington Institute for Near East Policy website: <http://www.washingtoninstitute.org/media/levitt/levitt090803.htm> viewed 19 May 2004.

¹⁴³ Without such cavilling, Canada has listed both Hizbollah and HAMAS in its *Regulations Establishing a List of Entities* SOR 2002-284, located on the Department of Justice Canada website: <http://laws.justice.gc.ca/en/c-46/sor-2002-284/83799.html> viewed 19 May 2004.

¹⁴⁴ Bills Digest No 170 2002-03, n 120 and Parliament of the Commonwealth of Australia, *Criminal Code Amendment (HAMAS and Lashkar-e-Tayyiba) Bill 2003*, Bills Digest No 60 2003-04, available from Parliament of Australia website: <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd060.htm> viewed 19 May 2004.

¹⁴⁵ However, a body that engages in four regular activities, of which terrorism is only one, is a terrorist organisation, more culpable than a person who lives 20,000 days and murders on only one of them.

¹⁴⁶ HAMAS’ Izz al-Din al-Qassam Brigades, Hizbollah’s External Security Organisation and Lashkar-e-Tayyiba were banned pursuant to the *Criminal Code Amendment Regulations 2005* (Cth).

service, Television & Radio Broadcasting Services Australia Pty Ltd (TARBS), allegedly advertised in Australia for donations. Money sent to Al Manar is money to Hizbollah. The *Criminal Code* states that a person commits an offence when he or she intentionally or recklessly provides funding to a terrorist organisation (whether directly or indirectly).¹⁴⁷ Uncertainty in the interpretation of this provision as applied to the partial listing of Hizbollah raises many pressing questions. For example, is a request by the donor that funds be used benevolently in itself enough to avoid a finding of recklessness when those funds can still be used to finance terrorist acts?¹⁴⁸ This conundrum leaves a judge with a potentially unworkable law and its application to Hizbollah still has not been resolved as at the time of writing.¹⁴⁹

The *Criminal Code*'s provisions for listing terrorist organisations are necessary, in that they do not significantly duplicate other criminal provisions and are utile, as indicated above. It is not the aim of this article to assess their necessity in the public policy sense. From the beginning, policy has been argued by the majority of legal commentators such that the "practical effect of the legislation is to deny Australians the right to politically associate with any political movements which may involve violent struggles anywhere in the world".¹⁵⁰ It seems likely that this concern led to Parliament listing only parts of Hizbollah and HAMAS (and to Parliamentary consternation over the regulatory listing of Palestinian Islamic Jihad¹⁵¹) in an attempt to artificially distinguish their political activities. However, it is ironic that legislative efforts to refine their listing have clouded the clarity of and led to impracticability in these parts of the legislation. We suggest that, in practice, the typical public policy risk lies not so much in which organisations are listed but more in which are not. For example, the Liberation Tigers of Tamil Eelam are notably absent among Australian listed terrorist organisations.

¹⁴⁷ *Criminal Code*, s 102.6(1). Crimes proscribing the funding of terrorist acts and organisations are discussed below.

¹⁴⁸ Rose G, "Our Terrorism Law: Pity the Poor Judge", *Canberra Times* (19 November 2003).

¹⁴⁹ The actual case of Hizbollah donations solicited in Australia through Al Manar illustrates the ongoing conundrum. On 14 November 2003 the Australian Broadcasting Authority (now the Australian Communications Media Authority (ACMA)) suspended Al Manar's broadcasting rights by the licensee and announced an investigation into whether funding was provided to the Hizbollah External Security Organisation ("Arab TV station cut for terror fund probe", *ABC News Online* (14 November 2003) and Australian Broadcasting Authority news release, http://www.aba.gov.au/newspubs/news_releases/archive/2004/135nr04.shtml viewed 22 November 2005). Almost a year later, the ACMA concluded its investigation, finding that "if such material were broadcast with the intent to solicit funds and the broadcaster was reckless as to whether or not the funds would be used for terrorism purposes, it could constitute use of the broadcasting service in the commission of a[n] terrorist offence" (Australian Broadcasting Authority news release, http://www.aba.gov.au/newspubs/news_releases/archive/2004/135nr04.shtml). The ACMA has announced that it will be reviewing standards for narrowcast television services to avoid a repeat of this incident ("Bans likely for TV pro-terror content" (18 November 2005), <http://news.ninemsn.com.au/article.aspx?id=72766> viewed 22 November 2005). However, the primary problem lies not with ACMA standards but with the conundrum posed by the partial listing of Hizbollah. In the event, there was insufficient evidence that TARBS had broadcast the material with the requisite intention (Australian Broadcasting Authority news release, http://www.aba.gov.au/newspubs/news_releases/archive/2004/135nr04.shtml) and TARBS withdrew the cable service before the investigation began and is now in receivership ("Bans likely for TV pro-terror content" (18 November 2005), <http://news.ninemsn.com.au/article.aspx?id=72766>).

¹⁵⁰ Ricketts A, n 8, p 140. However, careful deconstruction of the argument reveals that it presupposes a definition of terrorism broader than in the *Criminal Code Act 1995* (Cth).

¹⁵¹ Brew N, *The Politics of Proscription in Australia* (Parliamentary Library, Department of Parliamentary Services, Research Note 2003-04 No 63, 21 June 2004). See also Parliament of Australia, Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of the Palestinian Islamic Jihad* (2004) p 24. In its report on the listing, the Joint Parliamentary Committee on Intelligence indicated that the PIJ posed no known threat to Australia and recommended that threats to Australian interests be given "particular weight" in future listings. However, the Committee's misgiving was misplaced because there is no specific requirement that the Attorney-General be satisfied that an organisation will directly or indirectly compromise Australian interests (*Criminal Code*, s 102.1(2)), and the definitions of "terrorist act" and "organisation" in the *Criminal Code* encompass acts of terrorism occurring overseas (ss 101.1(1) and 102.1(1)), and because PIJ had previously indeed claimed responsibility for a terrorist bombing that murdered an Australian (referred to in an *Australian Press Council Ruling* relating to the reporting of it by the Australian Broadcasting Commission, <http://www.presscouncil.org.au/pcsite/adj/1257.html> viewed 13 December 2005).

Counter-terrorism orders

The *Anti-Terrorism Bill (No 2) 2005* (Cth) introduced preventative detention and control orders into the *Criminal Code*. These legal orders permit the detention of terrorist suspects in order to prevent a terrorist attack from occurring or to protect evidence relating to a terrorist act, and to permit control of the movement and activity of persons threatening a terrorist risk. Applications for the issue of these orders are not in themselves prosecutions for criminal offences.¹⁵² The standard of proof for obtaining a preventative detention or control order is merely the civil standard.¹⁵³ However, subsequent breaches of the orders by persons subject to them are prosecutable offences.¹⁵⁴ Discussion of the new counter-counter terrorism procedural orders is included in this analysis of the new offences because they entail relevant offences and criminal procedures.¹⁵⁵

Preventative detention orders

An Australian Federal Police (AFP) member may apply for, and an issuing authority may issue, a preventative detention order in relation to a person if there are reasonable grounds to suspect that: the person will engage in a terrorist act; will possess a thing that is connected with a terrorist act; or has done an act in preparation for a terrorist act; and making the order would substantially assist in preventing a terrorist attack occurring.¹⁵⁶ An order may also be made if a terrorist act has occurred within the last 28 days and it is necessary to detain the person to preserve evidence.¹⁵⁷ Once in force, any police officer can detain the subject of the initial preventative detention order and it is an offence for the person to refuse.¹⁵⁸

There are two types of preventative detention orders: initial and continued orders. For initial preventative detention orders, the issuing authority is a senior AFP member.¹⁵⁹ Applications can be made for more than one initial preventative detention order, provided that any second application relates to a different terrorist act, or the terrorist act occurs and evidence needs to be preserved.¹⁶⁰ An initial preventative detention order must not exceed 48 hours, although there is provision for an unspecified number of 24-hour extensions.¹⁶¹ If an initial preventative detention order is already in force, an AFP member may apply to an issuing authority for a continued preventative detention order.¹⁶² For continued preventative orders, the Minister for Justice may appoint as issuing authorities

¹⁵² As the *Crimes Act 1914* (Cth) is gradually amended, crimes proscribed in it are being shifted into the *Criminal Code*, so that the *Crimes Act 1914* (Cth) will eventually be confined to criminal procedures and the *Criminal Code* to criminal offences. However, the new counter-terrorism orders, which are procedures, were inserted into the *Criminal Code* to expedite the amendment process.

¹⁵³ See, eg *Crimes Act 1900* (NSW), ss 562AE, 562AI. The standard of proof requirements for obtaining preventative detention and control orders are not new departures from the current criminal law. In New South Wales, for example, Apprehended Violence Orders may be obtained where a person shows on the balance of probabilities that he or she has reasonable grounds to fear. However, see the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW), s 140, which states that, in determining whether the standard is satisfied, that court may take into account the nature of the cause of action or defence, the nature of the subject-matter of the proceeding, and the gravity of the matters alleged. In serious matters, the standard might be raised to be beyond reasonable doubt. See also *Briginshaw v Briginshaw* (1938) 60 CLR 336.

¹⁵⁴ Although cynics might suggest that a reason for the introduction of control orders was that it is easier to prove a breach of a control order than to prove the actual offence, the respective sentences are not comparable.

¹⁵⁵ Principled objections to preventative detention of the victims of mental disease or the perpetrators of domestic violence have been articulated before. Although the same principled objections apply to perpetrators of terrorism, they do not affect the necessity or clarity of the new provisions examined here.

¹⁵⁶ *Criminal Code*, s 105.4(4).

¹⁵⁷ *Criminal Code*, s 105.4(6).

¹⁵⁸ *Criminal Code*, s 105.21(2).

¹⁵⁹ *Criminal Code*, s 105.8. The definition of an "issuing authority" is set out in s 100.1(1).

¹⁶⁰ *Criminal Code*, s 105.6(1).

¹⁶¹ *Criminal Code*, ss 105.9(2), 105.10(5).

¹⁶² *Criminal Code*, s 105.11.

judges, federal magistrates, tribunal members or legal practitioners.¹⁶³ Uncertainties as to the constitutionality of appointing judges to issue administrative orders¹⁶⁴ are addressed by providing that any judicial officer who is an issuing authority is appointed in a personal capacity.¹⁶⁵ A continued preventative detention order must not exceed 48 hours, although again, the period may be repeatedly extended by 48 hours.¹⁶⁶

Prohibited contact orders are ancillary orders to prevent the detainee from contacting a family member, parent or lawyer,¹⁶⁷ which is otherwise permitted during preventative detention.¹⁶⁸ A prohibited contact order may be sought concurrently with a preventative detention order, on the same grounds as the preventative detention order and where it “would assist in achieving the objectives of the preventative detention order”.¹⁶⁹ This wording has been criticised as unacceptably vague,¹⁷⁰ a charge that reflects concern for the detainee’s family. However, it is difficult to see how the plain meaning could be made clearer.

The necessity for preventative detention orders might be doubted, given that a person might simply be arrested on suspicion under extant laws. The *Crimes Act* specifies that a suspect may be arrested in order to investigate whether the person committed a terrorism offence. However, the regular investigating period for a terrorism suspect under arrest does not extend beyond four hours.¹⁷¹ Further, preventative detention is distinguished from investigative arrest because a person cannot be questioned while under preventative detention.¹⁷² Instead, in order to be questioned, the detainee must be released and then arrested in accordance with the *Crimes Act*¹⁷³ or detained in accordance with a

¹⁶³ *Criminal Code*, 105.2(1). Specifically, Federal Court judges and State and Territory Supreme or District Court judges, retired judges, Federal Magistrates, Deputy Presidents or the President of the federal Administrative Appeals Tribunal, or legal practitioners of five years’ standing.

¹⁶⁴ Vesting judges with the administrative role of issuing authorities might be considered incompatible with their judicial functions, which are separated from executive functions under the federal constitutional doctrine of separation of powers (set out in *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254). The problem is highlighted by the provision of the same protection and immunity as a High Court judge to any issuing authority who makes a continued preventative detention order (*Criminal Code*, s 105.18(1)).

¹⁶⁵ *Criminal Code*, s 105.18(2). In relation to judges acting as issuing authorities, it was held in *Grollo v Palmer* (1995) 184 CLR 348 that the appointment of judges, in their personal capacities, as issuers of interception warrants under the *Telecommunications (Interception) Act 1959* (Cth) was not incompatible with the exercise of their judicial functions. The majority considered that interception warrants should be issued only by authorities such as judges because the authorisation of intrusions into privacy requires impartial evaluation (at 367). A similar argument applies in the case of preventative detention orders. Although the reasoning in the *Grollo* decision was narrowly divided and the majority of the High Court seems since to have shifted towards a more restrictive position on the constitutionality of judicial exercise of Executive powers (in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1), nevertheless, the *Grollo* precedent is on point and likely to be determinative.

¹⁶⁶ *Criminal Code*, ss 105.12(5), 105.14(6).

¹⁶⁷ *Criminal Code*, s 105.14A.

¹⁶⁸ *Criminal Code*, s 105.19(8).

¹⁶⁹ *Criminal Code*, s 105.16.

¹⁷⁰ See Senate Legal and Constitutional Legislation Committee, n 133, p 44. The Committee recommended that the provision be amended to elaborate on grounds for such orders (Recommendation 8).

¹⁷¹ *Crimes Act 1914* (Cth), s 23CA(4). For Aboriginal or Torres Strait Islanders, the investigating period is limited to two hours. Times to be disregarded for the purposes of the investigating period include, inter alia, any time taken for the detainee to contact friends, relatives or a lawyer (s 23CA(8)). The person may only be detained within the prescribed investigating period and must either be released unconditionally or on bail within that period or otherwise brought before a judicial officer (s 23CA(3)). The investigating officers may apply to a judicial officer to extend the investigating period under s 23DA. To grant the extension, the judicial officer must be satisfied that the offence is a terrorism offence, further detention is necessary to preserve or obtain evidence, the investigation is being conducted properly and without delay and the person has been given an opportunity to make representations about the application (s 23DA(4)).

¹⁷² Nevertheless, police may enter the detainee’s premises to effect the detention and may conduct frisk and ordinary searches (*Criminal Code*, ss 105.22-105.24).

¹⁷³ *Criminal Code*, ss 105.26(1) and 105.42.

warrant issued under s 34D of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act).¹⁷⁴ Thus, preventative detention orders are not duplicative of extant laws.

In addition to requirements for the Attorney-General's consent and for issuing authority approval, safeguards against abuse of preventative detention include restrictions on police action. Preventative detention orders cannot be made for persons under 16 years of age,¹⁷⁵ a detainee must be treated humanely¹⁷⁶ and must have the effect of an order explained to her or him and be given copies of it and the grounds on which it was made.¹⁷⁷ We suggest that the meaning of humane treatment is not clear on the face of it and should be elaborated by a protocol specifying standards of treatment, such as applies to ASIO detainees.¹⁷⁸ Furthermore, it is not clear who is responsible for oversight of the preventative detention safeguards. It has been usefully suggested that the Commonwealth Ombudsman should take on that role (comparable to the Inspector-General of Intelligence for ASIO detention warrants).¹⁷⁹

Further safeguards against abuse of power seem clear enough: the detainee may contact a lawyer for the purposes of seeking a remedy in a federal court or complaining to the Ombudsman.¹⁸⁰ That conversation with a lawyer is monitored,¹⁸¹ although it is inadmissible for evidentiary purposes and the laws of professional legal privilege are expressly preserved.¹⁸² Unless a prohibited contact order is in force, a detainee may contact family members and employers for the purposes of informing them that he or she is safe¹⁸³ but the detainee, the detainee's lawyer, family members or parents of detainees who are minors cannot disclose that the detainee is the subject of a preventative detention order.¹⁸⁴ The Attorney-General must prepare an annual report on the operation of the preventative detention provisions,¹⁸⁵ which lapse in 10 years.¹⁸⁶

¹⁷⁴ *Criminal Code*, s 105.25. The character of an *Australian Security Intelligence Organisation Act 1979* (Cth), s 34D warrant is different to that of a preventative detention order, primarily because it allows questioning (that is its purpose) and applies to a broader range of persons (ie who might divulge security intelligence information) for an initial period of seven days; see Rose G and Nestorovska D, "Terrorism and national-security intelligence laws: Assessing Australian reforms", *LAWASIA Journal*, 2005, pp 127-155.

¹⁷⁵ *Criminal Code*, s 105.5. See Senate Legal and Constitutional Legislation Committee, n 133, p 40.

¹⁷⁶ *Criminal Code*, s 105.33.

¹⁷⁷ *Criminal Code*, s 105.29. Failure to do so means the police officer may commit an offence (s 105.45). However, it has been submitted that nothing less than the full statement of reasons should be provided to the subject of the order in the interests of procedural fairness (see submission of Bret Walker SC, n 109; Senate Legal and Constitutional Legislation Committee, n 133, Recommendation 7).

¹⁷⁸ A Protocol has been developed in relation to the treatment of detainees under ASIO warrants: see Attorney-General Daryl Williams AM QC MP, *ASIO Protocol to Guide Warrant Process*, Press release, 12 August 2003, available from Attorney-General's website: [http://www.ag.gov.au/agd/www/attorneygeneralhome.nsf/Page/Media_Releases_2003_August_2003_ASIO_Protocol_to_guide_warrant_process_\(12_August_2003\)](http://www.ag.gov.au/agd/www/attorneygeneralhome.nsf/Page/Media_Releases_2003_August_2003_ASIO_Protocol_to_guide_warrant_process_(12_August_2003)) viewed 5 August 2005. See also Senate Legal and Constitutional Legislation Committee, n 133, Recommendation 10 and comments by Professor McMillan, the Commonwealth Ombudsman, Ian Carnell and the Inspector-General of Intelligence and Security in Senate Legal and Constitutional Legislation Committee, p 40.

¹⁷⁹ Senate Legal and Constitutional Legislation Committee, n 133, Recommendation 9.

¹⁸⁰ *Criminal Code*, s 105.37.

¹⁸¹ A proposition that the Law Council of Australia described as an "anathema to a system of justice which depends in significant part on the sacrosanct nature of client/lawyer communications", cited in Senate Legal and Constitutional Legislation Committee, n 133, p 50.

¹⁸² *Criminal Code*, ss 105.38(1), 105.38(5), 105.50.

¹⁸³ *Criminal Code*, s 105.35. These restrictions on communication have been criticised as oppressive because the subject should be allowed to give "instructions solely for the running of a legitimate business" or other family commitments (Human Rights and Equal Opportunity Commission Submission to the Senate Legal and Constitutional Legislation Committee, n 133, p 45).

¹⁸⁴ *Criminal Code*, s 105.41.

¹⁸⁵ *Criminal Code*, s 105.47.

¹⁸⁶ *Criminal Code*, s 105.53. However, there is no provision for earlier periodic review. Recommendations have been made that the division be reviewed, regularly reported on and lapse after five years (Senate Legal and Constitutional Legislation Committee, n 133, Recommendations 16, 17, 18).

A privative clause deprives a prospective detainee of opportunity to contest the application for an initial or continued preventative detention order, other than in the High Court, which has a judicial review jurisdiction guaranteed under the federal *Constitution*.¹⁸⁷ Complaints during detention can be made to the Commonwealth Ombudsman, who can make only recommendations to the relevant authorities.¹⁸⁸ The Administrative Appeals Tribunal can award post hoc compensation to those wrongly detained,¹⁸⁹ as can a federal or State court, but neither can do so while an order under Commonwealth law is in force.¹⁹⁰

Control orders

A control order can impose prohibitions, restrictions and other requirements upon a person's activities. The terms may include restrictions and prohibitions on movement, leaving Australia, associating with certain individuals, using certain forms of technology, and possessing or using certain articles. They may also include requirements to wear tracking devices, report to specified persons at specified times and places, be photographed and fingerprinted and participate in counseling or other services.¹⁹¹ It is an offence to contravene a control order, liable to a maximum of five years' imprisonment.¹⁹²

Control orders are not duplicative of other extant Commonwealth laws. They have been likened to apprehended violence orders (AVOs) but they are nonetheless distinct in function and form.¹⁹³ For example, if a person trained with a terrorist organisation prior to that training becoming an offence (ie they are innocent of the current offence under Commonwealth law), their transfer of expertise to others under the guise of recreational shooting or war games conducted on outback cattle stations¹⁹⁴ might be usefully obstructed by control orders. Thus, even though they are not actually engaged in violent acts, their use of firearms or travel to such stations can be restricted.

The control order provisions, set out in Div 104 of the *Criminal Code*, are generally clear. However, minor deficiencies are noted below. The procedures for issuing control orders vary with their three types: "urgent" and "interim", each of which is subject to judicial confirmation in order to become a "continuing" control order. A senior member of the AFP may apply¹⁹⁵ to the Family Court, Federal Court or Federal Magistrates Court (the "issuing court")¹⁹⁶ for an interim control order, subject to the Attorney-General's written consent.¹⁹⁷ The use of a federal court for the issue of an executive order raises legal uncertainties concerning the separation of judicial and executive powers that are inherent in current constitutional law, as has been noted above.¹⁹⁸

¹⁸⁷ *Constitution*, s 75(v) guarantees access to the courts where a person may seek a writ of habeas corpus or rely on the common law principles of judicial review of executive decisions. See *Ruddock v Vadarlis* [2001] FCA 1329.

¹⁸⁸ *Criminal Code*, s 105.36.

¹⁸⁹ *Criminal Code*, s 105.51(4) and (7).

¹⁹⁰ *Criminal Code*, ss 105.51(2), 105.52.

¹⁹¹ *Criminal Code*, s 104.5. Fingerprinting and photographing must be carried out in accordance with s 104.22.

¹⁹² *Criminal Code*, s 104.27.

¹⁹³ Apprehended violence orders are dealt with under federal, State and Territory laws. The *Family Law Act 1975* (Cth), s 114(1) utilises injunctions to protect persons or property in a marriage and s 60D uses the term "family violence orders", defined as orders made under State and Territory law to protect a person from family violence.

¹⁹⁴ Such a situation is believed to have occurred: see Baker J, Cubby B and Timms A, "Jihad camps held in bush, police say", *Sydney Morning Herald* (15 November 2005), <http://www.smh.com.au/news/national/jihad-camps-held-in-bush-police-say/2005/11/14/1131951099035.html> viewed 13 December 2005.

¹⁹⁵ For both urgent and interim control orders, the AFP member must consider on reasonable grounds that the control order would substantially assist in preventing a terrorist act, or suspect on reasonable grounds that the person has provided training to or received training from a listed terrorist organisation (*Criminal Code*, s 104.2(2)).

¹⁹⁶ *Criminal Code*, s 104.3(1) and proposed new definition of "issuing court" in s 100.1(1).

¹⁹⁷ *Criminal Code*, s 104.2(1). The procedure to be followed is outlined in accordance with s 104.2(2). For the making of an urgent control order, the AFP member may dispense with the Attorney-General's consent for up to four hours from making the request (ss 104.6(2), 104.6(10)).

¹⁹⁸ See n 187.

The issuing court may grant an interim order where the AFP member has requested it in accordance with specified requirements¹⁹⁹ and the court is satisfied, on the balance of probabilities, that making the order would substantially assist in preventing a terrorist act or that the person has provided training to or received training from a listed terrorist organisation, and the court is also satisfied on the balance of probabilities that each of controls requested is reasonably necessary, and reasonably appropriate and adapted,²⁰⁰ taking into account the impact on the person's circumstances.²⁰¹ Where an interim or urgent control order has been made, the order must specify the date on which the person who is the subject of the order may attend court where the order will be confirmed, voided or varied.²⁰² This provision could be more specific as to time limits within which the confirmation hearing should take place.²⁰³ The Senate Legal and Constitutional Legislation Committee usefully recommended that the provision expressly require the day of the confirmation hearing to be set as soon as reasonably practicable after the interim or urgent order has been made.²⁰⁴

In addition to the checks and balances of the Attorney-General's consent and issuing authority approval and confirmation, are other safeguards against abuse of power. Interim control orders cannot be issued for persons under 16 years of age.²⁰⁵ The AFP member commits an offence if the draft request to the Attorney-General is false or misleading.²⁰⁶ Any photographs or fingerprints taken under the terms of a control order must be destroyed 12 months after the control order ceases to be in force, if new proceedings in respect of the control order have not been brought, or have been completed or discontinued.²⁰⁷ To ensure that the subject has sufficient notice to attend a court considering confirmation, the AFP member must personally serve the interim or urgent order, together with a summary of the grounds on which it was made as well as information on its effect and the period for which it is in force, and ensure that the person understands the information provided.²⁰⁸ However, a failure to comply with this requirement does not invalidate the control order,²⁰⁹ which, of course, undermines the effectiveness of that safeguard requirement. The Attorney-General is to report to

¹⁹⁹ *Criminal Code*, s 104.3.

²⁰⁰ *Criminal Code*, s 104.4(1).

²⁰¹ *Criminal Code*, s 104.4(2). It was suggested that, in addition to requiring that the order be reasonably appropriate and adapted taking into account the person's circumstances, a further proportionality test should require that the order be in the least restrictive terms for achieving the purpose of the order (Senate Legal and Constitutional Legislation Committee, n 133, Recommendation 19). If incorporated, the additional test would have increased the discretion available to the issuing court to safeguard the detainee's interests but it would have diminished the certainty of the provision. For urgent orders, the court must also be satisfied that the order should be made urgently (*Criminal Code*, s 104.7(2)). Where an urgent control order is granted, the AFP member must submit within 24 hours a form of order, information or explanation on the necessity of the order that has been duly sworn or affirmed, together with a copy of the Attorney-General's consent (ss 104.6(4) and (5), 104.7(5)). If the Attorney-General does not give consent within 24 hours, then the urgent control order ceases to have force (s 104.10(2)).

²⁰² *Criminal Code*, s 104.5(1)(e).

²⁰³ This is a concern particularly given the ex parte nature of the interim and urgent control order issuing processes. See submissions of Human Rights Office, Professor Charlesworth, Professor Byrne and Ms Mackinnon to Senate Legal and Constitutional Legislation Committee, n 133, p 65.

²⁰⁴ Senate Legal and Constitutional Legislation Committee, n 133, Recommendation 20. If the person concerned or their representative does not appear in court at the confirmation, the court may confirm the order without variation if satisfied that it was properly served (*Criminal Code*, s 104.14(4)). Confirmed control orders have a maximum term of 12 months after the day on which the interim order is made, but there is no limitation on the number of repeat orders that can be made once the 12-month time period expires (s 104.5(1)(f)) and Castan Centre for Human Rights Submission to the Senate Legal and Constitutional Legislation Committee, n 133.

²⁰⁵ *Criminal Code*, s 104.28.

²⁰⁶ *Criminal Code*, ss 137.1-137.2.

²⁰⁷ *Criminal Code*, s 104.22(2). Additionally, the photographs and fingerprints must be used only for the purpose of ensuring compliance with the control order and a failure to comply with this provision is an offence (s 104.22(1), (3)).

²⁰⁸ *Criminal Code*, s 104.12(1).

²⁰⁹ *Criminal Code*, s 104.12(4).

Parliament each year on the operation of the control orders and the operative part of the *Criminal Code* (Div 104), which is set to lapse in 10 years.²¹⁰ These provisions appear clear.

At the confirmation hearing, the person may be legally represented and there are provisions allowing the representing lawyer to obtain a copy of the order as well as a summary of grounds.²¹¹ The Senate Legal and Constitutional Legislation Committee recommended that the issuing court provide full rather than summary reasons for its decision to grant an interim or urgent order.²¹² A full statement of reasons would ensure conformity with the applicable principles of procedural fairness and would facilitate judicial review.²¹³ Although full reasons are preferable, they would be subject to excisions for reasons of national security in accordance with the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). As the court need only be satisfied that the control order would substantially assist in preventing a terrorist act, or that the person subject to it has provided training to or received training from a listed terrorist organisation,²¹⁴ it seems that there would be little difference between a coherent summary and heavily censored full reasons.

Acts criminalised pursuant to international conventions

A diverse range of terrorist acts are proscribed pursuant to treaties to which Australia is a party – a suite of them since 2002. There are 13 United Nations treaties that pertain to combating terrorism. Three mandate measures to prevent terrorist acts.²¹⁵ Ten were negotiated to respond to a particular type of terrorist act, all except one after the incidents took place, by cooperating to punish perpetrators of the specified violent crimes. The types of terrorist acts that the treaties respond to are: attacks on protected persons;²¹⁶ hostage taking;²¹⁷ hijacking of aircraft;²¹⁸ unlawful acts of violence against civil aircraft and airports and offences on aircraft;²¹⁹ unlawful acts of violence against ships and against platforms at sea;²²⁰ bombings of public places;²²¹ and nuclear attacks.²²²

²¹⁰ *Criminal Code*, s 104.32.

²¹¹ *Criminal Code*, s 104.21.

²¹² Senate and Legal Constitutional Committee, n 133, Recommendation 20. It also recommended placing an obligation on AFP officers to arrange access to a lawyer or interpreter where the subject of the control order would have difficulty understanding its effect due to language barriers or mental or physical incapacity (Recommendation 21) although this recommendation was not taken up.

²¹³ See also submission of Bret Walker SC, n 109.

²¹⁴ These are the matters as to which an issuing court must be satisfied under proposed new s 104.4(1).

²¹⁵ *Convention on the Physical Protection of Nuclear Material 1980* [1987] ATS 16, which entered into force for Australia on 22 October 1987; *Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991*, Department of Foreign Affairs and Trade, Select Documents on International Affairs No 39 (1991) 3 (AGPS, Canberra, 1995) p 28; *International Convention for the Suppression of the Financing of Terrorism 1999* [2002] ATS 23, which came into force for Australia on 26 October 2002.

²¹⁶ *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973* [1977] ATS 18.

²¹⁷ *International Convention against the Taking of Hostages 1979* [1990] ATS 17.

²¹⁸ *Convention for the Suppression of Unlawful Seizure of Aircraft 1970* [1972] ATS 16.

²¹⁹ *Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963* [1970] ATS 14; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971* [1973] ATS 24; *Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988* [1990] ATS 39.

²²⁰ *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988* [1993] ATS 10; *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 1988* [1993] ATS 11.

²²¹ *International Convention for the Suppression of Terrorist Bombings 1997* [2002] ATS 17.

²²² *International Convention for the Suppression of Acts of Nuclear Terrorism* (New York, 14 April 2005), available from United Nations website <http://untreaty.un.org/English/Terrorism.asp> (viewed 15 May 2006).

Treaties relevant to terrorist acts that Australia had ratified prior to its anti-terrorism legislative reforms in 2002 were already implemented by legislation. The agreed offences are tightly constrained by the treaties and the language of the implementing legislation reflects a careful, technical approach to their implementation:

- The *Crimes (Aviation) Act 1991* (Cth) implements the four treaties listed in its Schs 1-4: the *Convention for the Suppression of Unlawful Seizure of Aircraft 1970*, the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971*, the *Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation 1988* and the *Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963*.²²³
- The *Crimes (Ships and Fixed Platforms) Act 1992* (Cth) implements the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988* and the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 1988*, listed in its Schs 1-2.²²⁴
- The *Crimes (Hostages) Act 1989* (Cth) implements the *International Convention against the Taking of Hostages 1979*.²²⁵
- The *Crimes (Internationally Protected Persons) Act 1976* (Cth) implements the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973*.²²⁶
- The *Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth) implements the *Convention on the Physical Protection of Nuclear Material 1980*.²²⁷

Thus, Australia had already ratified and enacted its obligations under nine of the 13 multilateral treaties, but not the *International Convention for the Suppression of Terrorist Bombings 1997*, the *Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991*²²⁸ and the *Convention for the Suppression of the Financing of Terrorism 1999*.²²⁹ The Plastic Explosives Convention entered into force on 21 June 1998 and the *International Convention for the Suppression of Acts of Nuclear Terrorism* adopted on 13 April 2005 has not yet entered into force. These are the only United Nations counter-terrorism treaties not ratified by Australia.²³⁰

Terrorist bombings

The Commonwealth *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth) amended the *Criminal Code* to give effect to the *International Convention for the Suppression of*

²²³ Conventions cited at nn 218 and 219. The States and Territories have their provisions relating to aircraft offences: *Crimes Act 1900* (ACT), ss 27(3)(g), 120; *Crimes Act 1900* (NSW), ss 204-209; *Criminal Code of the Northern Territory of Australia*, ss 180, 191, 216-217, 244-245, 248, 443; *Criminal Code Act 1899* (Qld), ss 319A, 338A, 408A, 417A, 467A; *Aircraft Offences Act 1971* (SA); *Criminal Code Act 1924* (Tas), ss 276A-276G; *Crimes Act 1958* (Vic), ss 80, 246A, 246B, 246E, 263A, 269; *Criminal Code* (WA), ss 711A, 565A, 294A, 451A, 390B.

²²⁴ Conventions cited at n 220. Offences occurring at sea are governed by a myriad of Commonwealth, State and Territory arrangements, as well as general criminal laws relating to murder, assault, destruction of property etc. For example, see *Crimes at Sea Act 2000* (Cth); *Crimes at Sea Act 1998* (NSW); *Criminal Law (Offences at Sea) Act 1978* (NT); *Crimes at Sea Act 2001* (Qld); *Crimes at Sea Act 1998* (SA); *Crimes at Sea Act 1999* (Tas); *Crimes (Offences at Sea) Act 1978* (Vic); *Crimes at Sea Act 2000* (WA). Some States and Territories have specific criminal law provisions relating to ships: *Crimes Act 1900* (ACT), ss 27(3)(g) and 120 can also apply to ships; *Criminal Code of the Northern Territory*, ss 180, 242-243; *Criminal Code 1899* (Qld), s 469 generally; *Criminal Code Act 1924* (Tas), s 270; *Criminal Code* (WA), s 565A.

²²⁵ Convention cited at n 217.

²²⁶ Convention cited at n 216.

²²⁷ *Convention on the Physical Protection of Nuclear Material 1980* [1987] ATS 16, which entered into force for Australia on 22 October 1987.

²²⁸ Select Documents on International Affairs, n 215. See also *Status of MEX Convention*, International Civil Aviation Organisation website: <http://www.icao.int/icao/en/leb/MEX.htm> viewed 30 November 2004.

²²⁹ *Convention for the Suppression of the Financing of Terrorism*, n 215.

²³⁰ Select Documents on International Affairs, n 215. The Convention obliges parties to: prohibit and prevent the manufacture of unmarked plastic explosives within their territories; establish effective control over their possession and transfer; prevent the unauthorised movement of unmarked plastic explosives into or out of their territory; and ensure that any unmarked plastic explosives that are not held by military or police bodies are destroyed or consumed.

Terrorist Bombings 1997, thus enabling its ratification.²³¹ The legislation created offences relating to international terrorist activities using explosive or lethal devices, for which the offender could face life imprisonment. Section 72.3 of the *Criminal Code* now provides that it is an offence to place a bomb in a public place or outside a government facility with the intention of causing death or serious harm. Under Art 6(1) and (2) of the Convention, the bombing must be subject to the jurisdiction of more than one State.²³² Therefore, the offence, as defined in s 72.4(2) of the *Criminal Code*, applies only if it cannot be classed as wholly internal to Australia.

Prior to the new bombing provisions, the *Public Order (Protection of Persons and Property) Act 1971* (Cth) already related to the offences of possessing, discharging or throwing a weapon, missile or other noxious substance at or in the vicinity of Commonwealth, Federal Court and diplomatic or consular premises. However, that Act is largely concerned with offences such as trespassing, willful damage and obstruction and does not extend to serious crimes like murder. Nor does the earlier Act extend to bombing acts committed entirely extraterritorially. That lacuna could prevent Australia and other countries that require dual criminality in extraditions from cooperating to extradite offenders. Further, although the general extraterritorial criminalisation of terrorist acts introduced in 2002 under s 101 of the *Criminal Code* overlaps the new bombing provisions, the latter were necessary to implement the specific cross-jurisdictional requirements of the international treaty.

Financing terrorist acts

The financing of terrorism offences can be conceptually divided into two categories: financing terrorist acts and financing terrorist organisations. The *Suppression of the Financing of Terrorism Act 2002* (Cth) inserted a financing of terrorist acts into the *Criminal Code* to implement the *Convention for the Suppression of the Financing of Terrorism 1999*. A person commits an offence, risking life imprisonment, if he or she provides or collects funds and the person is reckless as to whether the funds will be used to facilitate a terrorist act.²³³ The *Anti-Terrorism Act (No 2) 2005* (Cth) inserted an additional provision that a person is guilty of an offence, again carrying a penalty of life imprisonment, for intentionally making funds available to another person or collecting funds for or on behalf of another person, in circumstances where the first person is reckless as to whether the second person will use those funds to facilitate or engage in a terrorist act.²³⁴ The newer offence captures circumstances where a person recklessly provides funds indirectly, such as through a fundraiser or other intermediary.²³⁵ It is questionable whether the earlier provision's wording on "providing" funds could achieve the same outcome and, therefore, the amendment enhances the clarity of the offence of providing funds through an intermediary.

A separate offence of funding a terrorist organisation is committed if a person intentionally receives funds from or makes them available to an organisation, reckless as to whether it is a terrorist organisation.²³⁶ This offence is distinct from that of funding terrorist acts because no terrorist act is required but merely the step of providing funds to or receiving funds from an organisation. There has been one conviction under this offence, for receiving funds from Al Qaeda.²³⁷ The *Anti-Terrorism Act (No 2) 2005* (Cth) extended this offence to cover circumstances where a person collects funds as an intermediary for a terrorist organisation, reckless as to whether it is a terrorist organisation.²³⁸ The

²³¹ *Criminal Code*, s 72.1. The Terrorist Bombings Convention entered into force for Australia on 8 September 2002.

²³² *International Convention for the Suppression of Terrorist Bombings*, n 221, Art 6.

²³³ *Criminal Code*, s 103.1. The amendments are discussed further below in the context of their implementation of the *Convention for the Suppression of the Financing of Terrorism 1999*, which aims to deprive terrorists of assets.

²³⁴ *Criminal Code*, s 103.2.

²³⁵ See the discussion of fundraising for Hizbollah through Al Manar, discussed at n 149.

²³⁶ *Criminal Code*, s 102.6. An exception is made for funds for the use of the organisation to comply with a law or obtain legal representation (s 102.6(3)).

²³⁷ Joseph Terrence Thomas was convicted and sentenced to five years' imprisonment in the Victorian Supreme Court on 31 March 2006 (*DPP v Thomas* [2006] VSC 120).

²³⁸ *Criminal Code*, ss 102.6(1)(a), 102.6(2)(a).

terrorist organisation funding provision can be compared to the *Crimes Act*, which provides that it is an offence to “give or contribute money or goods” or to “receive or solicit subscriptions or contributions of money or goods” for an unlawful association.²³⁹ However, as noted above, the provisions concerning unlawful associations under the *Crimes Act* apply to a different class of organisations from those under the *Criminal Code*.²⁴⁰

Offences against government

A set of extant crimes proscribe acts seeking to undermine government: mercenary activities, sedition, espionage, sabotage, treason and treachery. Some of these have been recently updated to meet contemporary counter-terrorism challenges. Others, although reviewed by Sir Harry Gibbs in 1991,²⁴¹ have not been revised and so they remain broad and archaic, overlapping awkwardly with new counter-terrorism offences.

Mercenary activities

The *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (*Foreign Incursions Act*) makes it an offence for Australian citizens to attack a foreign government. This is defined as intending to engage, and actually to engage, in hostile activities in foreign states, including violently overthrowing a foreign government; armed hostilities; causing death or bodily injury to a head of state or a public person; or unlawfully destroying or damaging property belonging to a foreign government.²⁴² It is a defence if the person was serving “in any capacity in or with” the armed forces of a foreign state or other armed forces for which a Ministerial declaration is in force.²⁴³ The *Anti-Terrorism Act 2004* inserted a provision to prevent that defence from applying to persons engaged in armed hostilities while serving in the armed forces of a proscribed organisation.²⁴⁴ Proscribed organisations are those listed by regulation as terrorist organisations or those listed under regulations pursuant to the *Foreign Incursions Act*.²⁴⁵

The necessity of the amendment to the defence was debated in the Senate Legal and Constitutional Legislation Committee, given the extraterritorial application of the definitions of “terrorist act” and “organisation” and the new offences relating to harming Australians while overseas.²⁴⁶ The Senate Committee ultimately accepted the Attorney-General’s submission that, although there is an overlap in laws concerning terrorist acts or organisations and foreign incursions, the amendment was necessary to close a loophole available to persons engaged in armed hostilities where the terrorist organisation is also an instrument of the State.²⁴⁷ The Bosnian Serbian army, the Taliban and Hizbollah are examples of such organisations.

In order to proscribe an organisation, the Act currently provides that the Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in planning, preparing, assisting in or fostering serious human rights violations, armed hostilities against the Commonwealth or its allies, a terrorist act or any act prejudicial to the security, defence or international relations of the Commonwealth.²⁴⁸ Reflecting concern as to the adequacy of these criteria for proscribing

²³⁹ *Crimes Act 1914* (Cth), s 30D.

²⁴⁰ See nn 118-119. Accordingly, the Senate Legal and Constitutional Affairs Committee concluded in 2002 that this provision was justified (see *Consideration of Legislation Referred to the Committee*, n 7, p 29).

²⁴¹ *Review of Commonwealth Criminal Law*, Fifth Interim Report (1991).

²⁴² *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), s 6(1) and (3).

²⁴³ *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), s 6(4).

²⁴⁴ *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), s 6(5).

²⁴⁵ *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), s 6(7).

²⁴⁶ See submissions of Castan Centre for Human Rights Law and Mr Joo-Cheong Tham in Senate Legal and Constitutional Committee, n 96, p 23.

²⁴⁷ Submission of the Attorney-General’s Department in Senate Legal and Constitutional Committee, n 96, pp 24-25 and the Committee’s conclusion, p 32.

²⁴⁸ *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), s 6(8).

organisations under the *Foreign Incursions Act*,²⁴⁹ the Committee recommended that further criteria be developed.²⁵⁰ Indeed, the wide breadth of some of the existing criteria, such as prejudicing the international relations of the Commonwealth, would benefit from the development of guidelines to clarify their application.

Sedition

The *Anti-Terrorism Act (No 2) 2005* (Cth) repealed the then extant crime of sedition in the *Crimes Act*²⁵¹ and updated it with a new crime in the *Criminal Code*.²⁵² Under the new *Criminal Code* sedition provisions,²⁵³ the common element running through the offence is the urging of unlawful force or violence. A person commits an offence punishable by seven years' imprisonment for urging the use of force or violence to overthrow the *Constitution* or government or to interfere in Parliamentary elections; urging violence between community groups;²⁵⁴ or urging a person to assist the enemy;²⁵⁵ or to assist others engaged in armed hostilities against the Australian Defence Forces.²⁵⁶ It applies whether the offender is deliberate or reckless as to the factual circumstances prevailing (eg as to whether the Australian Defence Forces would be affected). The offence applies extraterritorially²⁵⁷ and the Attorney-General's consent is required to commence prosecution.²⁵⁸

In reviewing the offences, the Senate Legal and Constitutional Legislation Committee (and several submissions to it) welcomed the attempt to revise and modernise the *Crimes Act* sedition provisions.²⁵⁹ However, many submissions to the Committee questioned the necessity of sedition laws per se, given that the extant incitement to violence provisions in the *Criminal Code*²⁶⁰ could be applied to offences, such as treason and treachery, allegedly to the same effect.²⁶¹ Nevertheless, treason and treachery laws (examined below) are narrowly focused on the overthrow of government and do not address the broader urging of public violence that the revised crime of sedition does. Sedition does completely overlap with incitement to commit terrorism offences. But, it also extends beyond incitement to commit specific extant offences, to include urging persons to engage in the

²⁴⁹ See submission of Castan Centre for Human Rights Law in Senate Legal and Constitutional Committee, n 96, p 27, which argued for restraints on regulatory power. The Attorney-General's Department submitted that this was not necessary as the organisation need not be a terrorist organisation to be listed under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) and that a crime is only committed once a person engages in armed hostilities (pp 27-28).

²⁵⁰ Senate Legal and Constitutional Committee, n 96, p 33 and Recommendation 4.49.

²⁵¹ Under the previous version of the sedition crime, seditious intention was defined as an intention to bring the Sovereign into hatred or contempt, excite disaffection against the government or *Constitution* of the Commonwealth or against either House of the Parliament of the Commonwealth, excite people to attempt to procure the alteration by unlawful means of any matter in the Commonwealth established by law of the Commonwealth, or promote feelings of ill-will and hostility between different classes of people so as to endanger the peace, order or good government of the Commonwealth (*Crimes Act 1914* (Cth), s 24). A seditious enterprise (s 24B) could be punished by up to three years of imprisonment (s 24C).

²⁵² The definition of unlawful associations in the *Crimes Act* was also amended so that the meaning of seditious intention used to identify an unlawful association in the *Crimes Act* would be consistent with the new crime of sedition in the *Criminal Code*. An unlawful association is declared to be a body that advocates or encourages the doing of any act having or purporting to have as an object the carrying out of a seditious intention (*Crimes Act 1914* (Cth), s 30A).

²⁵³ *Criminal Code*, s 80.2.

²⁵⁴ Community groups means those distinguished by race, religion, nationality or political opinion.

²⁵⁵ The enemy is defined as an organisation or country that is at war with the Commonwealth or otherwise specified as an enemy by s 80.1(1)(e).

²⁵⁶ The latter two limbs do not apply to engagement in conduct for the purposes of providing humanitarian aid.

²⁵⁷ *Criminal Code*, s 80.4.

²⁵⁸ *Criminal Code*, s 80.5.

²⁵⁹ See Saul B, of the Gilbert and Tobin Centre for Public Law, Senate Legal and Constitutional Legislation Committee Report, n 133, pp 77, 114.

²⁶⁰ *Criminal Code*, s 11.4.

²⁶¹ For example Saul B, of the Gilbert and Tobin Centre for Public Law, in the Senate Legal and Constitutional Legislation Committee Report, n 133, p 87. See *Criminal Code*, s 80.1 (treason); *Crimes Act 1914* (Cth), s 24AA (treachery).

general categories of political violence set out in the sedition provisions.²⁶² Overall, it is apparent that there are multiple overlaps among criminal laws applicable to urging others to do illegal violence, but that the laws are not all identical. In relation to the necessity of the offence of sedition, it is of broader application to the urging of political violence than are extant laws and it is more generally applicable in the contemporary context, where electronic media can easily be used to foment political violence across an infinitely wide range of possibilities.

It is a defence to the crime of sedition if the acts were done in good faith, as set out in broad described circumstances. These circumstances occur where a person, in good faith, seeks to show that government advice, policies or actions are in error; points out (with a view to reform) the defects of the government, *Constitution* or administration of justice; urges another person to act lawfully in procuring change; points out issues causing tensions between rival groups with a view to removing those issues; or does anything in connection with an industrial dispute.²⁶³ Proof of mens rea would be impossible in these described circumstances and, thus, the defence is superfluous, other than the cosmetics of explicitly repeating the mens rea applicable to the offence.

Concerning the clarity of the sedition offence, it has been argued that the term “urge” is vague and makes the scope of the offence uncertain,²⁶⁴ possibly capturing legitimate academic and journalistic commentary, satire, comedy and artistic expression.²⁶⁵ Consequently, the Senate Legal and Constitutional Legislation Committee recommended that the fault element in “urging” be expressly intentional,²⁶⁶ rather than merely reckless urging; that defences include actions for journalistic, educational, artistic, scientific, religious or public interest purposes; and that the words “in good faith” be removed as a qualifier of the defences.²⁶⁷ However, the offence already requires that urging to violence be intentional. Recklessness relates merely to the urging person’s adequate understanding of the contextual circumstances in which urging occurs.²⁶⁸ Further, a broad unqualified defence for actions for journalistic, educational, artistic, scientific, religious or public interest purposes would render the offence nugatory, as would allowing actions said to give rise to the defences to be made not in good faith.

Unfortunately, the brief time allowed for the Senate Legal and Constitutional Legislation Committee’s work and for the preparation of submissions to it lowered the quality of its considerations.²⁶⁹ In fairness, the Committee’s first recommendation on the sedition provisions was that they be excised and that the matter be referred to the Australian Law Reform Commission for fuller consideration.²⁷⁰ It is a cause for regret that the truncated process of Committee scrutiny for the *Anti-Terrorism Bill 2005*, which was the product of governmental management of the legislative agenda, impacted on the quality of parliamentary consideration of legislation of wide concern to the Australian community.

²⁶² The Commonwealth Attorney-General’s Department submitted to the Senate Committee that, whereas sedition is proved by urging violence, incitement requires proof of intention that a specific offence is urged to be done and that it is, therefore, harder to prove the requisite intention for incitement to commit a specific offence, than to prove intention to urge the general categories of violence set out in the sedition provision (Committee Hansard, 14 November 2005, p 22 in Senate Legal and Constitutional Legislation Committee Report, n 133, p 87).

²⁶³ *Criminal Code*, s 80.3.

²⁶⁴ Law Council of Australia Submission to the *Provisions of the Anti-Terrorism (No 2) Bill 2005* (11 November 2005), http://www.aph.gov.au/senate/committee/legcon_ctte/terrorism/submissions/sub140.pdf viewed 22 November 2005.

²⁶⁵ See n 264. See also Castan Centre for Human Rights Submission to the Senate Legal and Constitutional Legislation Committee Report, n 133; submission of Dr Saul of the Gilbert and Tobin Centre of Public Law, Senate Legal and Constitutional Legislation Committee Report, n 133, p 92.

²⁶⁶ Senate Legal and Constitutional Legislation Committee Report, n 133, Recommendation 29.

²⁶⁷ Senate Legal and Constitutional Legislation Committee Report, n 133, Recommendation 29.

²⁶⁸ See nn 256-257.

²⁶⁹ The *Anti-Terrorism Bill (No 2) 2005* was introduced to the House of Representatives on 3 November 2005, where it was promptly referred to the Senate Legal and Constitutional Legislation Committee for scrutiny. Only one week was allowed for public submissions and the Committee’s report was released on 28 November 2005.

²⁷⁰ Senate Legal and Constitutional Legislation Committee Report, n 133, Recommendations 27-28.

Concerns were expressed that the offences would breach the implied constitutional right to freedom of political communication by stifling free speech.²⁷¹ The Attorney-General's Department received advice that the provisions pose no constitutional issues in respect of freedom of political communication.²⁷² Nevertheless, specific provision that the offences do not apply to the extent that they inhibit any such freedom would provide an additional safeguard.²⁷³

In November 2005, the Attorney-General acknowledged the need for further and deeper consideration of the sedition provisions following their enactment²⁷⁴ and the matter was referred to the Australian Law Reform Commission in March 2006.²⁷⁵ It follows that the government assessed the need for the sedition provisions to come into effect at the time as more urgent and weighty than the need to refine the provisions. The Australian Law Reform Commission produced a discussion paper in May with a final report due in December 2006.²⁷⁶ In essence, the discussion paper confirmed that the reforms were necessary and not duplicative but suggested a range of changes that clarify, simplify and "beautify" the legislation. These include renaming the sedition offence as "offences against political liberty and public order", stating expressly that urging to violence must be intentional and, conversely, removing the superfluous defence of good faith, although the listed good faith factors may instead be taken into account in sentencing. Substantive recommendations on policy matters that sought to refine the scope of the legislation included that the offence of sedition be limited to Australian nationals or residents and that the offences of urging a person to assist the enemy or others engaged in armed hostilities against the Australian Defence Forces be repealed.

Treason and treachery

The long-standing offence of treason under the *Criminal Code* potentially overlaps terrorism offences.²⁷⁷ It is an offence of treason to cause the death of the Sovereign, the Sovereign's heir or consort, the Prime Minister or the Governor-General. It is also an offence to harm, or in any way imprison them, to wage war against the Commonwealth, or intentionally engage in conduct that assists its enemies.²⁷⁸ Further, it is an offence to assist anyone who has committed treason with the intention of allowing that person to escape punishment. It is also an offence to know that a person intends to commit treason and to fail to inform the police of that person's treasonous activities.²⁷⁹ The treason provisions were amended in the *Security Legislation Amendment (Terrorism) Act 2002 (No 2)* (Cth), which moved it from the *Crimes Act* to the *Criminal Code*. As for sedition, the changes allowed extraterritorial jurisdiction,²⁸⁰ subject to the Attorney-General's consent,²⁸¹ and defences for specified

²⁷¹ See eg Mr John North of the Law Council in Senate Legal and Constitutional Legislation Committee Report, n 133, p 90.

²⁷² Senate Legal and Constitutional Legislation Committee Report, n 133, p 91.

²⁷³ Such a guarantee is included in the *Australian Security and Intelligence Organisation Act 1979* (Cth), s 34VAA(12).

²⁷⁴ Australia, House of Representatives, *Hansard*, Hon Philip Ruddock MP, (3 November 2005) "Anti-Terrorism Bill 2005", Second Reading Speech, p 67

²⁷⁵ Attorney-General's Department, *Australian Law Reform Commission to Review Sedition Laws*, Media Release No 028 (2006).

²⁷⁶ Australian Law Reform Commission (ALRC), *Review of Sedition Laws*, Discussion Paper No 71 (2006).

²⁷⁷ Listed acts of treason also overlap with attacks on protected persons as set out in the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973*, n 216.

²⁷⁸ *Criminal Code*, s 80.1(1). Several States, which were previously the early colonies, have specific offences dealing with treason: *Crimes Act 1900* (NSW), s 12; *Criminal Law Consolidation Act 1935* (SA), s 7; *Criminal Code 1924* (Tas), s 54; *Crimes Act 1958* (Vic), s 9A.

²⁷⁹ *Criminal Code*, s 80.1(2).

²⁸⁰ *Criminal Code*, s 80.4.

²⁸¹ *Criminal Code*, s 80.5.

actions in good faith.²⁸² The Australian Law Reform Commission has usefully proposed that the meaning of “assistance” to an enemy be clarified by confining its meaning from “any means whatever” to “material” assistance.²⁸³

The *Crimes Act* deals with treachery, which overlaps with but is narrower than treason under the *Criminal Code*. The *Crimes Act* provides that it is an offence of treachery to do any act with the intent of overthrowing the *Constitution* of the Commonwealth by revolution or sabotage.²⁸⁴ Thus, treachery focuses on overthrow of the *Constitution*, while treason focuses on attacks on State leaders. Assisting enemies of the Commonwealth is a treacherous offence, similar to treason under the *Criminal Code*.²⁸⁵ However, unlike the *Criminal Code*, the *Crimes Act* requires that the enemies of the Commonwealth must be specified by proclamation.²⁸⁶ Safeguards provide that certain acts carried out in good faith, such as political rallies attempting to bring about legislative change through lawful means, are not unlawful.²⁸⁷

The treachery provisions were not amended as a part of the legislative package to address terrorist acts and they are neither so clear nor comprehensive as the definitions of terrorist acts. Recommendations for their amendment have been outstanding since the 1991 Gibbs Review of Commonwealth Criminal Law. Since the enactment of the terrorist act offences, the parts of the extant treason and treachery offences, other than those that deal with armed conflict, war, enemies and invasion, have become redundant.²⁸⁸

Espionage

The *Criminal Code Amendment (Espionage and Related Matters) Act 2002* (Cth) inserted a 25-year penalty for a person convicted of espionage into the *Criminal Code*.²⁸⁹ The provision states that a person commits the offence if he or she makes available information concerning the Commonwealth’s security or defence or reveals information concerning the security or defence of another country. The fact that the information is lawfully available is a defence.²⁹⁰ The act must result in, or be likely to result in the information being communicated to foreign country or to a foreign organisation.²⁹¹

The espionage provision overlaps with the general proscriptions on making documents to facilitate terrorist acts or planning or preparing a terrorist act in instances where the espionage is to gather information for the purpose of a terrorist act.²⁹² An additional overlapping layer of offences is set out in the *Crimes Act*. Part VI of the *Crimes Act* deals with offences relating to the disclosure of sensitive information by Commonwealth officers and Pt VII creates offences relating to the disclosure of official secrets and unlawful soundings.²⁹³ The overlapping ranges of activities covered by the espionage and unlawful disclosure offences and the terrorism related offences are far from identical.

²⁸² *Criminal Code*, s 80.3.

²⁸³ ALRC, n 276 at [8.106]-[8.113].

²⁸⁴ *Crimes Act 1914* (Cth), s 24AA(1).

²⁸⁵ *Crimes Act 1914* (Cth), s 24AA(2).

²⁸⁶ *Crimes Act 1914* (Cth), s 24AA(4).

²⁸⁷ *Crimes Act 1914* (Cth), s 24F(1). Good faith does not include assisting proclaimed enemies for a purpose prejudicial to the security of the Commonwealth (s 24F(2)).

²⁸⁸ See ALRC, n 276 at [4.41]: the discussion paper obliquely notes that the *Crimes Act 1914* (Cth) provisions on treachery are redundant.

²⁸⁹ *Criminal Code*, s 91.1.

²⁹⁰ *Criminal Code*, s 91.2.

²⁹¹ *Criminal Code*, s 91.1(1)(c). Communication to a foreign organisation was an addition introduced in the 2002 amendments, which increased the penalty and moved the offence from the *Crimes Act 1914* (Cth) to the *Criminal Code*.

²⁹² *Criminal Code*, ss 101.5, 101.6.

²⁹³ The *Crimes Act 1914* (Cth), s 83(6) states that a reference to the taking of soundings includes a hydrographic survey. Extant ambiguities in the provisions concerning unlawful disclosures by public officials have generated confusion for decades. The matter was reported on by the Gibbs Committee in 1991 and was considered by the ALRC, *Protecting Classified and Security Sensitive Information* Discussion Paper No 67 (2004).

For example, terrorist act preparations and documents may be made without obtaining unlawful disclosures or security and defence information. However, the ways that these and the espionage offences articulate with the offences of making documents facilitating terrorist acts, or planning or preparing terrorist acts, is partly duplicative. Revision of the espionage offence could clarify their relationship.

Sabotage

The offence of sabotage is essentially limited to causing damage to a narrow set of Australian Defence Force targets. Under the *Crimes Act*, an act of sabotage is the destruction, damage or impairment, with the intention of prejudicing the safety or defence of the Commonwealth, of any article used or intended to be used either by the Defence Force; in connection with the manufacture, investigation or testing of weapons or apparatus of war; for the defence of the Commonwealth; or that is in or forms part of a place that is a Commonwealth prohibited place.²⁹⁴ These form only a small subset of targets available to terrorists and are unlikely choices as they are “hard”, even if “high profile” targets. Conversely, the mens rea element required in the sabotage offence is premised on intention to do the act and does not include the extra intentional elements required in a terrorist act (ie coercing or intimidating the government or intimidating sections of the public). Thus, the overlap between the two categories of offences is very limited and the crime of sabotage is not made redundant.

CONCLUSION

This article’s assessment of the counter-terrorism reforms against the criteria of necessity and clarity indicates that the new criminal offences were necessary to update or extend prior legislation but that most prior legislation remains on the books, overlap occurs and that in several of the new provisions clarity is lacking. Shortcomings in prior legislation prohibiting acts of political violence included a lack of extraterritorial reach, inadequate proscription of preparatory and supporting activities, inability to prohibit participation in terrorist organisations, non-implementation of applicable treaties, inadequate applicable penalties and inadequate incitement laws. Not least in these prior shortcomings was the lack of a legal definition for terrorism in the context of globally networked political violence.

The 2002 reforms gave terrorism a sound contemporary legal definition. An anomaly in the definition’s safeguard for legitimate political activism is that unintended damage to property or electronic systems is not exempted from the definition of a terrorist act. Additionally, the definition’s extraterritorial application fails specifically to exempt legitimate military operations conducted in accordance with international law.

The definition provides a toolbox within which are placed offences with more severe penalties than correlated common violent crimes. These include terrorist acts, preliminary acts supportive of terrorist acts and participation in terrorist organisations. Although remoteness at the extremities of the range of preparatory acts is undefined, the difficulty of establishing criminal intention will correctly define the limits of remote acts. Curiously, the new provisions on extraterritorial violence against Australians do not address attacks committed overseas causing serious damage to Australian public property or electronic systems, in parallel with the definition of terrorist acts. The initial provisions on participation in terrorist organisations were a weak point in the reforms, being partly unworkable, but have been amended with little remaining damage, other than the two unworkable listings adopted by Parliament in 2003. (Indeed, the main public policy risk in the terrorist organisation listing process would seem to be improper exclusion rather than inclusion.) Concerning identification of terrorist organisations, the provisions on organisations that advocate terrorist acts would be clearer if indicia as to who in the organisation does the advocating and how were set out. In addition, crimes of participation in terrorist organisations could be clarified by setting out indicia for the participatory acts of membership and support. The provisions on association as a form of participation might be simplified.

²⁹⁴ *Crimes Act 1914* (Cth), s 24AB(1). Under s 24AB(2), a person who commits an act of sabotage or has in his possession any article that is capable of use, and which he intends for use, in carrying out an act of sabotage faces up to 15 years’ imprisonment. The meaning of a prohibited place is set out in s 80.

The new preventative detention provisions could be clarified by elaborating the standards of humane treatment by means of a protocol and by specifying that the Commonwealth Ombudsman is responsible for review of administration of the preventative detention safeguards. Material consequences for failure to comply with safeguards in the implementation process for confirmation of control orders need to be introduced to ensure their effectiveness. Further, guidelines clarifying the grounds on which an organisation might be proscribed under the prohibitions on mercenary activities would be useful to clarify the scope of mercenary crimes. The overhaul of the crime of sedition appears utile, although its articulation of the intention to urge violence could be made clearer. The scope of the assisting the enemy in offence of treason might be clarified by requiring that the assistance be material.

Finally, concerning the more profound policy questions, it might be noted that the Australian Government acted following the bombings of the 11 September 2001 across a range of approaches. National criminal laws form merely part of the broader effort required to combat extremist political violence. Societal approaches include long-term strategic efforts to engage the potential perpetrators constructively, through education, peer pressure and the addressing of grievances. Security-oriented approaches include tactical efforts to gather intelligence, secure the movements of dangerous persons, of weapons and of dangerous goods, to harden targets, to suppress the circulation of illegal funding and propaganda, and to build cooperative domestic and international alliances. The criminal law reforms that formed a part of this broader effort were initially accused of being a draconian ploy, exploiting public fear to establish a police state. That alarm stimulated long and exhaustive public scrutiny of the proposals, and thereby enhanced democratic accountability in the press and in Parliament.²⁹⁵ However, the alarm might itself be seen as exaggeratedly fearful, as the usual constitutional safeguards for democratic process, including regularity of legislative action and a separation of powers, were maintained. In the end, the best defence against potential oppressiveness of public policy in Australia, as in all other democracies, remains the informed, sober and vigilant exercise of public conscience by the majority of electors.

²⁹⁵ In Parliament, the *Anti-Terrorism Bill (No 2) 2005* (Cth) formed a regrettable exception and its provisions were later referred to the Australian Law Reform Commission. That Bill was introduced to the House of Representatives on 3 November 2005 and promptly referred to the Senate Legal and Constitutional Legislation Committee for scrutiny. The Committee report was released on 28 November and passed to the Senate on 6 December 2005 (Senate Legal and Constitutional Legislation Committee, n 133), where debate on the Bill was limited. The rushed legislative process raised questions as to whether the parliamentary and public debate was sufficiently robust to ensure democratic accountability: see Murphy D, "Laws rushed through before a nation notices", *Sydney Morning Herald* (10-11 December 2005) p 4.