LEGISLATING WITH URGENCY — THE ENACTMENT OF THE *ANTI-TERRORISM ACT [NO 1] 2005*

ANDREW LYNCH*

[This article examines the circumstances surrounding the urgent enactment of the Anti-Terrorism Act [No 1] 2005 *which broadened the scope of several terrorism offences in the* Criminal Code*. It considers the necessity of those amendments both as a matter of substance given the original provisions and also as essential so as to enable authorities to move against suspected terrorists. The author argues that despite the drama accompanying the Act's expedited passage through Parliament, this episode was largely typical of the legislative process which has underpinned counter-terrorism in Australia since September 11, 2001. The article concludes by identifying several unsatisfactory trends in law-making on national security issues and argues that their minimisation would reduce the need for more 'urgent legislation' in future.]*

CONTENTS

I Introduction 747
II One Week in November 749
III Were the Amendments of the *Anti-Terrorism Act [No 1] 2005* Necessary? 757
  A The Original Legislative Intention 758
  B A 'Minor' Amendment? 761
  C The Consequences of Caution 765
IV Were the Amendments of the *Anti-Terrorism Act [No 1] 2005* Urgently Necessary? 767
  A Just How 'Imminent' Was the Threat? 768
  B Selective Urgency 773
V Law-Making and the Law — Trends in Counter-Terrorism 775
VI Conclusion 781

I INTRODUCTION

The traditional focus of legal scholarship is upon the judicial arm of government. Law is understandably analysed through consideration of how it is either made or interpreted by the courts. While one may turn to parliamentary intention in order to illuminate statutory meaning, generally the law-making power of the legislature is not considered ripe for legal analysis. This article challenges the reluctance of lawyers to acknowledge the often significant legal dimensions which may be integrated with the political aspects of parliamentary activity.

* LLB (Hons), LLM (QUT), PhD (UNSW); Senior Lecturer, Faculty of Law, The University of New South Wales; Director, Terrorism and Law Project, Gilbert + Tobin Centre of Public Law, The University of New South Wales. This article is based upon a paper presented at the Australian National University workshop on 'Ensuring Accountability — Terrorist Challenges and State Responses in a Free Society', Canberra, 20–21 April 2006. I thank the organisers for their invitation to speak and the participants for their comments and suggestions, as well as those made by Professors Kent Roach and George Williams. I also thank Tessa Meyrick for her research assistance in preparing that paper and Edwina MacDonald for her work on this article. I alone am responsible for any flaws.

Undoubtedly some law-making by the legislature is more amenable to legal analysis than others. Many Bills are debated on policy grounds alone and the legislation is seen as little more than a means to that end. But in other areas, questions of policy and law are clearly linked, so that parliamentary deliberation is quite directly about the meaning and operation of the law which is being created. In these instances, it is possible to gain significant insights from an examination of the circumstances surrounding enactment.

One area where this is very much the case is anti-terrorism law. Of course, there are a range of policy debates in this field, but perhaps because there exists broad consensus on the need to prevent and severely punish terrorism, significant attention is also given to the detail of laws as they progress through the legislative process. This is often centred upon the intended operation of provisions, their intrusion upon freedoms of the individual and the role of both judicial and parliamentary review. Many of the new laws passed by the Commonwealth Parliament since the attacks of September 11, 2001 have necessarily been subjected to analysis by legal commentators drawing on this sort of material due to the lack — until very recently — of any judicial consideration of the provisions.[1]

This article starts from the premise that the analysis of law-making by legislatures can be, in certain areas, appropriately employed as a tool of legal scholarship. This acknowledges that the Parliament is not a purely political institution but fulfils a significant legal role under the *Australian Constitution*.[2] It demonstrates the usefulness which such analysis can provide through a legislative case study focusing on the enactment of the *Anti-Terrorism Act 2005* (Cth) ('*Anti-Terrorism Act [No 1] 2005*').[3]

The circumstances of the Act's passage through the Commonwealth Parliament were highly unusual. Its provisions were found in parts of a draft Bill which dealt with a number of anti-terrorism strategies proposed by the Commonwealth and upon which the states and territories agreed at the Council of

[1] See, eg, Greg Carne, 'Detaining Questions or Compromising Constitutionality?: The *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth)' (2004) 27 *University of New South Wales Law Journal* 524; Andrew Lynch, 'Use of Overseas Evidence in Terrorism Offences: The Implications of the Commonwealth's New Scheme for Defendants and the Courts' (2006) 27 *Australian Bar Review* 288; Bernadette McSherry, 'Terrorism Offences in the *Criminal Code*: Broadening the Boundaries of Australian Criminal Laws' (2004) 27 *University of New South Wales Law Journal* 354; George Williams, 'Australian Values and the War against Terrorism' (Speech delivered at the National Press Club, Canberra, 29 January 2003).

[2] Flores makes the following comment on the hesitation with which this blurring is recognised:

> Curiously, in adjudication the political — or ideological — element is denied and underestimated, while in legislation the political — or ideological — element is taken for granted and overestimated. Equally, adjudication appears to be totally objective and the political element absolutely minimized, whilst legislation seems to be wholly subjective and the political element completely maximized.

Imer B Flores, 'The Quest for Legisprudence: Constitutionalism v Legalism' in Luc J Wintgens (ed), *The Theory and Practice of Legislation: Essays in Legisprudence* (2005) 26, 46.

[3] Strictly speaking, the title for the law is the '*Anti-Terrorism Act 2005* (Cth)' since numbering is only required to differentiate subsequent statutes of the same name passed in the same year. However, the addition of '*[No 1]*' after the title is seen as useful for the sake of clarity.

Australian Governments in September 2005.[4] Those sections were hurriedly extracted and presented to the Commonwealth Parliament as a short Bill for urgent passage in early November 2005.[5] The justification for this was the announcement by Prime Minister John Howard of a potential terrorist plot uncovered by federal and state authorities through an investigation named 'Operation Pendennis'.[6] The Prime Minister claimed that 'the immediate passage of this bill would strengthen the capacity of law enforcement agencies to effectively respond to this threat.'[7] While there was a degree of cynicism over both the need for the amendments and their urgency, several days after the Bill was enacted a major police operation leading to several arrests took place.

In hindsight, the story of the Act demands proper assessment. This is so for two reasons. First, much was claimed in respect of this legislation, in particular that it was both necessary and urgent in order to stop a terrorist attack. Those assertions as to the adequacy of the pre-existing law and the effect of the amendments made to it by the Act warrant further scrutiny. Second, this examination throws up many more general themes in respect of the way in which anti-terrorism laws have been made in Australia since September 11. As such, the Act provides a case study indicative of wider problems in the area.

The article adopts the following structure. In Part II, a detailed overview is provided of the terrorist threat as it was presented to the public, the amendments which the Act made in order to respond to it, and the arrests which took place a few days later. Part III aims to consider the question of the need for the amendments and whether they were, as was claimed both prior and subsequently to the arrests, of assistance to the police. In Part IV, the matter of urgency is considered, to the extent that this is possible, in isolation from the other factors. The assertion of urgency will be tested and some observations as to its effect upon the legislative process will be offered. In the final section, conclusions will be drawn regarding the circumstances of the enactment of the Act and also the challenges to parliamentary authority which stem from the executive's responsibility for national security.

II One Week in November

The first Tuesday of November is marked in the Australian calendar as the day on which the country's richest horse race, the Melbourne Cup, is run. The significance of the Cup to national life is summed up in the cliché, tired though it may be, that it is 'the race that stops the nation'. The occasion is a public holiday

4 See Council of Australian Governments, 'Special Meeting on Counter-Terrorism' (Communiqué, 27 September 2005). The original draft was leaked by the Chief Minister of the Australian Capital Territory via his website: see Commonwealth, *Draft-in-Confidence: Anti-Terrorism Bill 2005* (2005) Jon Stanhope, Chief Minister, Australian Capital Territory <http://www.chiefminister.act.gov.au/docs/B05PG201_v281.pdf> ('leaked draft Bill').

5 Anti-Terrorism Bill 2005 (Cth) ('Anti-Terrorism Bill [No 1] 2005').

6 Australian Federal Police, *Annual Report 2005–06* (2006) 5. In relation to these particular events falling within the operation, see Marian Wilkinson and Matthew Moore, 'Patient Hunters Wait To Spring the Trap', *The Sydney Morning Herald* (Sydney), 12 November 2005, 32–3.

7 John Howard, Prime Minister of Australia, 'Anti-Terrorism Bill' (Press Release, 2 November 2005).

in Melbourne and, for a variety of reasons, might fairly be said to account for a heightened level of distraction throughout the Australian community. It was for this reason that the Howard Government's initial plan to introduce its new major counter-terrorism package on that Tuesday,[8] as well as sweeping changes to industrial relations law later that same week,[9] were met with outcry. The prospect of the latter had already garnered a huge amount of anticipatory protest from the union movement, vocal political opposition and an unsuccessful High Court challenge to Commonwealth spending on advertisements promoting the reforms.[10] As it turned out, the original terrorism legislation was delayed by state and territory leaders failing to approve the detail of its provisions in time[11] and the Howard Government decided to table its new industrial relations laws the day after the Cup. Accordingly on Wednesday 2 November 2005, the Workplace Relations Amendment (Work Choices) Bill 2005 (Cth) was duly introduced to the House of Representatives.

However, on that same morning, the Prime Minister released a statement to the media which contained, inter alia, the following:

> Today the Government will introduce into the House of Representatives an urgent amendment to Australia's counter-terrorism legislation and seek the passage of the amendment through all stages tonight. The President of the Senate will recall the Senate for 2pm tomorrow. It is the Government's wish that the amendment be law as soon as possible.
>
> The Government has received specific intelligence and police information this week which gives cause for serious concern about a potential terrorist threat. The detail of this intelligence has been provided to the Leader of the Opposition and the Shadow Minister for Homeland Security.
>
> The Government is satisfied on the advice provided to it that the immediate passage of this bill would strengthen the capacity of law enforcement agencies to effectively respond to this threat.
>
> The Government is acting against the background of the assessment of intelligence agencies that a terrorist attack in Australia is feasible and could well occur. In ASIO's recently released annual report a warning is contained that specifically cites the threat of home-grown terrorism. ASIO also warned that attacks without warning are feasible. …
>
> The substance of these amendments is currently part of the draft Anti-Terrorism Bill which has been circulated to the States and is being presented as a stand-alone bill. The effect of the amendment is to give relevant agencies a greater capacity to respond promptly whenever threats arise.
>
> The Government would like all elements of the Anti-Terrorism Bill, when introduced, to become law before Christmas. However, for the reasons I have

[8] Michael Harvey, 'PM in an Awful Hurry', *Herald Sun* (Melbourne), 29 October 2005, 30; Ben Ruse and Robert Taylor, 'Don't Rush Us on Anti-Terror Laws, Premiers Tell Howard', *The West Australian* (Perth), 31 October 2005, 4.

[9] Mark Skulley and Mark Davis, 'IR Reforms Head to Parliament Next Week', *The Australian Financial Review* (Sydney), 25 October 2005, 3.

[10] *Combet v Commonwealth* (2005) 224 CLR 494.

[11] Ruse and Taylor, above n 8, 4.

> outlined, these specific elements have taken on a greater degree of urgency and on that basis the Government intends to secure their passage immediately. …
>
> Details of amendments
>
> Schedule 1 of the Anti-Terrorism Bill amends the terrorism offences in Divisions 101 and 102 of the *Criminal Code*, and adds a further ground for listing terrorist organisations in regulations.
>
> Items 2 to 5 clarify that, in a prosecution for a terrorism offence, it is not necessary to identify a particular terrorist act. The existing offences contain a subsection that provides that a person commits the offence even if 'the' terrorist act does not occur. When the offences were originally drafted, it was not the intention that the prosecution would be required to identify a 'particular' terrorist act.
>
> The amendments will clarify that it is not necessary for the prosecution to identify a specific terrorist act. It will be sufficient for the prosecution to prove that the particular conduct was related to 'a' terrorist act.
>
> Similarly, item 10 clarifies that, when determining whether an organisation satisfies the definition of a terrorist organisation, it is not necessary to prove the organisation is preparing, planning, assisting in or fostering 'the' particular terrorist act. It will be sufficient if the prosecution can show the organisation is preparing, planning, assisting in or fostering 'a' terrorist act.[12]

Some suggested that the Government's handling of the matter in this way had itself put national security at risk by very publicly alerting the suspects that a swoop by authorities was about to take place.[13] The Commissioner of the Australian Federal Police, Mick Keelty, agreed that there was a danger that suspects might change their behaviour as a result, but took the view that the recall of the Senate — and the attendant publicity — was a necessary step in getting the law changed so that action could be taken against the suspects.[14] The Victorian Chief Commissioner, Christine Nixon, later expressed her view that the investigation had not been compromised as a result.[15]

The day after making the announcement, the Prime Minister admitted that it was a situation where 'you are damned if you do and you are damned if you don't'.[16] *The Australian*'s Political Editor Dennis Shanahan defended the decision to go public as in accordance with the so-called 'Madrid Protocols' by which governments should reveal rather than keep secret the existence of

[12] Howard, above n 7.

[13] Brendan Nicholson and Ian Munro, 'Don't Expect Arrests Yet, Says Howard', *The Age* (Melbourne), 4 November 2005, 1; Peter Hartcher, 'Dramatic Proof That Laws Are Adequate and the Rest Is Just Atmospherics', *The Sydney Morning Herald* (Sydney), 9 November 2005, 17. See also Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 50 (Senator Bob Brown), discussing comments by terrorism expert Clive Williams on the ABC Radio: ABC Radio, 'Threat Probably Generated Locally, Analysts Say', *AM*, 3 November 2005 <http://www.abc.net.au/am/content/2005/s1496621.htm>.

[14] ABC Television, 'PM, Beazley Welcome Raids', *The 7.30 Report*, 8 November 2005 <http://www.abc.net.au/7.30/content/2005/s1500755.htm>; Louise Dodson and Tom Allard, 'PM Hints at Vindication of Security Law', *The Sydney Morning Herald* (Sydney), 9 November 2005, 5.

[15] Hartcher, above n 13, 17.

[16] Nicholson and Munro, above n 13, 6.

intelligence indicating a threat to the community.[17] It is dubious that there is any kind of fixed rule on such questions,[18] with the particular circumstances in each case surely guiding any decision to publicly announce the possibility of an imminent attack. However, the announcement in this instance could hardly be said to have provided the public with any helpful or even remotely detailed advice,[19] but instead was more clearly directed to explain what was going to occur in the Commonwealth Parliament.

So far as the recall of the upper house was concerned — an event which according to the Leader of the Opposition in the Senate had occurred only three times previously in the history of the Parliament[20] — it is worth noting that it was due to sit just five days later on Monday 7 November 2005.[21] The Opposition, whether as an attempt to one-up the Government or in all sincerity accepting the claim of urgency, indicated its willingness to recall the Senate on the very evening of 2 November so the Bill could be passed that day.[22] The Shadow Minister for Homeland Security expressed concern that any delay 'may give notice and opportunity to people to do things that they would not otherwise be able to do' if the Bill was passed in a single day.[23] That offer was declined and the Senate met to consider the legislation on 3 November 2005 as originally announced. The Act was passed without a call for a division by the Senate just before 5 pm that afternoon.[24]

Just a few hours separated the Prime Minister's original statement and the reading of the Bill in the House of Representatives, yet enough time surely existed to ensure parity between the stated objectives of the former and the contents of the latter. In the details of the provisions given in the Prime Minister's statement,[25] the references to items in sch 1 are to the draft of the planned single Anti-Terrorism Bill 2005 (Cth), which had been leaked to the public by the Australian Capital Territory's Chief Minister via his website.[26] Items 2 to 5 were amendments to a number of the individual offences in Division 101 of the

17 Dennis Shanahan, 'Howard and Beazley Had To Act on Terror', *The Australian* (Sydney), 4 November 2005, 14; Dennis Shanahan, 'Howard's All or Nothing Play', *The Weekend Australian* (Sydney), 5–6 November 2005, 1.

18 Indeed, when quizzed about it a year earlier, Alexander Downer confessed, 'I've never heard of the Madrid [P]rotocol': ABC Television, 'Downer Defends SMS Intelligence Release', *Lateline*, 13 September 2004 <http://www.abc.net.au/lateline/content/2004/s1198308.htm>.

19 Contrast, for example, the announcement in New York City on 6 October 2005 that there had been a threat made against the security of the subway system and that while it would operate as normal, passengers were requested not to travel with baggage of any sort; if they did they had to allow inspection of those items they carried: BBC News, *Warning of New York Subway Threat* (7 October 2005) <http://news.bbc.co.uk/2/hi/middle_east/4317758.stm>.

20 Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 13 (Senator Chris Evans, Leader of the Opposition in the Senate).

21 Parliament of Australia, *Scheduled Sittings for 2005* (2004) <http://www.aph.gov.au/house/info/sittings/rsp05tab.htm>.

22 Interview with Nicola Roxon, Shadow Attorney-General (Doorstop interview, 2 November 2005) <http://www.alp.org.au/media/1105/dsiag030.php>; Patrick Walters and Steve Lewis, 'Cities on Terror Alert', *The Australian* (Sydney), 3 November 2005, 1.

23 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 94 (Arch Bevis, Shadow Minister for Homeland Security).

24 Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 61.

25 See above n 12 and accompanying text.

26 See above n 4.

Criminal Code[27] and these were faithfully lifted from the draft and placed in sch 1 of the Anti-Terrorism Bill [No 1] 2005 which eventually passed.

But despite the Prime Minister's emphasis that 'organisational offences' also required urgent amendment,[28] no such offences were incorporated in the eventual first Bill. Instead, the eventual amendment to the definition of a 'terrorist organisation' in s 102.1 was made by sch 1 of the *Anti-Terrorism Act [No 2] 2005* (Cth), passed almost a month later.[29]

This was a remarkable oversight — and one which attracted no comment from either the Government or Opposition in what passed for debate over the laws in both Houses. Only the Australian Democrats expressed concern over the disparity between the Government's stated intentions and the law which was supposed to give effect to them.[30] Senator Lyn Allison actually argued that the Prime Minister had been 'deliberately misleading' in order 'to confuse and to frighten people and the media'.[31] She was undoubtedly on safer ground when she opined that the media was unlikely to pick up the discrepancy given the pace of events.[32] It is revealing that even having spotted the failure of the Bill to do all which lay behind the justification for its urgent passage, the senator attributed this to dishonesty, rather than incompetence, on behalf of the Government. No-one in Parliament or the media was prepared to say that the Attorney-General had simply not got the Bill right.[33]

The critical change which the Act *did* make became known as the '"the" to "a"' change. The Prime Minister's statement gave a reliable description of what was being done and why, but it is useful to consider an example of one of the provisions altered. Section 101.4 of the *Criminal Code* makes it an offence to possess 'a thing' connected with terrorist acts. As originally introduced by *Security Legislation Amendment (Terrorism) Act 2002* (Cth) sch 1 item 4, it provided:

> (1) A person commits an offence if:
>
> (a) the person possesses a thing; and
>
> (b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
>
> (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

27 The *Criminal Code* is contained in the Schedule to the *Criminal Code Act 1995* (Cth).

28 Although the Prime Minister's statement referred to these as being in 'item 10', it is clear from examination of the leaked draft Bill that item 11 was actually being discussed: see Commonwealth, *Draft-in-Confidence: Anti-Terrorism Bill 2005*, above n 4, 6.

29 See especially *Anti-Terrorism Act [No 2] 2005* (Cth) sch 1 item 6. The status of these offences at the time of the later arrests will be considered later in this article: see below nn 42–3 and accompanying text.

30 Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 20 (Senator Lyn Allison, Leader of the Australian Democrats) (although it should be noted that it seems she was confused generally by the renumbering of items as they were taken from the leaked draft Bill), 26 (Senator Andrew Bartlett).

31 Ibid 20 (Senator Lyn Allison, Leader of the Australian Democrats).

32 Ibid.

33 The author did manage to make this criticism in an opinion piece published in a metropolitan daily newspaper on the day the Act was passed: Andrew Lynch, 'Laws Enough for Clear Danger', *The Sydney Morning Herald* (Sydney), 3 November 2005, 13.

Penalty: Imprisonment for 15 years.

(2) A person commits an offence if:
   (a) the person possesses a thing; and
   (b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
   (c) the person mentioned in paragraph (a) is reckless as to the existence of the connection described in paragraph (b).

   Penalty: Imprisonment for 10 years.

(3) A person commits an offence under subsection (1) or (2) even if the terrorist act does not occur.

The sole purpose of the *Anti-Terrorism Act [No 1] 2005* was to make it explicit that the later reference to 'the terrorist act' in s 101.4(3) did not mean that the earlier references to 'a terrorist act' in the preceding offence subsections were to be read as applying only to terrorist activities which had developed to a certain level of specificity. The Attorney-General claimed that the change would ensure that the provisions were interpreted 'as they were originally intended … [that] in a prosecution for a terrorist offence, it is not necessary to identify a particular terrorist act.'[34] The effect of the Act upon s 101.4 was to retain the offences but replace the final clarifying subsection with:

(3) A person commits an offence under subsection (1) or (2) even if:
   (a) a terrorist act does not occur; or
   (b) the thing is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or
   (c) the thing is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.

An equivalent substitution was made by the *Anti-Terrorism Act [No 1] 2005* in ss 101.2(3) (training connected with a terrorist act), 101.5(3) (possessing a document connected with a terrorist act), 101.6(2) (preparing or planning a terrorist act) and 103.1(2) (financing terrorism).

Although several parliamentarians complained that they were essentially being asked to legislate in the dark, media outlets provided some further information as to the reason the amendments were now being rushed through. *The Australian* reported on the morning of 3 November 2005 that the laws were a response to 'fears terrorists are moving closer to an attack on Sydney and Melbourne' and claimed to have learnt that the intelligence received by the Government related to 'home-grown terror suspects' in those cities.[35] The *Herald Sun* described the threat as 'immediate and unspecified' and emanating from 'an Islamic extremist group centred on Sydney'.[36] Although it is highly probable that these details were embellishments which journalists made upon the information officially

[34] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 92 (Philip Ruddock, Attorney-General).

[35] Walters and Lewis, above n 22, 1.

[36] Ian McPhedran, Nick Butterly and Michael Harvey, 'Terrorists Planning Attack, PM Warns STOP EVIL PLOT', *Herald Sun* (Melbourne), 3 November 2005, 1, 1.

available, Senators Andrew Bartlett and Bob Brown were both explicit in suggesting that the Government was engaged in leaking security information to the Murdoch-controlled press while withholding the same from Parliament.[37] The Government strongly rejected this allegation.[38]

The more interesting aspect of the press coverage was, however, indications as to just how long the matter had been brewing as both a security and legal issue. *The Australian* reported — and it was never contradicted — that:

> Yesterday's move followed months of intensive operations by Australia's top spy agency ASIO and the Australian Federal Police … Law enforcement agencies have been seeking this legislative amendment for at least 18 months, amid concerns existing law is too restrictive.[39]

Since the Act was passed on the basis that it was urgently needed to protect the community, there ensued a few days of anticipation with the public and media expecting that arrests would now be made. However, the Prime Minister warned that this might not eventuate for some time[40] — a view which *The Australian*'s Dennis Shanahan argued was in fact entirely to be expected:

> Logically, because the laws are not retrospective and the old specific definition has been used as a defence in existing cases, ASIO is attempting to gather evidence under the new act, or perhaps prevent flight, with a timetable in mind.
>
> It does not follow that the urgency signals an imminent terrorist bombing, arrests within days or the upgrading of the national terror alert — there are myriad possibilities that may require urgent powers without such consequences.[41]

This last paragraph is rather puzzling. It is difficult to think of many situations, let alone a 'myriad', where urgent powers are needed which do not involve any of the options he dismisses. This was actually an overstatement of the Government's position which simply amounted to an acknowledgment that the matter now lay in the hands of the authorities.

Nevertheless, arrests *were* made soon after. On 8 November 2005, a large number of people were arrested in Sydney and Melbourne at the culmination of a joint operation by the Australian Federal Police, the NSW Police, Victoria Police and the Australian Security and Intelligence Organisation ('ASIO').[42] The nine men arrested in Sydney are currently in custody and all face charges of conspiring to do acts in preparation for a terrorist act contrary to ss 11.5 and 101.6 of the

[37] Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 26–7 (Senator Andrew Bartlett), 47 (Senator Bob Brown).

[38] Ibid 45, 47 (Senator Christopher Ellison, Minister for Justice and Customs).

[39] Walters and Lewis, above n 22, 1.

[40] Nicholson and Munro, above n 13, 1. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 100 (Philip Ruddock, Attorney-General).

[41] Shanahan, 'Howard and Beazley Had To Act on Terror', above n 17, 14. It is not clear in which existing cases 'the old specific defence' had been used.

[42] Australian Federal Police, 'Terrorism Related Charges' (Press Release, 8 November 2005) <http://www.afp.gov.au/__data/assets/pdf_file/1958/mr051108terrorism.pdf>. This press release says 17 persons were arrested in total, but the final figure was eventually 19.

Criminal Code.[43] The latter provision was one which had been amended by Parliament's passage of the *Anti-Terrorism Act [No 1] 2005* the week before. Of the initial 10 arrests in Melbourne, all were charged under s 102.3's offence of membership of a terrorist organisation. Abdul Nacer Benbrika alone is also charged with directing a terrorist organisation contrary to s 102.2, while the others face an additional count of funding a terrorist organisation contrary to s 102.6. It will be recalled that, despite the Prime Minister's statement to the contrary of 2 November 2005, none of the provisions relating to terrorist organisations were actually amended by the Act.

That last point did not, however, prevent all involved from claiming that the new laws had enabled the police to move on the suspects and thus the events of the previous week had been justified. On *The 7.30 Report*, in an interview with Kerry O'Brien, the Commissioner of the Australian Federal Police, Mick Keelty, made the following comments:

> O'Brien: Mick Keelty, this police operation has been in train nearly 18 months. What finally decided you to move on the suspects?
>
> Keelty: Well, Kerry, the activities of the people concerned, or their alleged activities, was one part of it. The advice from the DPP was another aspect of it. And the legislation that is in place today is another part of it …
>
> O'Brien: So it's clear that you waited until after the amendment, last week's amendment was rushed through both houses of parliament and royal assent to that amendment before you put your plan into motion; that's correct? Can we assume that you began to put that plan into motion immediately after that impediment was removed?
>
> Keelty: Well, certainly on the advice of the DPP … all of us [accept] that the passing of the legislation assisted in making the decision, but of course one thing that certainly the parliament can't dictate is just how long we would let this go.[44]

The state Police Commissioners made similar comments which were seized upon by the Prime Minister,[45] though subsequently the Victorian Chief Commissioner had to concede that the amendment 'was not critical to the Victorian arrests.'[46] There was some suggestion in *The Sydney Morning Herald* that the importance of the *Anti-Terrorism Act [No 1] 2005* was overstated, but that was not widely

[43] Section 11.5(1) provides:

> A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

[44] ABC Television, 'Keelty Says Raids a Group Effort', *The 7.30 Report*, 8 November 2005 <http://www.abc.net.au/7.30/content/2005/s1500746.htm>.

[45] ABC Television, 'PM, Beazley Welcome Raids', above n 14; Hartcher, above n 13, 17; Steve Lewis and Samantha Maiden, 'Raids Prompt Call for PM To Stay on', *The Australian* (Sydney), 9 November 2005, 4; Brendan Nicholson with Fergus Shiel, 'Rushed Law Change Justified, Says Howard', *The Age* (Melbourne), 9 November 2005, 4; Dodson and Allard, above n 14, 5.

[46] Nicholson with Shiel, above n 45, 4.

repeated.[47] Senator Allison gave public voice to her continued scepticism over the whole incident,[48] but the consensus seemed to be that events had vindicated the Prime Minister's statement and the urgent passage of the *Anti-Terrorism Act [No 1] 2005*. As the Nationals' Senator Ron Boswell said of the dissenting parliamentarians, they've got 'egg all over their face from head to toe'.[49]

It is hardly surprising that the speed with which these dramatic developments unfolded prevented much dispassionate analysis of what was occurring. As indicated earlier, the remainder of November 2005 was consumed by discussions as to the several substantial changes to be wrought by what remained of the original draft Bill — now the *Anti-Terrorism Act [No 2] 2005* (Cth). The 'minor' or 'technical' question of changing 'the' to 'a' seemed insignificant — and it had, apparently, done the job. However, questions about the necessity and urgency of those swiftly executed amendments remain. Intrinsically worthy of examination in their own right, these also invite wider consideration of the following: the extent to which we are prepared to criminalise intent to commit terrorist acts in the absence of any action specifically connected with and proximate to their achievement; our capacity to sensibly allay fears that the executive is exploiting its relationship with security agencies; and whether there is an ideal to which legislators should subscribe in making counter-terrorism laws which averts the need for the kind of legislative inflation Australia has experienced in this area over recent years.

III Were the Amendments of the *Anti-Terrorism Act [No 1] 2005* Necessary?

Whether the changes made by the *Anti-Terrorism Act [No 1] 2005* were in fact necessary to enable authorities to protect the community by the arrest of would-be terrorists must hinge on the claim that the existing offence provisions suffered from some defect. This was the apparent failure of the original drafting to properly reflect legislative intent as to the scope of the offence so that the prosecution would not need to link activities of a preparatory nature to any 'particular terrorist act'.[50] The use of the phrase 'the terrorist act' in later subsections of offence provisions arguably required that the conduct forming the basis of the charge be shown to be in preparation for a specific attack. Certainly, there seems to have been a perception that the courts might view the later wording as a constraint upon the meaning of 'a terrorist act' used in the relevant sections.[51]

47 A quote was attributed to a source who said: 'We already had the powers and we believed the threat was becoming imminent, so we had to act on it regardless': Dodson and Allard, above n 14, 5. See also Editorial, 'The Crossing of Terrorism's Threshold', *The Sydney Morning Herald* (Sydney), 9 November 2005, 16.

48 See, eg, Matt Price, 'Critics Lose Face, from Head to Toe', *The Australian* (Sydney), 9 November 2005, 4.

49 Ibid.

50 Explanatory Memorandum, Anti-Terrorism Bill 2005 (Cth) 3; Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 92 (Philip Ruddock, Attorney-General).

51 As the Attorney-General put it, 'sometimes you face a situation where what you had intended is not read the same way by those who are called upon to adjudicate separately in their role as

A *The Original Legislative Intention*

In the short debate in the House of Representatives, the Government's Malcolm Turnbull mounted a defence of the *Anti-Terrorism Act [No 1] 2005* by submitting that its amendments were motivated not so much by any fault in the original drafting but instead by a 'superabundance of caution'.[52] After reading the original form of *Criminal Code* s 106.1, by way of example, Turnbull said:

> I do not believe that many people would have thought that the natural and ordinary meaning of the words that I have just read out refers to a specific terrorist act at a particular time and place. The use of the definite article in subsection (2) — 'even if the terrorist act does not occur' — is clearly intended simply to mean the terrorist act referred to in the previous subsection, as opposed to any terrorist act unconnected with the person who has been charged.[53]

The Shadow Attorney-General indicated that, as far as the Opposition was concerned, that had also been their understanding of the use of 'the' in the subsections at the time of original enactment. Yet, with the possibility of a different legal reading,[54] 'we need to make it abundantly clear to any person who might try to put a different sort of interpretation on this' what was actually intended.[55]

It should be noted that an examination of the parliamentary debates over the introduction of the relevant terrorism offences in 2002 reveals little intention one way or another as to their scope of operation.[56] While much attention was unsurprisingly devoted to the definition of 'terrorist act', there is almost no indication that, when criminalising preparatory conduct, parliamentarians turned their minds to whether the intention to commit such an act need only be general rather than specific. Instead much energy was given to the introduction of requirements of knowledge or recklessness into the offences which, as originally drafted, imposed strict liability. There was talk later that the offences might be extended to include a fault element of negligence.[57] This came to nothing, but consumed attention that might otherwise have been directed to the question of

judicial officers': Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 101 (Philip Ruddock, Attorney-General).

52 Ibid 95 (Malcolm Turnbull).

53 Ibid 95–6 (Malcolm Turnbull).

54 The Shadow Attorney-General said, '[p]eople often joke that if you put a group of lawyers in a room you will get 10 different opinions about what something means': ibid 97 (Nicola Roxon, Shadow Attorney-General). She was later more emphatic about the problem when she told media, 'I think that if you put 100 lawyers in a room you would probably get 98 different views on it': Interview with Nicola Roxon, above n 22.

55 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 97 (Nicola Roxon, Shadow Attorney-General).

56 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1139–61; Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2333–79; Commonwealth, *Parliamentary Debates*, Senate, 24 June 2002, 2393–409; Commonwealth, *Parliamentary Debates*, Senate, 25 June 2002, 2560–606; Commonwealth, *Parliamentary Debates*, Senate, 26 June 2002, 2623–50; Commonwealth, *Parliamentary Debates*, Senate, 27 June 2002, 2791–818. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10 263–4 (Daryl Williams, Attorney-General) (being the re-enactment of the earlier amendments using power referred by the states).

57 Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2336 (Senator John Faulkner).

whether a preparatory offence would apply to a person whose intention to commit a terrorist act had yet to take definite shape.

In the limited debate over the Anti-Terrorism Bill [No 1] 2005, no-one challenged the assertion as to what had been the legislative intent over three years earlier. But a handful of parliamentarians rejected the argument that the existing text of the provisions was vulnerable to alternative interpretation. However, it is important to see their objections in the context of their suspicion that the Government was trying to deflect attention away from its industrial relations package. Under different circumstances they may well have been less resistant to an attempt to clarify Parliament's initial intent. The independent member for Calare, Peter Andren, claimed to have received advice that 'there is no difference of legality between the terms "the" and "a"', leading him to conclude that 'there is no necessity for these amendments, so I have a serious suspicion that they are far more about politics than policing.'[58] The following day, Greens Senator Kerry Nettle chose to challenge the assumption that the courts would adopt a narrow interpretation of the sections as they stood. After citing specific instances, she claimed that 'we have senior lawyers and lawyers involved in these cases saying the courts are already interpreting the legislation in this way.'[59] The Minister for Justice and Customs, Senator Christopher Ellison, responded that the Government was unaware of any court decision one way or another in relation to the interpretation of the section and that it had never claimed to be responding to an actual judicial interpretation.[60]

In fact, the form of comparable enactments elsewhere provided some support for the 'superabundance of caution' of making the amendment. While the *Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*[61] does not clarify whether an offence of preparation or planning may be committed even without the actual occurrence of a terrorist act, those statutes which do so tend to take particular care over use of the definite article when referring to terrorist acts. Indeed, they may expressly provide that the intended terrorist act need not be specifically identified.

[58] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 99 (Peter Andren). The Australian Democrats also claimed to have received advice along these lines: Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 18–19 (Senator Lyn Allison, Leader of the Australian Democrats).

[59] Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 39, 55 (Senator Kerry Nettle). The senator was seriously undermined in this argument by the earlier comment of her party colleague, Senator Brown, who cavalierly said, '[l]egal advice I have is that you could argue about [the correct interpretation] until the cows come home. Then so be it': at 23 (Senator Bob Brown).

[60] Ibid 56 (Senator Christopher Ellison, Minister for Justice and Customs). The only person tried under the sections prior to their amendment had been Zaky Mallah who was acquitted in the Supreme Court of New South Wales on 6 April 2005 of two counts of doing an act in preparation for an act of terrorism contrary to s 101.6(1) of the *Criminal Code*. Wood CJ at CL, when sentencing Mallah for a crime under s 147.2 of the *Criminal Code*, merely said it was not clear which aspect of the offences under s 101.6 the jury had not been satisfied of beyond reasonable doubt: *R v Mallah* [2005] NSWSC 317 (Unreported, Wood CJ at CL, 21 April 2005) [26].

[61] 8 USC § 1189 (2001).

An example of this type of drafting is found in s 83.18 of the Canadian *Criminal Code*,[62] which makes it an offence to knowingly participate, whether directly or indirectly, in 'any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity'. Section 83.18(2) then clarifies that this offence may be committed whether or not:

> (a) a terrorist group actually facilitates or carries out a terrorist activity;
> (b) the participation or contribution of the accused actually enhances the ability of any terrorist group to facilitate or carry out a terrorist activity; or
> (c) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.

Section 83.19 goes even further in rejecting a focus on a specific terrorist act when it provides an offence of knowingly facilitating a terrorist activity, but then clarifies that:

> For the purposes of this Part, a terrorist activity is facilitated whether or not
> (a) the facilitator knows that a particular terrorist activity is facilitated;
> (b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or
> (c) any terrorist activity was actually carried out.

Section 25 of the *Terrorism Suppression Act 2002* (NZ) is an even more interesting example since it appears to deliberately employ a combination of approaches depending upon whether one is involved in 'carrying out' or 'facilitating' a terrorist act:

> (1) For the purposes of this Act, a terrorist act is carried out if any 1 or more of the following occurs:
> (a) planning or other preparations to carry out the act, whether it is actually carried out or not;
> (b) a credible threat to carry out the act, whether it is actually carried out or not;
> (c) an attempt to carry out the act;
> (d) the carrying out of the act.
>
> (2) For the purposes of this Act, a terrorist act is facilitated only if the facilitator knows that a terrorist act is facilitated, but this does not require that —
> (a) the facilitator knows that any specific terrorist act is facilitated;
> (b) any specific terrorist act was foreseen or planned at the time it was facilitated;
> (c) any terrorist act was actually carried out.

It will be noted that s 25(1) is similar to the original Australian provisions under discussion — the first reference to 'a terrorist act' is followed by a statement that this includes making preparations 'to carry out the act'. This provision is arguably even more likely to have the effect of requiring specific identification

[62] RSC 1985, c 46, as amended by the *Anti-Terrorism Act*, SC 2001, c 41.

of a planned attack, given that sub-s (2) which deals with facilitation is clearly drafted not just with a total avoidance of the definite article but also with express rejection of a requirement that 'any specific terrorist act was foreseen or planned at the time it was facilitated'.

The United Kingdom's new general offence of engaging in 'conduct in preparation' of a terrorist act makes it very clear that it is 'irrelevant … whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally.'[63]

In short, there are sufficient indications from comparable jurisdictions that the original drafting of the offences under Australian law was not as precise as it might have been in reflecting legislative intention. This is not to play the pedant. As Turnbull said, '[i]f ever there were a statute that should be treated with an abundance of caution, it is this one.'[64]

B *A 'Minor' Amendment?*

It is a mistake to examine necessity only against how a majority of elected representatives claim they intended the law to operate all along. It is crucial to assess the actual impact of the resulting amendments upon Australia's counter-terrorism laws. However, there was no real debate at all on the impact of the amendments. On the contrary, many involved characterised them as 'minor' or 'technical'. There was no acknowledgment of the extent to which a small technical change broadened the scope of the offence. But an appreciation of this is vital in determining whether the amendment was, in fact, necessary.

One might have expected the Government itself to portray the amendment as trifling in order to expedite passage of the Anti-Terrorism Bill [No 1] 2005, but it was overwhelmingly the opposition parties who set this tone. The Shadow Minister for Homeland Security described the Bill as 'very specific and limited',[65] while his colleague the Shadow Attorney-General said the Bill introduced 'fundamentally technical changes … minor changes.'[66] This language was echoed by the Leader of the Opposition in the Senate, Senator Chris Evans, who added that the Bill was 'unremarkable and uncontentious'.[67] While this perception may have suited those supporting the change, it also formed the core objection of those senators who accused the Government of contrivance. Australian Democrats Senator Allison said she was 'not persuaded it was in any way a substantial amendment',[68] while Senator Brown of the Australian Greens

63 *Terrorism Act 2006* (UK) c 11, s 5(2). Earlier offences which may also be described as preparatory in nature are not so explicit on this issue: see *Terrorism Act 2000* (UK) c 11, ss 57–8.

64 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 96 (Malcolm Turnbull).

65 Ibid 93 (Arch Bevis, Shadow Minister for Homeland Security).

66 Ibid 97 (Nicola Roxon, Shadow Attorney-General). See also Interview with Nicola Roxon, above n 22.

67 Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 15 (Senator Chris Evans, Leader of the Opposition in the Senate).

68 Ibid 21 (Senator Lyn Allison, Leader of the Australian Democrats).

argued that 'substituting the word "a" for the word "the" is not a hugely important legal matter [which is] going to make plotters easier to arrest.'[69]

Even accepting that the change was being made to ensure judicial interpretation in accordance with Parliament's original intention, it is remarkable that participants failed to see beyond the slight textual alteration so as to appreciate that the amendment significantly broadened the nature of the offences. Yet the Government actually made this very clear in the Explanatory Memorandum which read:

> The amendments will ensure the relevant offences will be available where a person is considering a range of activities that are still in formative stages and not advanced to the point of the details being decided upon … it will not be necessary to establish that the person has settled on a particular target, time or date or other specific particulars of the action or threat of action said to constitute the terrorist act.[70]

What is obviously being countenanced here could hardly be described as of 'minor' effect upon the extent of criminal liability — and it is interesting that this description was never employed by the Government in the Prime Minister's statement, the Explanatory Memorandum or parliamentary debate. The Government cannot be accused of obfuscation on this score, but it is hard to assess the stance taken by opposition parties — whether supporting or opposing the Bill — since they all seemed blind to its potential impact. This requires looking beyond simply the changes of the Anti-Terrorism Bill [No 1] 2005 itself, to consider how they will operate in conjunction with those terms already used in the offences which are extremely vague.

For instance, as seen above,[71] *Criminal Code* s 101.4 criminalises possession of 'a thing' which is 'connected with preparation for, the engagement of a person in, or assistance in a terrorist act'. While the individual charged must know or be reckless as to that connection, it is not an element of the offence that he or she personally *provides* the connection by intending to use the thing in planning or committing a terrorist act — it is merely enough that someone else have it in mind. However, *Criminal Code* s 101.4(5) provides a defence if the possession by the defendant of the item in question was not intended to facilitate preparation for, engagement in, or be of assistance in a terrorist act.[72] Placing the evidential burden upon the defendant in respect of intention is a significant departure from the accepted notion in Australian criminal law that the prosecution should be required to prove all the central elements of an offence before a person has to defend themselves.[73]

69 Ibid 23 (Senator Bob Brown).

70 Explanatory Memorandum, Anti-Terrorism Bill 2005 (Cth) 3.

71 See above n 34 and accompanying text.

72 The provision is accompanied by a note confirming that the evidential burden lies with the defendant. The significance of the note itself was considered by McSherry, above n 1, 369–70, who concluded at 369 that it 'simply codifie[d] the general principle [established in *He Kaw Teh v The Queen* (1985) 157 CLR 523] that the accused has an evidential burden in relation to defences.' Indeed, *Criminal Code* s 13.3(3) expressly states this to be the rule throughout the Code.

73 The defendant has to adduce or point to evidence that suggests a reasonable possibility that he or she held no such intention (*Criminal Code* s 13.3) before the prosecution will be called upon to

The effect of the 2005 amendment is to stipulate that the offence is committed even if 'the thing' is not connected to 'a specific terrorist act'.[74] Dispensing with that link means that, for example, possession of items like a box-cutter or street directory may form the basis of an offence if some evidence of a general intention by 'a person' to commit a terrorist act using the item in question can be shown. As Wood CJ at CL noted in *R v Mallah*, 'the statutory definition of a "terrorist act" is [itself] less than happy',[75] an allusion, one supposes, to the difficulty of proving its composite elements in addition to those of the various offences. Whether a charge under the amended provisions will stick is no longer a matter of pointing to the details of any plot in which the item was to play a part, but instead to the presence of some non-specific intent.

It may seem that the examples given above are unrealistic and alarmist. Doubtless the purpose of the provisions is to enable arrests of persons engaged in acts such as significant stockpiling of chemicals or reconnaissance of strategically important sites — the kind of conduct alleged against those arrested in November.[76] But this complaint is not to the point when the law itself is expressed in terms so wide that criminal responsibility is effectively left to be determined by police on a case-by-case basis. These laws do not provide individuals with sufficient certainty as to when they will have exposed themselves to prosecution. In assessing the laws the benchmark is not how they will be used but rather how they might be.

This difficulty must be an unavoidable consequence of attempts to criminalise the 'formative stages' of a particular act. These provisions now render persons liable for preliminary actions undertaken before a clear criminal intent has crystallised.[77] This is a significant extension of traditional conceptions of criminal responsibility since it is far removed from the commission of an unlawful act. The clarification achieved by the amendments means that illegality attaches beyond the realm of existing inchoate offences of an attempt to commit a crime, or even a conspiracy to do so.[78] In the Senate debate, the Government's spokesperson offered a justification for this in the context of national security:

> Under our criminal law, when you charge a person you have to have a particularity in relation to the charge … You have to prove intention to do a particular act. In the security environment that we are dealing with, you may well have a situation where a number of people are doing things but you do not yet have the information which would lead you to identify a particular act … When you

establish it (*Criminal Code* s 13.1). Certainly, the prosecution must refute the defence's claims beyond a reasonable doubt, but the defendant effectively has to argue their innocence first.

74 *Criminal Code* s 101.4(3).

75 [2005] NSWSC 358 (Unreported, Wood CJ at CL, 11 February 2005) [82]. See also Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2004) 200–3; McSherry, above n 1, 359–64.

76 See above nn 42–3 and accompanying text.

77 As Zedner explains, '[r]especting the individual as a moral agent must acknowledge a categorical "window of moral opportunity" in which the would-be offender ought to be given a chance to remain innocent': Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32 *Journal of Law and Society* 507, 524.

78 McSherry made this criticism of the offences as originally drafted without even alluding to an interpretation which did not require the act to be specifically identified: see McSherry, above n 1, 366.

> are dealing with security, you have to keep an eye on prevention of the act itself as well as bringing those who are guilty of the act to justice.[79]

The reservations about the changes made by the *Anti-Terrorism Act [No 1] 2005* to notions of criminal liability are well demonstrated by this passage. In short, it is the use of illegality not merely to punish or deter particular conduct but to actually *prevent* it by empowering authorities to act so pre-emptively as to arrest persons before they themselves have formed a definite plan to commit a criminal act. This appeal to the 'precautionary principle' is in step with trends elsewhere. It might just be supportable if the hooks upon which the individual offences hang were otherwise tightly circumscribed, but the ambiguity of terms such as 'training', 'thing', 'document' and 'any act' leaves the potential scope of liability wide open. As a result, the operation of such criminal offences relies far too heavily upon the discretion of police to apply the powers sensibly. It is far from inconceivable that persons who are simply foolish or careless — not unlike Zaky Mallah[80] — might find themselves being prosecuted under these sections.

A related argument against the breadth of these offences, as amended, is that they will prove difficult in application. While this issue will presumably play itself out when the trials for those arrested in November 2005 are heard, it might be conjectured that the breadth of the offences actually makes much harder the job of convincing a jury beyond reasonable doubt of the accused's guilt. Just because the provisions now clearly enable charges to be laid on the strength of conduct not obviously connected to a specific terrorist act does not necessarily mean that juries will feel confident in finding guilt — especially with such serious penalties attached — on the basis of such loosely connected conduct.[81] If this suspicion is borne out, then the effect of the amendments might be said to encourage the authorities to act precipitately. Certainly, with delay may lie danger, but to arrest persons on the basis of activities or possessions which cannot, at that point in time, be connected to any specific terrorist act risks failure in convincing courts that a crime was in fact being prepared.

It is obviously open to Parliament to determine that reframing the concept of criminal liability is necessary in order to combat terrorism. What is deeply worrying is that this change occurred not just absent any principled debate over the legitimate breadth of criminal responsibility, but seemingly without any awareness that this was the clear effect of the amendments. The element of haste must account for this, at least in part. The only express recognition from anyone that '[t]he effect of the amendments is to widen the scope of each offence' came from the Bills Digest produced by the Parliamentary Library.[82] But by the time the Bills Digest was available to assist parliamentarians to appraise the legisla-

[79] Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 43 (Senator Christopher Ellison, Minister for Justice and Customs); see the Opposition's agreement with this approach in the remarks of the Shadow Attorney-General: Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 97 (Nicola Roxon, Shadow Attorney-General).

[80] See above n 60.

[81] Of course each matter must depend upon its own particular facts, but it seems simplistic to suggest that the Crown case against Mallah under *Criminal Code* s 101.6 would have succeeded if that offence had been more broadly expressed at the time he was charged.

[82] *Bills Digest No 62 2005–06: Anti-Terrorism Bill 2005* (2005) 5.

tion, it had already been passed by the House of Representatives. It is unclear whether senators had the benefit of its independent assessment of the effect of the amendments.[83]

C *The Consequences of Caution*

Having considered the effect of the amendments made by the *Anti-Terrorism Act [No 1] 2005* to the *Criminal Code*, an opinion as to their necessity is now possible. To the extent that they were presented merely as a semantic corrective to ensure that the offences operated as originally conceived by the legislature, there is little evidence that the generality or specificity of intention to commit a terrorist act was considered in passing the law at that time. As a result, it is impossible to assess the need for the change simply by reference to assertions as to any earlier legislative intention. However, this is not to say that the amendments are not a better expression of what that intention might have been than the text as first enacted — just to acknowledge that we really cannot be sure either way.

Instead, the need for the amendments must be considered on the basis of what they actually do to the law as it previously stood. It has been argued above that the impact of the change was crucially underestimated by most parliamentarians, and that in attempting to avoid a restrictive judicial interpretation of the offences the *Anti-Terrorism Act [No 1] 2005* actually enlarged them significantly. The true extent of the difficulty perceived as arising from the original form of the offences was over-inflated. Subsequent judicial consideration of the amendment provides support for this reading.

In *R v Lodhi*, Whealy J invested the use of the definite article in later subsections of the offence provisions with no greater purpose than to refer back to an earlier usage of 'a terrorist act'.[84] In discussing the sections as originally enacted, his Honour said that 'an offence will have been committed by a person acting in a preliminary way in preparation for a terrorist act even where no decision has been made finally as to the ultimate target.'[85] Certainly, we need to acknowledge that terrorist cells may indeed convey only limited information to operatives until just prior to an attack,[86] but this does not mean that the intention to commit a specific act is absent. For example, uncovering a plan which consisted merely of loading a backpack with explosives and a rendezvous with others at a train station would still have been sufficient to enable charges to be laid under the offences as originally enacted. Even allowing for the practice by courts of

83 This went beyond simply recognising the widening effect of the change to include a recommendation that, as a result, Parliament might wish to clarify the operation of *Criminal Code* s 101.4 through 'the insertion of a non-exhaustive list of possible items that would constitute a 'thing': ibid 7.

84 (2005) 199 FLR 236, 244; see also *R v Lodhi* [2006] NSWSC 584 (Unreported, Whealy J, 14 February 2006) [67].

85 *R v Lodhi* (2005) 199 FLR 236, 246.

86 This point was recognised by the Shadow Attorney-General who said 'terrorists do and often can leave the final details of any of their planning until quite late in the process': Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 97 (Nicola Roxon, Shadow Attorney-General).

narrowly construing such provisions, it is a strained argument to suggest that evidence of both that intended course of action, and steps undeniably taken towards it (whether sourcing explosive materials, bomb construction or setting out for the rendezvous), would have failed to satisfy a court for lack of specificity. No sensible reading of those sections could have required the prosecution to identify, say, at which particular station on the train line the would-be terrorist was to detonate his or her device.

Whealy J drew on similar examples to explain his interpretation.[87] In doing so his Honour rejected the argument of defence counsel, Phillip Boulten, 'that there needs to be "a different mens rea to bomb position X than to bomb position Y".'[88] That submission is a good example of the kind of specificity which the legislature was keen to prevent a court from insisting upon in its interpretation.[89] Whealy J's aversion was endorsed by the Court of Criminal Appeal of New South Wales, indicating that the fears of judicial perversity held by legislators were ill-founded. Spigelman CJ said:

> Each of the offence sections is directed to the preliminary steps for actions which may have one or more effects. By their very nature, specific targets or particular effects will not necessarily, indeed not usually, have been determined at such a stage … Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, eg well before an agreement has been reached for a conspiracy charge. The courts must respect that legislative policy.[90]

This passage is revealing in two senses. First, of course, it confirms that as originally drafted, the preparatory offences were to be understood as applying even when the prosecution could not set out the exact details of a planned terrorist act. Second, it pinpoints the issue which underlies this entire episode — just what level of precision is required? When the Chief Justice describes the offences as ones 'where an offender has not decided precisely what he or she

87 *R v Lodhi* (2005) 199 FLR 236, 246.

88 Ibid. Whealy J also stated at 246 that:

> The actus reus is the packing of the bag with explosives. The necessary 'mens rea' is the intention that an action is intended to be carried out which possesses the characteristics of causing serious physical harm to a person, in causing a person's death or causing serious damage to property (or for that matter any of the other characteristics set out in [the definition of 'terrorist act' in s 100.1(2)]). This mental element is necessarily present even if a terrorist act does not occur and it exists even where the ultimate target has not been finally determined or is, at least, not known to the person who has done an act in preparation for a terrorist act.

89 It may be that that passage overstates the level of particularity which Boulten was advocating. Elsewhere he has described his argument as one where it was necessary for 'the Crown to prove that a particular terrorist act, capable of being identified in some way, shape or form was being prepared for. Only then could a jury determine whether the accused was guilty or not of a particular, identifiable crime': Phillip Boulten, 'Counter-Terrorism Laws in Practice' (Paper presented at the NSW Public Defender's Office Conference, Taronga Zoo, 14–15 May 2006) pt 7 <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_counterterrorism>.

90 *Lodhi v The Queen* (2006) 199 FLR 303, 318.

intends to do', this is not especially controversial, but instead must surely follow from the very character of those crimes as preparatory.

That reading of the provisions may be distinguished from their meaning as now amended by the *Anti-Terrorism Act [No 1] 2005*. Stipulating that the preparatory activity — possession of a thing or collection of a document — need not be connected to 'a specific terrorist act' invites an interpretation so wide as to have been quite unlikely under the original drafting. For example, a defendant may now be prosecuted under s 101.5 of the *Criminal Code* for having a document which is merely connected with another's general aim to engage in a terrorist act.[91] He or she may certainly face charges for possessing such a document while also personally harbouring nothing more than some vague and generalised desire to commit a terrorist act. That seems distinctly broader than the sensible latitude which Spigelman CJ and Whealy J were willing to find in the original provisions.

In its 'superabundance of caution', the Commonwealth Parliament has certainly avoided the risk of judicial insistence that an intention to commit a terrorist act must be proved in all its particulars and with exact precision. As it turns out, that danger was illusory. But this 'technical change which closes a potential loophole',[92] has undoubtedly effected an expansion of the scope of preparatory terrorism offences beyond the bounds of orthodox notions of criminal liability.[93] The necessity of that result — seemingly missed by many — is certainly open to serious challenge.

IV Were the Amendments of the *Anti-Terrorism Act [No 1] 2005* Urgently Necessary?

While the preceding Part sought to examine general justifications for the amendments made by the *Anti-Terrorism Act [No 1] 2005*, this Part focuses upon whether the law was necessary as a matter of *urgency*. Some overlap between those questions is inevitable but separate consideration of the issue of urgency enables concerns to be addressed about the manner in which the executive handled the incident. It should be made clear at the very outset that I am not suggesting that the intelligence provided to the Government was itself distorted or concocted for political purposes. Nor is it suggested that the alleged activities of the arrested persons should not have given rise to very serious concerns about their intentions. Rather, the focus is upon two particular aspects of the Government's response: first, whether the threat was so imminent as to warrant the urgent recall of the Senate in order to secure the Bill's passage in two days; and second, to what extent legislative neglect contributed to that urgency.

91 Similar to *Criminal Code* s 101.4, which is discussed above nn 71–3 and accompanying text, it is a defence for the individual if his or her collection/making of the document is not connected to a terrorist act by their intention, but recall that this is not expressed as an element of the offences in question.

92 Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 14 (Senator Chris Evans, Leader of the Opposition in the Senate).

93 It should be noted that in their discussion of the original drafting, Spigelman CJ and Whealy J did not make any comment on whether the effect of the amendments was to enlarge the scope of the offences.

A *Just How 'Imminent' Was the Threat?*

The day after the Prime Minister's statement, one pollster declared that it had been met with 'a rather cynical community response'.[94] It is important to remember that the threat of terrorist attack was revealed on the very same day the Commonwealth's new industrial relations package was introduced into the House of Representatives. The Government had already been accused of looking for something to distract press and public attention from the new WorkChoices legislation by presenting the law in the week of the Melbourne Cup.[95] Quite apart from the industrial relations reforms, the Parliament was due to begin debate on the full range of controversial counter-terrorism proposals. The attempt to keep a lid on the detail of those measures had failed and many were questioning the need for significant new powers of prosecution and control in this area. The announcement that terrorists were not just in our midst, but close to making a strike against the Australian community clearly had the potential to strengthen the Government's case for tougher laws, and wrong-foot those decrying a further deterioration of civil liberties. It was no wonder that some responded with scepticism to this sensational development.

In the words of Senator Evans, the Australian Labor Party chose to 'accept … the government's bona fides … [and] the bona fides and advice given by the security agencies [were] genuine. There [was] no alternative for us.'[96] Nevertheless, they did so fully aware that the timing of the incident was a rather incredible coincidence.[97] That the Leader of the Opposition and his Shadow Minister for Homeland Security were given a briefing of some sort did not allay concerns in this respect. Just how specific that briefing by the intelligence agencies was is unclear, but comments indicate that it was fairly basic in nature and could hardly enable a strong independent assessment of the situation to be made.[98] This was implicit in the Opposition's claim that it simply had to 'trust' the Government.[99]

The minor parties and independents were far blunter in their assessment that the crisis had been deliberately manipulated. In the House of Representatives, independent Peter Andren pointed out that the terrorism alert level on the Government's national security website had not been raised from 'medium' where it has been set since its creation.[100] In the upper house, Senator Allison was convinced that the recall of senators had been made under 'false pre-

[94] Gary Tippet and Carolyn Webb, 'Are You Being Spooked?', *The Age* (Melbourne), 4 November 2005, 13.

[95] See, eg, Skulley and Davis, above n 9, 3, quoting Sharan Burrow (President of the Australian Council of Trade Unions).

[96] Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 17 (Senator Chris Evans, Leader of the Opposition in the Senate).

[97] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 93 (Arch Bevis, Shadow Minister for Homeland Security); Interview with Nicola Roxon, above n 22.

[98] See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 97 (Nicola Roxon, Shadow Attorney-General); Interview with Nicola Roxon, above n 22.

[99] Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 34 (Senator John Faulkner).

[100] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 99 (Peter Andren). In the Senate, Greens Senator Christine Milne and Australian Democrats Senator Andrew Murray also asked why the alert level had not been raised: Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 7 (Senator Christine Milne), 35 (Senator Andrew Murray).

tences';[101] Senator Christine Milne described it as 'a monstrous abuse of power and public faith';[102] Senator Rachel Siewert explained it as 'manipulation of the threat of terrorism for the basest of political purposes';[103] and Senator Andrew Murray labelled it a 'contrived and pathetic overreaction.'[104]

The Prime Minister responded to these accusations very effectively on talk-back radio:

> This idea that yesterday was some giant manipulative conspiracy is ridiculous.
>
> It's a conspiracy, incidentally, that involves not only me and the Attorney-General and the Director-General of ASIO, the head of the Australian Federal Police, the ministerial members of the national security committee of cabinet, the Leader of the Opposition, the shadow minister for homeland security and the premiers of the six states.[105]

Yet this refutation cannot simply be the final word on whether the urgency was engineered. It has already been noted that the Opposition, and presumably also the Labor state premiers, in all likelihood received a less than full briefing on the threat and the need for the Act.[106] Their cooperation (though the state governments, of course, had no part to play in enacting the urgent Bill) cannot itself be evidence of a lack of manipulation. Instead, some consideration of the claims made — both as to the nature of the threat and what was necessary to counter it — provides the only basis upon which the Government's actions may be evaluated.

The justification given for the urgent passage of the *Anti-Terrorism Act [No 1] 2005* was that without the amendment, law enforcement agencies might not have had the capacity to respond effectively to the threat. Yet there seemed to be a logical inconsistency at the heart of this. On the one hand, the intelligence pointing to the danger of a terrorist attack was sufficiently specific so as to require immediate action; but on the other hand, the amendments themselves sought to enable arrests where no plan to commit a terrorist act could be established with any particularity. The supposed deficiency of the offences was their inapplicability to situations of merely a general intention to commit a terrorist act. Surely this was not an issue on the information the Government had re-

[101] Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 17 (Senator Lyn Allison, Leader of the Australian Democrats).

[102] Ibid 28 (Senator Christine Milne).

[103] Ibid 33 (Senator Rachel Siewert).

[104] Ibid 35 (Senator Andrew Murray).

[105] Quoted in Tippet and Webb, above n 94, 13. The Commissioner of the Australian Federal Police has since said that the 'suggestion that the recall of the Senate was in any way related to diverting the attention of the media from other policy matters before Parliament, was ludicrous and in itself completely unfounded.': Mick Keelty, 'Between the Lines: New Powers and Accountability for Police and the Media' (Speech delivered at the Australian Press Council Annual Address, Sydney, 23 March 2006) <http://www.presscouncil.org.au/pcsite/activities/a_address/keelty.html>.

[106] In his statement of 2 November 2005, the Prime Minister had simply said that he had 'raised this matter in some detail with all of the State Premiers': Howard, above n 7. This does not indicate a full, and certainly not an independent, briefing.

ceived? If the attack was really 'specific' or 'imminent' then why did the existing suite of preparatory offences not enable charges to be laid?[107]

There are two answers to this. First, as we saw in the preceding Part of this article, the Government and Opposition both assumed that a court applying the sections might take a particularly strict view of the level of specificity with which the prosecution was required to prove an intention to commit a terrorist act. But second, and in light of what little we know about the activities of those arrested under the amended provisions this seems far more relevant, there is little to support the contention that the threat of a terrorist strike was sufficiently 'imminent'. Nor did the Government actually claim that this was so — a point not recognised at the time. Certainly the amendment itself was described many times as 'urgent'[108] and the intelligence which the Government received was 'specific',[109] but the threat *itself* was never described in such terms.[110] That may have been for operational reasons, but it also explains why there was a hesitation in utilising the existing offence provisions.

In fact almost all the official indications were that the suspects could only be said to be behaving with a general intent to commit a terrorist act. In words later echoed by the Attorney-General and the Minister for Justice and Customs, the Prime Minister said the intelligence gave 'cause for serious concern about a *potential* terrorist threat.'[111] This was supplemented by the following:

> The Government is acting against the background of the assessment of intelligence agencies that a terrorist attack in Australia is feasible and could well occur. In ASIO's recently released annual report a warning is contained that specifically cites the threat of home-grown terrorism. ASIO has warned that attacks without warning are feasible.[112]

That paragraph can hardly be said to add in any way to a picture of terrorists poised to strike within hours or days. Independent Peter Andren found reliance

107 See Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 5 (Senator Andrew Bartlett), 6 (Senator Kerry Nettle), 18 (Senator Lyn Allison, Leader of the Australian Democrats), 21 (Senator Bob Brown), 31 (Senator Christine Milne).

108 See, eg, Howard, above n 7.

109 Ibid. See also Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 46 (Senator Christopher Ellison, Minister for Justice and Customs).

110 Lest it be thought that this is an exercise in splitting hairs, the comments by Senator Ellison in defending the Government's position clearly distinguished between the specificity of the advice on one hand and the 'question of it being imminent in its proximity and what has been threatened' on the other: Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 46 (Senator Christopher Ellison, Minister for Justice and Customs).

111 Howard, above n 7 (emphasis added); see also Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 92 (Philip Ruddock, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 13 (Senator Christopher Ellison, Minister for Justice and Customs).

112 Howard, above n 7. The Attorney-General and the Minister for Justice and Customs adopted a briefer version of this statement when introducing the Bill into the two Houses of Parliament: see Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 92 (Philip Ruddock, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 13 (Senator Christopher Ellison, Minister for Justice and Customs).

upon that material particularly unconvincing, saying that the intelligence had been around for many months.[113]

The Australian Federal Police, in its press release after charges were laid, also carefully avoided describing the threat as 'specific' or 'imminent', but continued the cautious use of 'potential' by way of description. The press release contained a statement from the NSW Police Chief Commissioner that the 'individuals had moved to the point of planning some sort of activity including the purchase of potentially dangerous materials'.[114] Although the NSW Police Minister, in an excerpt not included in the Australian Federal Police press release, said that the operation had averted an 'imminent threat of potentially a catastrophic terrorist act',[115] there is little to suggest real imminence in the idea of people moving 'to the point of planning'.[116]

So far, there has been little added to the record to support the claim that the threat was so imminent that the law was required before the following Monday when the Senate was due to reconvene.[117] For one thing there are the offences themselves under which those arrested were charged. The persons in Melbourne face counts relating to membership rather than simply conduct — one might have expected use of the direct criminal sanctions for terrorist activity against persons whose actions were close to implementing a strike.[118] By contrast, charges arising from membership could surely have been laid at least some time earlier. The fact that the relevant offences were not even amended by the *Anti-Terrorism Act [No 1] 2005* would seem to provide further support for that. Those arrested in Sydney were charged under the new broadened offence of s 101.6 of the *Criminal Code*. As a matter of logical inference, if the amendment was necessary to achieve those arrests, then it cannot easily be said that they interrupted a truly 'imminent' attack'.[119] Again, this conclusion rests upon the

113 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 99 (Peter Andren).

114 Australian Federal Police, above n 42.

115 Marian Wilkinson, Matthew Moore and Andrew Clark, 'We'll Charge More Suspects', *The Sydney Morning Herald* (Sydney), 9 November 2005, 1, quoting New South Wales Police Minister Carl Scully.

116 Australian Federal Police, above n 42. In fact, Victoria Police's Acting Deputy Commissioner was required to defend the use of 'imminent attack' as a description of the threat, after journalists pointed out that there was not much support for this description offered when the accused appeared in court: Fergus Shiel, 'Lawyer Attacks Trial by Police, Politicians and Media', *The Age* (Melbourne), 10 November 2005, 4.

117 There was, however, a fairly substantial explanation that the intelligence community felt the need to act quickly against the suspects because of 'classic behavioural changes', but this was from an unnamed source: Cameron Stewart and Natalie O'Brien, 'Blizzard of Chatter Set Alarms Ringing', *The Australian* (Sydney), 9 November 2005, 1.

118 As already noted, the provisions relevant to those arrests were *not* amended by the urgent enactment, nor were those changes made retrospectively by the *Anti-Terrorism Act [No 2] 2005* (Cth). In its submission to the Security Legislation Review by the Attorney-General's Department, the Commonwealth Director of Public Prosecutions provided a summary of the allegations against the group to support the charges. While these are deeply concerning and include fundraising, paramilitary training, criminal activity and discussions about options for making a terrorist strike, there was no suggestion that the group was on the verge of acting: see Submission to the Security Legislation Review Committee, 31 January 2006, Submission No 15 (Commonwealth Director of Public Prosecutions).

119 Though again, while the alleged activities in question are highly worrying, they lack any sense of definite focus which would indicate that a plan to act was just days away: see Submission to

previous argument that the original offence provisions were not so hamstrung that they could not be used to charge and convict persons who were clearly acting in pursuance of a reasonably identifiable plan.[120] The need to widen the offences so as to allow the authorities to act against these suspects so pre-emptively can only suggest that the latter were not on the verge of acting at the time of the Prime Minister's statement.

That view is also supported by the fact that arrests did not take place immediately upon the new powers being granted on the afternoon of Thursday 3 November 2005. While, of course, one cannot know whether the suspects may have suspended their activities from the time the Prime Minister went public, it is difficult to square an *urgent* need for new powers to prevent an attack and not using them until over a week after the announcement of the threat. The Act could have been rushed through both Houses on Monday 7 November 2005 without any need for a recall and would still be in time for the swoop by authorities on 8 November. Any argument that a timetable of that sort would have been problematic since evidence had to be gathered under the provisions as amended[121] is disproved both by the early signals that the prosecution intends to make use of intelligence stretching back over the preceding 18 months of Operation Pendennis and also the later extension of retrospective operation to those amendments.[122]

To conclude on this point, perhaps if the Commonwealth Parliament had not been scheduled to sit for several weeks, the appeal to urgency would have appeared more credible. But while, in light of the above considerations, the refusal by the Government to wait a mere four days may invite scepticism, without access to all the security information which would have informed ministerial briefings, it is ultimately not possible to conclude that the attack was not sufficiently imminent to justify the recall and the swift enactment. There is certainly enough in the allegations raised against the suspects for us to appreciate

the Security Legislation Review Committee, 31 January 2006, Submission No 15 (Commonwealth Director of Public Prosecutions).

120 This is not to express any agreement with those senators who opposed the urgency of the amendments by saying that sufficient powers already existed to enable authorities to intervene and arrest suspects, suggesting it was a secondary concern whether the prosecution could secure a conviction subsequently: see Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 18 (Senator Lyn Allison, Leader of the Australian Democrats), 24 (Senator Andrew Bartlett), 39 (Senator Kerry Nettle); cf at 45 (Senator Christopher Ellison, Minister for Justice and Customs).

121 Shanahan, 'Howard and Beazley Had To Act on Terror', above n 17, 14.

122 *Anti-Terrorism Act [No 2] 2005* (Cth) sch 1 item 22, inserting s 106.3 into the *Criminal Code*. It provides:

> The amendments to this Code made by Schedule 1 to the *Anti-Terrorism Act 2005* apply to offences committed:
>
> (a) before the commencement of this section (but not before the commencement of the particular section of the Code being amended); and
>
> (b) after the commencement of this section.

As Boulten points out, the potential for retrospectivity was completely inconsistent with government assurances to the contrary: see Boulten, above n 89, pt 7. Although in *Lodhi v The Queen* (2006) 199 FLR 303, the New South Wales Court of Criminal Appeal ruled that the amendments could not be applied retrospectively to criminal trials which had already commenced, this obviously does not bear upon the position of those persons charged in November 2005.

that a political leader would be willing to act, even if others might also argue that the threat was not sufficiently developed. That is not a judgement for which all of us will be called to account. So while we can note that the Government and its agencies desisted from labelling the risk of terrorist action as 'imminent', there may be sound security reasons underpinning this. Similarly, in pointing to the arrests occurring after a delay which would have enabled the passage of the law without as much political drama, we need to acknowledge that once the law was enacted, the matter of when the authorities would move was for them to determine.[123]

In short, with the benefit of hindsight we may conclude that the threat was not so imminent as to have required the response it received in the first week of November. But that does *not* amount to saying that the Government's approach was verifiably illegitimate or manipulative. It was clearly one which was open to it on the evidence of what it knew. The threat may not have been imminent but the intelligence was sufficient to warrant all precaution.

B *Selective Urgency*

While we must accept that the threat was perceived as imminent, it is still possible to question the need for the urgent legislative action. This involves looking not to the danger allegedly posed by some in the community but instead to the Government's inactivity in attending to the legislation earlier.

Many of the reports stated that the amendment of the offences had been sought by law enforcement agencies as much as 18 months beforehand.[124] In light of the very steady attention which the Attorney-General's Department gives to security legislation it is difficult to understand why these amendments had not been made earlier. In his interview with the Australian Federal Police Commissioner Keelty, the ABC's Kerry O'Brien sought to understand just how long the Government had known of the desire for amendments before presenting the matter as one requiring an urgent response. It is worth examining his dogged pursuit of this fact in the following exchange:

> O'Brien: So when did the DPP first raise the perceived problem with the existing legislation related to acts of terrorism?
>
> Keelty: Well, as I said, Kerry, we've engaged with the DPP for a lengthy time on this, certainly from the early stages of it … I guess it came as a result of looking at the activities, looking whether we could prosecute at a particular time and looking at the law as it existed then … we talked through what was available and certainly in the Commonwealth legislation and then we discovered that there were

[123] Nicholson and Munro, above n 13, 1.

[124] Walters and Lewis, above n 22, 1; Craig Skehan and Marian Wilkinson, 'Army Shoot-To-Kill on Top of New Laws', *The Sydney Morning Herald* (Sydney), 8 November 2005, 7; ABC Radio, 'Threat Probably Generated Locally', above n 13; ABC Radio, 'Opinion Divided over Timing of Terror Threat Announcement', *The World Today*, 3 November 2005 <http://www.abc.net.au/worldtoday/content/2005/s1496941.htm>; ABC Television, 'Howard Defends Anti-Terror Changes', *The 7.30 Report*, 7 November 2005 <http://www.abc.net.au/7.30/content/2005/s1499811.htm>. See also Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 18 (Senator Lyn Allison, Leader of the Australian Democrats).

aspects of what we were looking at that didn't actually match the existing legislation and it was a difficult call.

O'Brien: And that call was some little time ago?

Keelty: That's right, Kerry.

O'Brien: So you indicated today that the Prime Minister and the Attorney-General were regularly briefed over the course of your 17–18 month operation. Does that mean they were informed at every significant stage or significant point in the investigations and when were they first alerted to the potential problem with the legislation?

Keelty: Kerry, one important aspect to separate here is that of course ASIO was an integral partner in this investigation and ASIO's intelligence collection formed really the basis of the briefings to the government, which is the normal case. Rare would it be that the police would brief a government on an ongoing investigation, except for [sic] in exceptional circumstances and of course we had here a confluence of objectives, both from an intelligence perspective and also from a police investigation perspective, so it became necessary to talk to the government about what it was — or what was proposed [—] to do about the alleged activities of the people involved.

O'Brien: And when did that first happen?

Keelty: Well, it's been happening over the course of a number of weeks but, of course, it is inappropriate for me to go into the detail of what I speak to the government about and certainly what ASIO speaks to the government about.[125]

From Keelty's frank responses it is clear that the Government knew of the 'need' for the amendments for several weeks, if not months. Of course, the original plan was to make the changes as part of a larger suite of counter-terrorism laws in the wake of the London bombings in July 2005. The Stanhope-leaked draft Bill signalled that the Government was on the verge of addressing the perceived defect in the offence provisions.

But we might still ask why it had taken so long for these requested amendments to be prepared. Both Houses of Parliament had sitting days in the preceding months of August, September and October. There was no need for the amendments to be held over so as to be grafted on to the controversial new proposals agreed upon at the Council of Australian Governments in September 2005. Indeed hitching the two together only risked delaying their passage. Earlier attention would also not have necessitated the very public announcements which accompanied their introduction in November. Those potentially jeopardised the success of a lengthy police operation.[126]

The Government's laxity in securing the prompt enactment of amendments which its agencies were seeking may be contrasted with its frequent resort to

[125] ABC Television, 'Keelty Says Raids a Group Effort', above n 44.

[126] Later in his interview, O'Brien asked Keelty whether he had winced when he saw coverage of the Prime Minister's announcement in the newspapers. The Commissioner's response was, '[w]ell, I wondered [if] the people involved would continue. Whether we'd be confronted with another sort of problem': ibid.

'urgency' in other, far less demonstrable contexts. By way of example, the Government insisted the new schemes — for control orders, preventative detention orders and revamped sedition offences — of the *Anti-Terrorism Act [No 2] 2005* (Cth) were all so urgently needed that scrutiny by a Senate committee was severely curtailed. The sedition laws were passed despite the fact that such serious misgivings surrounded them that they were to be reviewed almost immediately by the Australian Law Reform Commission.[127] Yet despite urgency having been used to sideline deliberation over these new initiatives, none were utilised in the first nine months after they were pushed through the Commonwealth Parliament.[128] In short, the Government has been very willing to urge swift parliamentary action in respect of legislative changes which have not then been used with any alacrity. Yet when the Government possessed knowledge that the police and ASIO had been investigating individuals and that the Commonwealth Director of Public Prosecutions believed amendments to the offences were necessary before charges could be laid, it failed to be even adequately responsive.

It is for this reason — rather than any assessment of the intelligence briefings themselves — that scepticism about the claim of urgency may be justified. At least in part, that urgency was of the Government's own making.

V LAW-MAKING AND THE LAW — TRENDS IN COUNTER-TERRORISM

It has become very clear that for those working at the intersection of law and national security, there is a need to move well beyond the traditional preoccupation with case law which defines so much common law legal scholarship. In part this has been because of the trickle-down effect whereby the courts have only recently started to hear cases involving the new wave of post-September 11 anti-terrorism laws. And while we should expect the growth over coming years of a significant jurisprudence concerning terrorism-related crime and the powers legitimate for community protection, this will nevertheless remain only part of the way in which we are required to think about anti-terrorism laws. The events surrounding the enactment of the *Anti-Terrorism Act [No 1] 2005* are but an illustration of the importance which legal researchers must grant to the study of legislation itself — both the process by which it is created and its final content. It is appropriate that the creation of law through legislation receives legal, and not simply political, analysis.[129]

[127] The Commission's report was completed in July 2006: Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006).

[128] Some members of the media challenged the Attorney-General on this inconsistency: Interview with Philip Ruddock (Doorstop interview, 24 July 2006) <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Interview_Transcripts_Transcripts_2006>. In August 2006, Jack Thomas was placed under Australia's first control order: *Jabbour v Thomas* [2006] FMCA 1286 (Unreported, Mowbray FM, 27 August 2006).

[129] Of course, this is hardly a controversial claim. Analysis of this sort has in fact dominated academic discussions about many of the Commonwealth Parliament's counter-terrorism laws since 2002. But it is important that this development is not seen as just lawyers playing at political science — rather it is to properly recognise the legal dimension of law-making which renders it more than purely politics. Yet, as Oliver-Lalana argues, legislation is routinely seen as merely

It is not surprising that the energetic attention by the Commonwealth to Australia's national terrorism laws has seen an increase in scrutiny by legal academics of the process by which such laws are made. The idea that legislating for security is an ongoing exercise has become a hallmark of the Howard Government's last two terms in office. With so many new laws on the topic within such a short space of time, it is only to be expected that a more critical eye is turned to the way in which the Commonwealth Parliament exercises its legislative powers to this end.

During the brief debates on the urgent amendments of the *Anti-Terrorism Act [No 1] 2005*, many non-government speakers sought to use the incident as proof of the benefits of law-making after a consultative and deliberative process held over a sufficient period of time.[130] It is easy to dismiss these protests as mere politicking over the secrecy surrounding the larger Bill and the plan to allow only very limited parliamentary review of it. But to do so is to ignore the obvious relationship between the legislative process — an untidy fusion of the political and legal — and the quality of the laws that emerge from it.

A combative attitude to the enactment of counter-terrorism laws is not new. Although the federal Opposition has consistently offered a bipartisan approach on domestic security questions, this has not usually been embraced by the Howard Government. Instead, there has been a pattern of behaviour which consists primarily of introducing substantial laws into the Parliament, stressing that they are urgently needed and that any delay caused by those seeking amendment of these Bills is not to be countenanced. In this sense, the experience of the enactment of the *Anti-Terrorism Act [No 1] 2005*, while obviously possessing unique features of interest, is largely symptomatic of the real challenges which national security places upon law-making. These may be summarised as follows.

First, the stakes are always raised in respect of counter-terrorism laws because to oppose or seek amendment of these Bills is to risk being portrayed as exposing the community to unnecessary danger. This is a recurring contextual feature of legislating in the area. The invocation of 'urgency' is the means by which the pressure of danger is brought to bear upon — if not expedite — parliamentary debate. As mentioned earlier in this article, the Howard Government has, on several occasions now, resorted to an appeal of urgency in an attempt to secure the passage of national security legislation. When the first group of anti-terrorism laws were introduced into the Commonwealth Parliament six months after September 11 they arrived at 8 pm on 12 March 2002, and debate in

the product of political will or approached by scholars on the assumption that it is rational: A Daniel Oliver-Lalana, 'Legitimacy through Rationality: Parliamentary Argumentation as Rational Justification of Laws' in Luc J Wintgens (ed), *The Theory and Practice of Legislation: Essays in Legisprudence* (2005) 239, 240. In either case the result has been to largely underestimate the value of examining the full scope of parliamentary deliberation to legal analysis.

130 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 94 (Arch Bevis, Shadow Minister for Homeland Security), 98 (Nicola Roxon, Shadow Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 3 November 2005, 15–16 (Senator Chris Evans, Leader of the Opposition in the Senate), 20 (Senator Lyn Allison, Leader of the Australian Democrats), 23 (Senator Bob Brown), 28 (Senator Andrew Bartlett), 29 (Senator Christine Milne), 33 (Senator Rachel Siewert), 38 (Senator Kerry Nettle).

the House of Representatives was set down for noon the next day with the understanding that the laws were to be passed within 24 hours. In the end, the Government closed the debate at 5:46 pm. The Opposition objected to such haste in passing laws which had taken several months to draft, but the Government claimed a 'need to move quickly'.[131] The then Leader of the Opposition, Simon Crean, attacked the Government's approach, suggesting that it risked rendering the House 'an irrelevancy with the scrutiny all done in the Senate'.[132] He noted that:

> There needs to be a mechanism by which appropriate time and due process is allowed for consideration by the opposition — in particular, where it is an opposition that is prepared to offer bipartisan support. The government's abuse of this process leads to bad law …[133]

Labor's plan to block the Bills in the Senate so as to subject them to closer consideration, prompted a Government member to describe the Opposition as 'anti-Australian in every action they have taken today here … [n]ot patriotic, not committed, not antiterrorist'.[134] Even after the Senate inquiry was concluded the Government continued to press that the laws were urgently needed. This irked the senators who were able to point to the Government's failure to act swiftly at the end of 2001[135] and the many bipartisan recommendations which had emerged from the committee process.[136]

The Howard Government is hardly unusual in this regard and there is evidence that claims of 'urgency' are employed in other jurisdictions.[137] There is clearly danger in such an approach — not just in the quality of the laws which result but also in the diminution of political and public trust. The cynicism engendered in some by the Prime Minister's announcement of an imminent threat on 2 November 2005 is a telling demonstration of this.

131 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1207 (Daryl Williams, Attorney-General).

132 Ibid 1143 (Simon Crean, Leader of the Opposition).

133 Ibid.

134 Ibid 1148 (Alan Cadman).

135 See, eg, Commonwealth, *Parliamentary Debates*, Senate, 20 June 2002, 2370 (Senator Steve Hutchins).

136 Ibid 2359 (Senator Robert Ray).

137 For example, the Blair Government's legislation for a scheme of control orders was presented to the United Kingdom Parliament with an extremely tight timeline. The Bill was presented on 22 February 2005, with the Government asking that it be passed in time for the scheduled release on 14 March 2005 of a number of persons from indefinite detention which had been declared incompatible with the *Human Rights Act 1998* (UK) c 42 by the House of Lords in *A v Secretary of State for the Home Department* [2005] 2 AC 68. The Bill spent just two days in the House of Commons where a significant number of the Government's own members voted against it. The House of Lords demanded amendments which were refused by the Commons — leading to a 'ping pong' between the two chambers over a 30-hour sitting day (10 March) — the longest in the history of the House of Lords. The Bill was finally secured in time by a compromise over future review. Several parliamentarians complained that the 'urgency' stemmed from the failure of the Government to introduce its legislative scheme earlier: see, eg, United Kingdom, *Parliamentary Debates*, House of Commons, 9 March 2005, 1612 (David Heath). See also the description of the passage of the Canadian Bill C-36 (enacted as *Anti-Terrorism Act*, SC 2001, c 41) in Kent Roach, *September 11 — Consequences for Canada* (2003) 66–8.

Second, it is extremely difficult for parliamentarians to know the true extent of the threat to the nation's security when trying to insist either upon a more consultative, careful process or the inclusion of specific powers and safeguards.[138] In this case, although the Leader of the Opposition and the Shadow Minister for Homeland Security received some form of briefing on the threat, the Shadow Attorney-General put that into perspective when she said, '[i]t is unrealistic to think that as an opposition we can make a thorough assessment of the information that is available.'[139] The events of that first week of November 2005 demonstrate that on matters of national security, the traditional theory of responsible government is particularly inapt as a description of Parliament's power. If anything, the inevitable limitation upon access to security intelligence results in a kind of inversion of responsible government. Not only is the legislature inhibited in its ability to call the executive to account, but it is in fact expected to be prompt in responding to the needs which the latter identifies. Of course, government secrecy is not confined to security intelligence and this is a wider problem of ensuring effective processes of accountability.[140]

Third, there is a repeated failure to see that a commitment to law-making by a consultative and deliberative process held over a sufficient period of time would avoid the need for later amendments — which are in turn urgently rushed. There is an unwillingness to see the legislative *process* as something beyond merely a political obstacle course. This combative attitude was applied when the Government did not dominate the upper house and continues even now that it does.[141] If anything, the change just makes the debilitated state of the relationship between the executive and legislature clearer than before. With the ability to secure passage of its Bills through both Houses and the Opposition prepared to cooperate on national security, one might think that the political stakes had decreased somewhat and the focus upon production of balanced and effective laws might be more readily indulged. Sadly the very opposite has occurred. This is strikingly apparent from the Government's attitude to bipartisan recommendations made by the Senate Legal and Constitutional Legislation Committee on the last few anti-terrorism Bills which have been considered by that body.[142] The decision to

138 Of course, this is just as true, if not more so, for the Australian community. Michaelsen has argued that throughout the debates over new laws there has been a lack of proportionality with the reality of the threat: Christopher Michaelsen, 'Antiterrorism Legislation in Australia: A Proportionate Response to the Terrorist Threat?' (2005) 28 *Studies in Conflict and Terrorism* 321.

139 Interview with Nicola Roxon, above n 22.

140 See, eg, John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998) 202–4.

141 This is in stark contrast to the early prediction from the Government's Senator George Brandis that the upper house would not 'revert to its earlier, constitutionally marginalized role': George Brandis, 'The Australian Senate and Responsible Government' (Paper presented at Gilbert + Tobin Centre of Public Law's Constitutional Law Conference, Sydney, 18 February 2005). While admittedly on some issues some government individuals have managed to wield a degree of influence, this has largely occurred in the party room. On the whole the Senate has rolled over to the demands of the Government even when those flout the unanimous recommendations of the Senate's own committees.

142 See Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005* (2005); Senate Legal and Constitutional Legislation Committee, Parliament of Australia,

disregard the bulk of suggestions made by the Government's parliamentarians is a stark rejection of the value of deliberative law-making. The determination to pass laws relating to sedition and telecommunications interception and to *then* conduct reviews of the measures enacted is but an illustration of how impoverished the act of legislating has become in this area.

John Uhr has

> selected tests for minimum conditions for three structural phases of the deliberation process: *timing* as a minimum prerequisite or precondition; *publicity* as a minimum requisite or condition; and *debate* as a minimum effect or output, which still leaves open the possibility of the output of debate maturing into the outcome of rational consensus.[143]

Obviously the rushed passage of the *Anti-Terrorism Act [No 1] 2005* scores poorly against these criteria but it is hardly alone amongst counter-terrorism legislation in that respect. While certainly there is nothing to be gained from a lengthy and unproductive process,[144] it is clear that the quality of the legislative process has often not been seen as linked to ensuring the quality of the anti-terrorism laws produced.

Fourth, the problem of legislative inflation[145] — that there is simply an excess of legislative responses to terrorism in Australia — pervades this discussion. This is evident from the story of the *Anti-Terrorism Act [No 1] 2005* in two ways. First, the failure of the executive to attend to the gap — whether real or exaggerated — in the existing law much earlier while it was busy cooking up all sorts of other proposals demonstrates that it is easy to lose perspective. Second, the passage of new legislation is too often seen, as here, as the core of the state's response to threats.[146] There has not been much interest in pursuing a more sustainable framework for counter-terrorism — by which the criminal offences are carefully constructed, the powers required by the authorities are granted but with adequate safeguards and forms of review, and then the agencies are allowed to get on with their job. Reactive law-making is an easy trap into which to fall.[147] There need not even be any obvious connection between the proposed law and its supposed catalyst, as illustrated by the emergence of the *Anti-Terrorism Act [No 2] 2005* (Cth) as a response to the London bombings. It seems fair to conclude that there is a distinct reluctance to relinquish the political capital that comes with legislating on security.

Provisions of the Anti-Terrorism Bill [No 2] 2005 (2005); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Telecommunications (Interception) Amendment Bill 2006* (2006).

143 Uhr, above n 140, 221 (emphasis in original).

144 As Uhr acknowledges, 'democratic deliberation is a process which precedes choice and … at some point the choice of the majority must carry the day': ibid.

145 Flores, above n 2, 30.

146 See Ben Golder and George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8 *Journal of Comparative Policy Analysis* 43, 57; Kent Roach, 'The Criminal Law and Terrorism' in Victor V Ramraj, Michael Hor and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (2005) 129, 131–3, 150.

147 See Conor Gearty, *Can Human Rights Survive?* (2006) 105–6; Kent Roach, 'Anti-Terrorism and Militant Democracy: Some Western and Eastern Responses' in András Sajó (ed), *Militant Democracy* (2004) 171, 184–6.

Fifth, in feeding this obsession with legislating, precautionary justifications for the enlargement of the scope of criminality and the diminution of civil liberties have been taken to their logical extreme. Thus, as with the amendments considered in respect of the *Anti-Terrorism Act [No 1] 2005*, the scope of criminal responsibility is determined more by reference to ensuring the authorities have powers of prevention than by traditional understandings of deterrence and punishment of guilt. The result is the triumph of what Markus Dirk Dubber labelled the 'Police Power Model' over a view of criminal justice centred upon due process.[148] The use of possession offences such as those in ss 101.4 and 101.5 of the *Criminal Code* are a good demonstration of this, since liability may arise not just at a level further removed from harm than it does under the existing inchoate offences of attempt or conspiracy, but indeed in the total absence of harm altogether.[149] There is a consequential concern here as well. Many commentators point to the tendency for the weakening of due process in respect of terrorism offences to permeate more generally into the criminal law.[150] At the same time, the offences blur the boundary between intelligence and crime. Traditionally, intelligence agencies would be concerned with assessing the risk of a terrorist activity occurring whereas the police would be focussed on specific acts. Now that links with any terrorist activity are subject to explicit criminal sanction, police are empowered to intervene and charge individuals on the basis of what might otherwise have been generalised risks. Previously those would have been left to ASIO.

Lastly, the combination of all the above makes for poor laws — and an overlaying multiplicity of them.[151] It becomes difficult for people to understand their potential liability which is increasingly a matter of discretionary enforcement given the breadth of offences. Laws in the area lack clarity and communicability. This can actually be counterproductive if sectors of the community feel that the

[148] The similarity between his description of this model and the changes wrought to the criminal law by anti-terrorism offences in recent years is quite striking:

> In the special part of the criminal law, the Police Power Model prefers broad offence definitions, narrow defence definitions (if it doesn't do away with defences altogether), status offences (over conduct offences), conduct offences (over result offences), unlawfulness and lack-of-authorization offences, inchoate offences (over completed offences), and endangerment offences (over harm offences). The scope of the special part is continuously expanded, not only for the sake of criminalization but also to provide prosecutors with ever greater discretion, to threaten, bring or dismiss charges in the plea process.

Markus Dirk Dubber, 'The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process' in R A Duff and Stuart P Green (eds), *Defining Crimes — Essays on the Special Part of the Criminal Law* (2005) 91, 94.

[149] Ibid 95–104. See also Kent Roach, 'The World Wide Expansion of Anti-Terrorism Laws after 11 September 2001' (2004) 116 *Studi Senesi* 487, 503–9.

[150] Roach, 'The Criminal Law and Terrorism', above n 146, 139; Zedner, above n 77, 525, 530. The difficulty of ensuring the containment of exceptional responses to terrorism underpins the recent debates amongst public lawyers over emergency constitutionalism: see particularly Bruce Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029; Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 *Yale Law Journal* 1011; Laurence H Tribe and Patrick O Gudridge, 'The Anti-Emergency Constitution' (2004) 113 *Yale Law Journal* 1801.

[151] 'If truth be told, there is a direct link between quantity and quality contributing to both more laws and bad laws': Flores, above n 2, 32.

laws unfairly target them.[152] Additionally, convoluted laws have diminished efficiency and efficacy.[153] It is highly questionable whether many of the Commonwealth's changes to the criminal law in respect of terrorism actually enhances the security of the community over other measures it might adopt or will result in convictions in which we may have confidence that justice has been done.

VI CONCLUSION

This article has considered the circumstances surrounding the urgent enactment of the *Anti-Terrorism Act [No 1] 2005*. In doing so it has examined parliamentary debate and the statements from government agencies at the time in order to evaluate the twin assertions that legislative amendment of several *Criminal Code* provisions was both 'necessary' and 'urgent'. It is submitted that the *Anti-Terrorism Act [No 1] 2005* was prompted by a misplaced fear over the manner in which courts would interpret the provisions as originally drafted. The result of the amendment was not, however, simply to ensure that Parliament's original intentions prevailed, but it actually broadened the scope of criminal liability significantly. In addition, while accepting the intelligence offered by the agencies to the Government and the Government's response to that as legitimate, the claim of urgency is open to serious criticism on the grounds that the legislative change had been requested several months earlier. The failure of the Government to act at that time resulted in a rushed legislative process later. As a consequence the amendments were incomplete with those affecting terrorist organisations being overlooked. Additionally, the hasty recall of the Senate alerted suspects that they were under surveillance and put at risk a lengthy police investigation.

It is clear from this episode that legislating with urgency is hardly desirable. But what is also striking is how these events are simply indicative of the general pattern of counter-terrorism law-making by the Commonwealth over the last five years. Admittedly, the classified nature of national security information presents a particular challenge to the dynamics of responsible government, but that just makes it more important that whenever possible Government proposals are presented with adequate opportunity for scrutiny, public input and useful debate. Certainly, invocations of 'urgency' should be rare. Indeed, the adoption of a more methodical parliamentary process for anti-terrorism laws should itself minimise the need for urgent enactments in the future.

[152] The Security Legislation Review Committee, in its report on the initial Commonwealth legislation expressed concern that several of the offences contributed to fear and alienation in the Muslim community: Security Legislation Review Committee, Attorney-General's Department, Australia, *Report of the Security Legislation Review Committee* (2006) 140–6.

[153] The best description to date of what it is like to actually have to defend a client charged with a terrorism offence in Australia is provided by Boulten, above n 89.