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Review of CT legislation: Submission on Federal Criminal Code CT provisions

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Abstract
This submission relates to only selected federal Criminal Code counter-terrorism (CT) laws, although recognising that national CT criminal laws form merely part a small part of the national effort required to combat extremist political violence. It suggests several of the CT provisions in which clarity could be improved.

Assessment of the federal CT laws against the criterion of necessity indicates that, although the CT criminal offences update or extend prior legislation, most prior legislation remains on the books, and overlap occurs. Yet, in another respect, they do not overlap with other extant crimes of violence. The intention of terrorism perpetrators, to coerce governments and intimidate the public, was considered by federal Parliament to pose sufficient threat to the fabric of the social and democratic system for related acts of violence to be labelled 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 introduced into the Criminal Code by the International Criminal Court Act 2002 (Cth) are examples. 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.2 These most heinous crimes share a similar mens rea, that is, the motivation includes intention to violently change a social order and, for this reason, they are distinctive offences.

This review is welcome as part of our safeguards for democratic process. The introduction of CT criminal law, initially accused by some social commentators of being a draconian ploy to establish a police state, in fact continues to contribute to the safeguarding of Australian constitutional democratic process.

Keywords
code, criminal, federal, provisions, submission, review, legislation, ct

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21 September 2012

Dear Secretariat

COAG Review of Counter-Terrorism Legislation

Please find attached a submission to the Review Committee undertaking the 2012 COAG Review of Counter-Terrorism Legislation.

Kind regards
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This submission relates to only selected federal *Criminal Code* counter-terrorism (CT) laws, although recognising that national CT criminal laws form merely part a small part of the national effort required to combat extremist political violence. It suggests several of the CT provisions in which clarity could be improved.

Assessment of the federal CT laws against the criterion of necessity indicates that, although the CT criminal offences update or extend prior legislation, most prior legislation remains on the books, and overlap occurs. Yet, in another respect, they do not overlap with other extant crimes of violence. The intention of terrorism perpetrators, to coerce governments and intimidate the public, was considered by federal Parliament to pose sufficient threat to the fabric of the social and democratic system for related acts of violence to be labelled 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 introduced into the *Criminal Code* by the *International Criminal Court Act 2002* (Cth) are examples.[1] 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.[2] These most heinous crimes share a similar mens rea, that is, the motivation includes intention to violently change a social order and, for this reason, they are distinctive offences.

This review is welcome as part of our safeguards for democratic process. The introduction of CT criminal law, initially accused by some social commentators of being a draconian ploy to establish a police state, in fact continues to contribute to the safeguarding of Australian constitutional democratic process.

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[1] 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.

[2] 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).

Definition of Terrorist Act

The federal CT 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.

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 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	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.	advocacy; protest; dissent; industrial action.
Intention	advancing a political, religious or ideological cause; AND coercing or intimidating the government; OR intimidating sections of the public.	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.

Weaknesses in clarity and specificity in the above definition arise due to its failure to confine its operation to persons who are not uniformed military forces (i.e. to non-State non-military actors), and to specifically exclude the open and direct use of violent force by States 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.[3] 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 for carrying out legitimate orders (as discussed below in relation to extraterritoriality). Although these examples may seem 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.

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".[4] 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.[5] 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?

[3] See International Court of Justice, "Arrest warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)" <http://www.icj-cij.org/icjwww/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.

[4] Head M, "Counter-terrorism laws threaten fundamental democratic rights" (2002) 27(3) *Alternative Law Journal* 125.

[5] These concerns were noted in the Consideration of Legislation Referred to the Committee, 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* (May 2002), p 35.

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

Curiously, the 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.

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. Over 100 Australians killed by terrorists since the year 2000 were murdered in foreign jurisdictions.[6]

Extraterritorial application also creates a technical ambiguity, 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 (e.g. 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,[7] it is unfortunate that Australian military action might nevertheless otherwise fall within the definition of terrorist acts.[8] 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.[9]

To clarify the scope of the definition, an elaboration to the exception in subs (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.[10]

Terrorist Organisations

The initial provisions on 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 originally adopted by Parliament in 2003.

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. Indeed, the main public policy risk in the terrorist organisation listing process would seem to be improper exclusion rather than inclusion.

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[6] 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.

[7] Criminal Code, s 10.5.

[8] 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. Application of the definition to Australian nationals engaged in foreign armies or militias has been specifically addressed with greater clarity in the legislative reforms.

[9] See International Court of Justice, "Arrest warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)"; 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.

[10] 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".

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.

A "terrorist organisation" is defined under s 102.1(1) of the Criminal Code 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.

The first definition for identifying a terrorist organisation under s. 102.1(1)(a) above, 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 or how it is determined that 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 under s. 102.2, a court is implicitly empowered to deem any organisation that assisted in the commission of that act as a terrorist organisation. The implication that it is a court that decides that an organisation is engaged in a terrorist act would be clearer if the implication and its consequences were made explicit.

In relation to approach (b) under s 102.1(1) of the Criminal Code, concerning definition by specification under a regulation, the Governor-General may list terrorist organisations by regulation, on the advice of the Attorney-General. To provide such advice, under s 102.1(2), the Attorney-General must be satisfied "on reasonable grounds" that the organisation is "directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)" or that the organisation "advocates" the doing of a terrorist act.

The term "advocates" is defined under s 102.1(1A) as counselling or urging, providing instruction on or directly praising the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person to engage in a terrorist act. There is uncertainty in this provision as to who does the advocating and how. In 2005, the Senate Legal and Constitutional Legislation Committee recommended including criteria to clarify the circumstances in which an organisation may be considered to have advocated terrorism: i.e. official media releases or statements by an acknowledged leader.[11] Included in these criteria should be the official electronic posting of materials onto its website or sending of materials in mass membership emails.

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. Yet, concern among 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"12 (sic) seems likely to have led to nonfeasant non-listing of some well known terrorist organisations by the government.[13]

Of particular concern are incomplete listing of the "Hizbollah External Security Organisation", identified in the Criminal Code Regulations 2002 s. 4Q, as it is not considered by experts to be a separate organisation from Hizbollah proper.[14] Similarly, the HAMAS military wing Izz al-Din al-Qassam Brigades, but not HAMAS, is listed in Criminal Code Regulations 2002 s. 4U, again despite the fact that the Brigades are an integral part of HAMAS under a unified leadership.[15] For example,

[11] 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.

[12] 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 p 140. However, deconstruction of the argument reveals that it presupposes a definition of terrorism broader than in the *Criminal Code Act 1995* (Cth).

[13] This is demonstrated by expressions of federal Parliamentary consternation over the regulatory listing of Palestinian Islamic Jihad. See: 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*, June 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 reporting of it by the Australian Broadcasting Commission.

[14] 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. Four of its senior operatives are under indictment by the United Nations Special Tribunal for Lebanon for the murder of a past Prime Minister of Lebanon, Rafiq Hariri, and his aides. In a 1994 operation in Buenos Aires it killed 86 people and injured 300 and, in 1982, murdered over 300 in the Beirut barracks bombings in 1983. Hizbollah is financed by Iran, supported by Syria, headquartered in Lebanon and has global operations. Some say Hizbollah is now more internationally capable as Al Quaeda.

[15] E.g. 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>.

Canada[16] has banned HAMAS and Hizbollah in their entirety. It is impossible to artificially distinguish their terrorism and political activities. In both cases, Australia's federal government demurred to the respective organisation's non-terrorist activities. Yet compare a body that engages in four regular activities, of which terrorism is only one, to a person who lives 20,000 days and murders on only one of them. If the former is at least as culpable as the murderer, it is surely a terrorist organisation.

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. Although it has been active and is the subject of concern in Australia, Hizb ut-Tahrir has not been listed as a terrorist organisation, although it proscribed in several other jurisdictions, including Germany and Turkey. It seems appropriate to keep the organisation under review.

The partial listing of Hizbollah and HAMAS confounds the workability of the terrorism offence provisions under the Criminal Code. To illustrate, Al Manar, the global broadcasting arm of Hizbollah, through a licensed cable television service, Television & Radio Broadcasting Services Australia Pty Ltd (TARBS), has advertised in Australia for donations. Money sent to Al Manar is money to Hizbollah. The Criminal Code s. 102.6 states that a person commits an offence when he or she intentionally or recklessly provides funding to a terrorist organisation (whether directly or indirectly). Uncertainty in the interpretation of this provision as applied to the partial listing of Hizbollah raises problematic 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?[17] This conundrum leaves a judge with an unworkable law.

Acts of Terrorism

The definition of terrorism 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.

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.[18] 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,[19] possessing things related to terrorist acts,[20] collecting or making documents to facilitate terrorist acts[21] or any other action in the planning or preparation of a terrorist act.[22] 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 preparation or engagement is connected with more than one terrorist act.[23] Thus, general preparations are proscribed even though a specific target and date have not been fixed upon.[24]

These provisions bear an indirect relationship to the extant common laws of attempt, conspiracy and accessorial liability because they entail complicity and common purpose.[25] Although the preparatory acts provisions overlap aspects of the extant

[16] 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.

[17] 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. 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. The ACMA announced a review of standards for narrowcast television services to avoid a repeat of this incident. 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 and TARBS withdrew the cable service before the investigation began and is now in receivership.

[18] Criminal Code, s 101.1.

[19] Criminal Code, s 101.2.

[20] Criminal Code, s 101.4.

[21] Criminal Code, s 101.5.

[22] Criminal Code, s 101.6.

[23] *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).

[24] 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..

[25] *Criminal Code*, ss 11.1, 11.2 and 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

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,[26] 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.

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. 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.[27] 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.[28] 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*,[29] 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.[30] In practice, however, the outer limits of the crimes of 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.

Preventative Detention

The *Anti-Terrorism Bill (No 2) 2005* 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.

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.[31] Further, preventative detention is distinguished from investigative arrest because a person cannot be questioned while under preventative detention.[32] Instead, in order to be questioned, the detainee must be released and then arrested in accordance with the *Crimes Act*[33] or detained in accordance with a warrant issued under s 34D of the *Australian*

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 and 1324.

[26] 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)).

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

[28] Brown et al, n 55.

[29] Brown et al, n 55, p 1310.

[30] 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 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).

[31] *Crimes Act*, 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)).

[32] 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).

[33] *Criminal Code*, ss 105.26(1) and 105.42.

Security Intelligence Organisation Act 1979 (Cth) (ASIO Act).[34] Thus, preventative detention orders are not duplicative of extant laws.

The 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.

Prohibited contact orders are ancillary orders to prevent the detainee from contacting a family member, parent or lawyer,[35] which is otherwise permitted during preventative detention.[36] 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".[37] This wording has been criticised as unacceptably vague,[38] a charge that reflects concern for the detainee's family. However, it is difficult to see how the plain meaning could be made clearer.

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,[39] a detainee must be treated humanely[40] 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.[41] 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.[42] 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).[43]

Control orders

The control order provisions, set out in Div 104 of the *Criminal Code*, are generally clear. 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. 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.[44]

The Senate Legal and Constitutional Legislation Committee has recommended that the issuing court provide full rather than summary reasons for its decision to grant an interim or urgent order.[45] A full statement of reasons would ensure

[34] *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.

[35] *Criminal Code*, s 105.14A.

[36] *Criminal Code*, s 105.19(8).

[37] *Criminal Code*, s 105.16.

[38] See Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, n 133, p 44. The Senate Legal and Constitutional Legislation Committee recommended that the provision be amended to elaborate on grounds for such orders (Recommendation 8).

[39] *Criminal Code*, s 105.5. See Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, n 133, p 40.

[40] *Criminal Code*, s 105.33.

[41] *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 (Submission of Brett Walker SC to the Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (11 November 2005), and Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, n 133, Recommendation 7).

[42] A Protocol has been developed in relation to the treatment of detainees under ASIO warrants. See also Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, 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.

[43] Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, n 133, Recommendation 9.

[44] *Criminal Code*, s 104.21.

[45] Senate and Legal Constitutional Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, 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.

conformity with the applicable principles of procedural fairness and would facilitate judicial review.[46] 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,[47] it seems that there would be little difference between a coherent summary and heavily censored full reasons.

[46] See also submission of Mr Brett Walker SC to the Senate and Legal Constitutional Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005,* 11 November 2005.

[47] These are the matters as to which an issuing court must be satisfied under s 104.4(1).