

## COMBATING TERRORISM: Australia's *Criminal Code* Since September 11, 2001

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This article focuses on the ways in which new anti-terrorism laws in Part 5.3 of the federal Criminal Code depart from, or challenge, traditional criminal law principles. It focuses on five key principles: the use of motivation as an element of an offence; the extension of offences to include preparatory actions; the use of offences to punish a person's status, rather than their actions; the reversal of the burden of proof; and the practice of detaining people without charge, trial or conviction. Examples of approaches taken in the United States, the United Kingdom, Canada, New Zealand and South Africa are explored where they provide a useful context or point of comparison to the approach taken in Australia.

### Introduction

Until September 11, 2001, Australia had no national laws on terrorism. Political violence was dealt with by the ordinary criminal law. Since that time, the federal parliament has passed 44 new anti-terror statutes, many of which impact on traditional notions of criminal justice. Under the *Australian Security Intelligence Organisation Act 1979*, for example, ASIO can monitor, question and detain Australian citizens who are *not* suspected of any involvement with terrorism. The *National Security Information (Criminal and Civil Proceedings) Act 2004* also requires a defendant's lawyer to obtain a security clearance from the Attorney-General's Department to gain access to the information needed to represent his or her client, and gives the Attorney-General the power to request that evidence be barred on the basis of national security.

The necessity or justification for the new anti-terrorism laws is not the subject of this article.<sup>1</sup> Instead, the focus is on the ways in which changes made to Part 5.3 of the federal *Criminal Code* depart from, or challenge, traditional criminal law principles. These are principles that have been developed over centuries. The Commonwealth government has codified some of them in Chapter 2 of the federal *Criminal Code*: 'General Principles of

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<sup>1</sup> For an examination on the necessity of the laws, see Rose and Nestorovska (2007).

Criminal Responsibility' and has developed its own guide, issued by the Minister for Justice and Customs in 2004: *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

Australia is not alone in enacting new legislation to protect its citizens from the threat of terrorism.<sup>2</sup> Other countries, such as the United States, the United Kingdom, Canada, New Zealand and South Africa, have also developed extensive new counter-terrorism laws since September 11. These nations have faced similar issues to Australia in designing and implementing such laws, including as to how far it is appropriate to modify traditional notions of criminal justice. However, it is a mistake to generalise these experiences. In some instances, such as the United Kingdom's definition of terrorism, the approach has been similar to that in Australia, while in other instances, such as the US detention regime, it differs considerably. While this article focuses on the Australian *Criminal Code*, overseas examples are explored where they provide a useful context or point of comparison to the approach taken in Australia.

This article examines five key criminal law principles and the way in which they are affected by the new anti-terrorism offences in the *Criminal Code*. The principles are:

- the use of motivation as an element of an offence;
- the extension of offences to include preparatory actions;
- the use of offences to punish a person's status, rather than their actions;
- the reversal of the burden of proof; and
- the practice of detaining people without charge, trial or conviction.<sup>3</sup>

This is a far from a complete list of the criminal law issues raised by the terrorism offences in the Code. For example, the process of proscribing organisations as terrorist organisations raises important questions about the role of the executive in determining the guilt of a person; and the new sedition laws have seen the revival of a law previously thought to be archaic.<sup>4</sup> However, they do represent some of the most significant challenges posed by the new legislation and their breadth demonstrates just how wide-ranging the new laws are.

### The Relevance of Motivation

Offences are generally made up of physical or external elements (conduct, circumstances and results of conduct) and fault or mental elements (intention, knowledge, recklessness and negligence) that attach to the physical elements. This is codified in section 3.1 of the *Criminal Code*. Fault elements go to a person's mental state in carrying out an act. For example, section 101.1(1) provides:

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<sup>2</sup> See generally Ramraj, Hor and Roach (2005).

<sup>3</sup> There is limited material written on criminal law and the new Australian terrorism offences. One of the more comprehensive discussions of these issues appears in Bronitt and McSherry (2005), pp 871–97. See also McSherry (2005b), p 283.

<sup>4</sup> For a detailed discussion of these and other anti-terrorism laws, see Lynch and Williams (2006).

A person commits an offence if the person engages in a terrorist act.

Penalty: Imprisonment for life.

In this offence, the only physical element is the conduct of engaging in a terrorist act. The fault element, by virtue of the default fault elements applied by section 5.6, is intention — that is, a person must intend to engage in a terrorist act in order to commit the offence.

The concept of motive is different from that of intention. While intention stems from whether a person meant to engage in conduct,<sup>5</sup> motive refers to the reason why they engaged in the conduct. Motive is not traditionally an essential element of an offence, although in a trial it may be circumstantially relevant to intent or the identification of the perpetrator. It may also be dealt with at sentencing when the political, cultural and social factors surrounding the commission of an offence are taken into account.

The terrorism offences depart from the traditional use of motive in criminal law. Motive plays a key role in the definition of ‘terrorist act’. Section 100.1(1) of the Code contains the following definition:

**terrorist act** means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (3); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of:
  - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
  - (ii) intimidating the public or a section of the public.

Subsection (2) states that action falls within the subsection if it causes harm such as ‘serious harm that is physical harm to a person’ or ‘serious damage to property’. Subsection (3) provides that action falls within the subsection, and so is not a terrorist act, if it:

- (a) is advocacy, protest, dissent or industrial action; and
- (b) is not intended:
  - (i) to cause serious harm that is physical harm to a person; or
  - (ii) to cause a person’s death; or
  - (iii) to endanger the life of a person, other than the person taking the action; or
  - (iv) to create a serious risk to the health or safety of the public or a section of the public.

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<sup>5</sup> *Criminal Code* (Cth), s 5.2.

Paragraph (b) of the definition of 'terrorist act' goes directly to the person's motivation in carrying out a terrorist act, rather than just their intention to do the relevant action. In proving a person is guilty of the offence in section 101.1(1) of committing a terrorist act, the prosecutor will need to establish that the person intentionally carried out an act because of a political, religious or ideological reason, rather than merely because of some other motive, such as revenge.

Several people have raised concerns about the inclusion of motive in terrorism offences. For example, Kent Roach discusses the requirement of proving a political, religious or ideological motive as a threat to liberal principles:

It means that police and prosecutors will be derelict in their duties if they do not collect evidence about a terrorist suspect's religion or politics. In my view, this presents a threat to liberal principles that democracies do not generally inquire into why a person committed a crime, but only whether he or she acted intentionally or without some other form of culpability. It also may have a chilling effect on those whose political or religious views are outside the mainstream and perhaps similar to those held by terrorists. Investigations into political and religious motives can inhibit dissent in a democracy.<sup>6</sup>

The Commonwealth Department of Public Prosecutions (CDPP) and the Attorney-General's Department, which is responsible for the administration of the anti-terrorism legislation, have argued that this motivation element should be removed from the definition of 'terrorist act'. They claim that the definition is too complicated and that motive should not be relevant to criminal culpability:

The requirement for the prosecution to establish that the person did the act with either the *intention* of or for the *purpose* of advancing a political, religious or ideological cause requires the court to consider the motive and not the intention of the accused. This seems to be at odds with the common law principles that motive is a distinct and largely irrelevant consideration to the criminality of an act. The CDPP submission states that 'it is not in the public interest for a person to avoid criminal liability by showing that their acts were motivated by something other than politics, religion or ideology'.<sup>7</sup>

Lex Lasry QC also claims that the political nature of terrorist crimes should not be relevant, but comes to a different conclusion. He questions the need for terrorism offences at all and argues that terrorist acts can adequately be dealt with by ordinary crimes such as murder, grievous bodily harm, malicious damage and arson.<sup>8</sup>

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<sup>6</sup> Roach (2004), p 491.

<sup>7</sup> Attorney-General's Department (2006), p 12.

<sup>8</sup> Lasry (2006), pp 2–3.

On the other hand, the inclusion of the motive of advancing a political, religious or ideological cause is an essential part of the definition of 'terrorist act' because it is one of terrorism's distinguishing features.<sup>9</sup> It is what separates ordinary crime that terrifies — such as armed robbery, serial rape and mass murder — from terrorism.<sup>10</sup> Two 2006 reviews of the terrorism laws — the government-appointed, independent Security Legislation Review Committee and the Parliamentary Joint Committee on Intelligence and Security — both supported the retention of motive in the terrorism definition for this reason.<sup>11</sup> The Human Rights and Equal Opportunity Commission (HREOC) has said the inclusion of paragraph (b) in the definition reflects the parliamentary intention to capture the contemporary use of the term 'terrorist act' to stigmatise certain political acts, rather than acts motivated by non-political reasons such as greed or revenge. It argues that removing the paragraph would widen the breadth of the definition to the extent that the terrorism offences could be a disproportionate limitation on the rights to freedom of expression and association guaranteed under the *International Covenant on Civil and Political Rights* (ICCPR).<sup>12</sup> The Western Australian government indicated that the inclusion of paragraph (b) was the result of a deliberate decision by the Coalition of Australian Governments (COAG) to ensure that the concept of terrorism would be a relatively narrow one designed to deal with the kind of terrorism seen in New York and Bali.<sup>13</sup>

While he acknowledges that motive is not traditionally relevant to criminal responsibility, Ben Saul presents a case for why motive should be included as an element of definition of 'terrorist act':

[I]n a sophisticated criminal justice system an element of motive can promote a more finely calibrated legal response to specific types of socially unacceptable behaviour. Where society decides that certain social, ethical, or political values are worth protecting, the requirement of a motive element can more accurately target reprehensible infringements of those values. There may be a powerful symbolic or moral value in condemning the motivation behind an act, quite separately from condemning the intentional physical act itself.<sup>14</sup>

<sup>9</sup> The authors of this article made this point in their submission with Andrew Lynch (2006) to the Parliamentary Joint Committee on Security and Intelligence, p 2.

<sup>10</sup> Saul (2006), p 40.

<sup>11</sup> Security Legislation Review Committee (2006), p 57; Parliamentary Joint Committee on Security and Intelligence, Parliament of Australia (2006), p 57. The Security Legislation Review Committee was appointed under the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and including independent members such as the Commonwealth Ombudsman. It conducted a major review of terrorism offences, taking submissions from interested parties and the public.

<sup>12</sup> Human Rights and Equal Opportunity Commission (2006), p 8.

<sup>13</sup> Western Australian Department of the Premier and Cabinet (2006).

<sup>14</sup> Saul (2006), p 41.

Internationally, there is no consensus as to whether motive should be included within the definition of 'terrorist act'.<sup>15</sup> The United Kingdom, which has had counter-terrorism measures in place for decades, includes motivation as a part of its definition. Its *Prevention of Terrorism (Temporary Provisions) Act 1974* defined terrorism as 'the use of violence for political ends',<sup>16</sup> and a 1996 inquiry into terrorism legislation recommended that terrorism be defined to include the purpose of promoting political, social or ideological objectives.<sup>17</sup> The United Kingdom's primary piece of counter-terrorism legislation, the *Terrorism Act 2000*, retains this element in its definition of terrorism. Section 1 of the Act defines terrorism to mean the use or threat of action where, amongst other things, 'the use of threat is made for the purpose of advancing a political, religious or ideological cause'.

The motivation or purpose of advancing an ideological, political or religious cause is also included in New Zealand and South African legislation. Part of the New Zealand definition in the *Terrorism Suppression Act 2002* is that the act 'is carried out for the purpose of advancing an ideological, political, or religious cause'.<sup>18</sup> South Africa's *Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004* even includes a philosophical motive, with a terrorist act being defined as an act which, amongst other things, 'is committed, directly or indirectly, in whole or in part, for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective cause or undertaking'.<sup>19</sup>

However, this approach has not been followed in all jurisdictions. The US legislation and the United Nations *Draft Comprehensive Convention on International Terrorism* do not require such a motive.<sup>20</sup> In addition, in Canada the legislative requirement to establish a religious, political or ideological motivation was struck down by a Canadian lower court on 24 October 2006.<sup>21</sup> Part of the Canadian *Criminal Code* definition is that the act in question is committed 'in whole or in part for a political, religious or ideological purpose, objective or cause'.<sup>22</sup> The requirement was struck down on the basis that it is an unjustified limitation on the freedoms guaranteed by section 2 of the *Canadian Charter of Rights and Freedoms*, which includes freedom of

<sup>15</sup> See Golder and Williams (2004), p 270.

<sup>16</sup> *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK), s 9(1).

<sup>17</sup> Rt Hon Lord Lloyd of Berwick (1996) *Inquiry into Legislation Against Terrorism*, Volume 1, CMD3420, p 28 cited in Parliamentary Joint Committee on Security and Intelligence, Parliament of Australia (2006), p 54.

<sup>18</sup> *Terrorism Suppression Act 2002* (NZ), s 5(2).

<sup>19</sup> *Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004* (South Africa), s 1(1)(xxv)(c).

<sup>20</sup> *United States Code*, Title 18, §2331; Draft Comprehensive Convention on International Terrorism Article 2(1), set out in Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 (2002).

<sup>21</sup> *R v Khawaja* (2006) 42 CR (6th) 348.

<sup>22</sup> *Criminal Code 1985* (Canada), para 83.01(1)(b)(i)(A).

religion, thought, belief and expression. Trial Judge Rutherford commented that:

the inevitable impact to flow from the inclusion of the ‘political, religious or ideological purpose’ requirement in the definition of ‘terrorist activity’ will be to focus investigative and prosecutorial scrutiny on the political, religious and ideological beliefs, opinions and expressions of persons and groups both in Canada and abroad.<sup>23</sup>

The result of this decision is that the prosecution has one less element to prove beyond a reasonable doubt. In its review of the Canadian terrorism provisions, the Standing Committee on Public Safety and National Security, while acknowledging the possible impact of future court decisions on the matter, recommended retaining the motive element in the definition on the basis that it constitutes a safeguard for the accused.<sup>24</sup>

### Preparatory Offences

The *Criminal Code* creates ‘inchoate’ offences that apply to all other Commonwealth crimes. Inchoate offences for attempt (s 11.1), incitement (s 11.4) and conspiracy (s 11.5) punish a person where the substantive offence that was intended is not completed. A major rationale behind these offences is crime prevention. The offences can be used to intervene before an offence is committed and harm caused, rather than to wait for the criminal act to occur.

Under the Code, a person attempts to commit an offence when they intend to carry out the relevant conduct for the offence but do not actually carry out that conduct, and they act in a way that is more than merely preparatory to the commission of the offence.<sup>25</sup> Incitement occurs where a person urges the commission of an offence.<sup>26</sup> Conspiracy, or complicity, takes place where two or more people enter into an agreement, and one person intends that an offence would be committed pursuant to the agreement and the same or another party carries out an act pursuant to the agreement.<sup>27</sup> A person who attempts or conspires to commit an offence can be punished to the same extent as if they actually committed the offence (for example, if the substantive offence has a maximum penalty of life imprisonment, then the attempt or conspiracy also has that penalty).<sup>28</sup> A person who incites an offence can be imprisoned for up to 10 years, depending on the maximum penalty for the urged offence.<sup>29</sup>

While inchoate offences have a long history, it is important to note that the appropriateness of inchoate offences, such as attempt, has been long

<sup>23</sup> *R v Khawaja* (2006) 42 CR (6th) 348 at [58].

<sup>24</sup> Standing Committee on Public Safety and National Security, Parliament of Canada (2007), p 9.

<sup>25</sup> *Criminal Code* (Cth), s 11.1.

<sup>26</sup> *Criminal Code* (Cth), s 11.4.

<sup>27</sup> *Criminal Code* (Cth), s 11.2.

<sup>28</sup> *Criminal Code* (Cth), ss 11.1(1) and 11.2(1).

<sup>29</sup> *Criminal Code* (Cth), s 11.4.

debated.<sup>30</sup> The terrorism offences found in Division 101 of the *Criminal Code* go much further than these existing offences by expressly criminalising acts made in preparation for a terrorist act. It is an offence if a person intentionally:

- ‘provides or receives training’(s 101.2);
- ‘possesses a thing’(s 101.4); or
- ‘collects or makes a document’(s 101.5)

that is ‘connected with preparation for, the engagement of a person in, or assistance in a terrorist act’. These offences are committed if the person either knows or is reckless as to the fact (that is, aware of a substantial risk) that they relate to a terrorist act. The maximum penalty for each offence varies between 10 and 25 years’ imprisonment, with the higher penalties applying where actual knowledge can be proved. Section 101.6 creates a broader, catch-all offence of intentionally doing ‘any act in preparation for, or planning, a terrorist act’. A person found guilty is liable to life in gaol. Since the enactment in 2005 of the *Anti-Terrorism Act*, all these offences are committed even if:

- a terrorist act does not occur;
- the training/thing/document/other act is not connected to a specific terrorist act; or
- the training/thing/document/other act is connected to more than one terrorist act.

These ancillary offences go further than existing inchoate offences in that they criminalise the formative stages of an act. They render individuals liable to very serious penalties even before there is clear criminal intent. The offence of attempt expressly excludes acts that are ‘merely preparatory to the commission of the offence’. By contrast, the offences in Division 101 are specifically targeted at merely preparatory acts, allowing the police to intervene long before actual harm occurs.

In parliament, the then Minister for Justice and Customs, Senator Chris Ellison, justified the offences as follows:

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 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.<sup>31</sup>

This reveals a policy of using the law not merely to punish or deter specific conduct, but to prevent such conduct. Authorities are now empowered to act preemptively by arresting people before they have formed a definite plan

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<sup>30</sup> See, for example, the overview of uncertainty and controversy that has surrounded the law of attempt in Arenson (2005), p 146.

<sup>31</sup> Commonwealth of Australia (2005), p 43.



to commit the criminal act — an approach that reflects the growing dominance in counter-terrorism law of what is known as the ‘precautionary principle’.<sup>32</sup>

While stopping a terrorist act from taking place must be the aim, there are constraints on the extent to which the criminal law can be used to achieve this without compromising its integrity. Attempt offences have been criticised for broadening the scope of criminal responsibility because they are vague and uncertain.<sup>33</sup> The terrorism preparatory offences (especially s 101.6), which are even more vague than the existing inchoate offences, enlarge this scope even further. The hooks on which offences hang are not tightly circumscribed: terms such as ‘training’, ‘thing’, ‘document’ and ‘any act’ are not defined in the *Criminal Code* and their meanings are far from precise. Moreover, the offences are drafted in such a way that authorities have a wide discretion over whether to lay charges and prosecute in each case. This particularly applies in relation to the possession and document offences, which place an evidential burden on the defendant to establish that they did not intend to facilitate preparation for a terrorist attack (this is discussed further below). This problem is compounded by the lack of any requirement for the prosecution to show that the preparatory activity or thing or document was connected to a particular terrorist plot. That sets a very low bar for authorities who have great discretion as to when to lay charges. Further, as McSherry points out, there is added uncertainty due to the possibility that the offence of attempt could technically be applied to one of the terrorism preparatory offences.<sup>34</sup> This means that a person could be found guilty of an offence punishable by life in gaol if they attempt to do something in preparation for a terrorist act.

These offences are still very new and to date there have been only two trials of people charged in regard to preparation offences. Zeky Mallah was acquitted in 2005 by a jury of charges under section 101.6 for doing an act in preparation for a terrorist act, but found guilty of a non-terrorism offence of making a threat to another to seriously harm an officer of the Commonwealth (s 147.2 of the Code). The acts in question were recording a video message explaining Mallah’s plans to acquire a rifle and to enter an ASIO or Department of Foreign Affairs and Trade building with a weapon to kill members of their staff. The video message was sold to an undercover police officer who was posing as a journalist. Mallah gave evidence that he had bought the rifle to protect himself following a series of break-ins and threats, and that his dealings with the ‘journalist’ were to gain publicity and money.<sup>35</sup>

Mallah’s defence counsel, Phillip Boulten SC, remarked that the jury’s verdict ‘reflected a widespread impression that the authorities had overcharged this young man’.<sup>36</sup> The possible penalty of life imprisonment may be one factor that accounted for the jury’s unwillingness to convict. It was questionable that Mallah actually posed such a threat to Australia’s national

<sup>32</sup> For critique of this principle, see Sunstein (2005).

<sup>33</sup> See, for example, Arenson (2005).

<sup>34</sup> McSherry (2005b), p 283.

<sup>35</sup> *R v Mallah* [2005] NSWSC 317.

<sup>36</sup> Boulten (2006).

security that he should be charged under several of the Code's strongest terrorism offences.

As this case shows, the provisions can enable charges to be laid on the strength of conduct that is not obviously connected to a specific terrorist act, but juries may not feel confident in finding guilt. Having such broad ancillary offences may also encourage authorities to act precipitately. It is true that with delay may lie danger, but to arrest people on the basis of activities or possessions that cannot, at that point, be adequately connected to any terrorist act creates the risk that a jury will not be convinced a crime was in fact committed.

Faheem Lodhi, on the other hand, was found guilty in 2006 by a jury of:

- possessing a thing connected with preparation for a terrorist act (s 101.4);
- collecting documents connected with preparation for a terrorist act (s 101.5); and
- doing an act in preparation for a terrorist act (s 101.6).<sup>37</sup>

Summarising the evidence against his client, Phillip Boulten SC wrote that Lodhi was detected 'purchasing maps of the electricity grid, making enquiries about the availability of chemicals, downloading aerial photographs of Victoria Barracks, Holdsworthy Barracks and HMAS *Penguin* and acquiring a large quantity of toilet paper'.<sup>38</sup> (The toilet paper was allegedly for the production of nitrocellulose.)

Lodhi's case was the subject of several appeals to the Supreme Court and the Court of Criminal Appeal. In his judgment quashing an earlier indictment, Chief Justice Spigelman acknowledges that in creating preparatory offences for terrorism the government has chosen to depart from traditional criminal principles and had created a unique legislative regime in Australian law:

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, e.g. well before an agreement has been reached for a conspiracy charge. The courts must respect that legislative policy.<sup>39</sup>

### Status Offences

Offences generally punish a person's actions rather than their status or beliefs. As McSherry states: 'An important premise behind the rule of law is that

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<sup>37</sup> *R v Lodhi* (2006) 199 FLR 364.

<sup>38</sup> Boulten (2006).

<sup>39</sup> *Lodhi v R* (2006) 199 FLR 303 at 318.

governments punish criminal conduct, not criminal types.<sup>40</sup> She refers to comments by Francis Allen, an American legal academic, that the principle of *nulla poena sine lege*, or no punishment without law:

has important implications not only for the procedures of justice but also for the substantive criminal law. It speaks to the questions, 'What is crime?' and 'Who is the criminal?' The *nulla poena* concept assumes that persons become criminals because of their acts, not simply because of who or what they are.<sup>41</sup>

Despite this, offences punishing a person's status still exist. 'Status' offences have existed in the form of offences of vagrancy, prostitution and drunkenness. Today, most status offences are summary offences, but more serious status offences are not without precedent. Until earlier this decade, a person could be gaoled for life for being 'knowingly concerned' in the importation of illicit drugs.<sup>42</sup> However, while not unprecedented, status offences with hefty punishments are not common in Australian criminal law.

Section 102.3 of the *Criminal Code* creates an indictable status offence for membership of a terrorist organisation. The section provides that:

- (1) A person commits an offence if:
  - (a) the person intentionally is a member of an organisation; and
  - (b) the organisation is a terrorist organisation; and
  - (c) the person knows the organisation is a terrorist organisation.*Penalty:* Imprisonment for 10 years.

- (2) Subsection (1) does not apply if the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.

*Note:* A defendant bears a legal burden in relation to the matter in subsection (2) (see section 13.4).

As McSherry states, this offence appears to breach the principle of *nulla poena* as set out by Francis Allen.<sup>43</sup> Under the provision, a person commits a crime because they are a member of a terrorist organisation, rather than because they have carried out any terrorism-related activity. Indeed, a person could otherwise be found guilty for a wide range of activities under other terrorism offences, including directing the activities of a terrorist organisation, recruiting for a terrorist organisation, training or receiving training from a terrorist organisation, getting funds to, from or for a terrorist organisation, or

<sup>40</sup> McSherry (2005b), p 283.

<sup>41</sup> Allen (1996), p 15.

<sup>42</sup> *Customs Act 1901* (Cth), s 233B(1)(d), repealed by *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* (Cth).

<sup>43</sup> McSherry (2005b), p 283.

providing support to a terrorist organisation. Ten years in gaol is a serious penalty for someone who is a member of a terrorist organisation but who has not carried out any of these or other terrorist activities. Further, as Roach argues, criminalising membership of proscribed organisations is a step in the direction of detaining people because the executive deems them to be a security threat, a practice found in some non-democratic countries.<sup>44</sup>

The problems with the membership offence are exacerbated by its breadth. While the offence appears straightforward enough at first glance, it can apply to groups of individuals who amount to an organisation under the law, even though they would not regard themselves as an 'organisation'. An organisation is a terrorist organisation if it comes within the definition of 'terrorist organisation' — that is, 'an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs)' — or if it is proscribed as such in regulations (perhaps because the Attorney-General finds that the organisation has 'directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person ... to engage in a terrorist act').<sup>45</sup> If the former approach is applied, the first formal recognition of a group as a 'terrorist organisation' could come when charges are laid. On the other hand, if the latter is applied, there is no opportunity for a member to contest the banning of the organisation in court. The terrorist nature of the organisation is determined by the executive arm of government, subject only to the remote possibility that the decision will be disallowed by parliament.

An additional factor that adds to the breadth of the offence is that the Code defines membership to include 'informal' members of an organisation. While this aims to address the practical problems surrounding the secret and unstructured nature of terrorist organisations, it makes the question of when someone has crossed the line into membership very unclear.

A person's status as a member of a terrorist organisation not only makes them a criminal but may also mean that someone who associates with them also breaks the law. Section 102.8 of the Code makes it an offence punishable by up to three years in gaol to associate with a member (formal or informal) of a proscribed terrorist organisation. However, while this provision raises many other concerns, an associate of a terrorist organisation member will not be convicted solely on the basis of that member's status. To commit an offence, the person's association must provide support to the terrorist organisation that is intended to 'assist the organisation to expand or to continue to exist'.<sup>46</sup>

It is worth noting that other countries have narrower membership offences or no membership offences at all. The United Kingdom's *Terrorism Act 2000* criminalises membership with an offence that applies to a person who 'belongs or professes to belong to a proscribed terrorist organisation'.<sup>47</sup> However, this offence is narrower than the Australian offence because it only applies to

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<sup>44</sup> Roach (2004), pp 510-1.

<sup>45</sup> *Criminal Code* (Cth), s 102.1.

<sup>46</sup> *Criminal Code* (Cth), s 102.8(2)(d) and (e).

<sup>47</sup> *Terrorism Act 2000* (UK), s 11.

proscribed organisations and does not appear to apply to an 'informal' member, unless they claim to be a member.

On the other hand, the United States, Canada and New Zealand do not criminalise membership of a terrorist organisation. Canada and New Zealand have demonstrated how people involved in terrorist organisations can be caught without relying on status offences and consequently violating the *nulla poena* principle. Canada's *Criminal Code* provides that anyone who:

knowingly participates in or contributes to, directly or indirectly, 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 is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.<sup>48</sup>

The offence in New Zealand's *Terrorism Suppression Act 2002* targets those who participate in a terrorist group or organisation for the purpose of enhancing the ability of the group or organisation to carry out, or participate in the carrying out of, terrorist acts.<sup>49</sup> While this offence may include informal members, the targeted conduct is participating in the organisation, not merely the status of membership (formal or informal). Further, a person must participate with a certain purpose in mind that is connected to terrorism.

As Roach suggests, the absence of a membership offence may be related to the fact that freedom of association is protected by charters of rights in these countries.<sup>50</sup> Indeed, when the terrorism amendments were debated in the Canadian Parliament, Stephen Owen, Parliamentary Secretary to the Minister for Justice and Attorney-General of Canada, said:

The decision not to ban membership of groups is to overcome a major legal difficulty of proving membership. It also can have constitutional implications. The way of targeting anyone who takes part in terrorist activity or facilitates, participates in, finances or leads it is a much more effective way of catching those who are responsible.<sup>51</sup>

However, the United Kingdom's *Human Rights Act 1998* and the European *Convention for the Protection of Human Rights and Fundamental Freedoms* did not prevent the United Kingdom from criminalising membership.

The New Zealand and Canadian participation offence has gained some support in Australia. In its review of counter-terrorism legislation, the Parliamentary Joint Committee on Intelligence and Security recommended that the government consider replacing the Australian membership offence with an offence of participation in a terrorist organisation, where the participation is

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<sup>48</sup> *Criminal Code*, RS 1985, c C-46, s 83.18.

<sup>49</sup> *Terrorism Suppression Act 2002* (NZ), s 13.

<sup>50</sup> Roach (2004), pp 512–13.

<sup>51</sup> Parliament of Canada (2001), p 1115.

linked to the furtherance of the terrorist aims of the organisation.<sup>52</sup> Such an amendment would meet the underlying purpose of the membership offence — to stop people participating in terrorist organisations — while ensuring that a person is punished for their acts of participation rather than for their mere status as a formal or informal member.

### The Burden of Proof: Innocent Until Proven Guilty?

The presumption of innocence is a fundamental principle of the criminal justice system and a cornerstone of the right to a fair trial. It was affirmed in *Woolmington v Director of Public Prosecutions*<sup>53</sup> and is embodied in Article 14(2) of the ICCPR: ‘Everyone charged with a criminal offence shall be presumed innocent until proven guilty.’ It has also been codified in section 13.1(1) of the *Criminal Code*: ‘The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.’ This means that the prosecution must prove all physical and fault elements of an offence beyond reasonable doubt.

Where a defendant seeks to rely on a defence, such as duress or self-defence, the defendant bears an ‘evidential burden’ in denying criminal responsibility on the basis of a defence — that is, the defendant has to point to evidence to show there is a reasonable possibility that the defence is made out.<sup>54</sup> If the defendant is successful in doing so, the prosecution must disprove the defence beyond reasonable doubt.<sup>55</sup> The legislation creating the defence can also place a more onerous ‘legal burden’ on the defendant, but it must do so expressly.<sup>56</sup> If this burden applies, the defendant must prove the defence on the balance of probabilities.<sup>57</sup>

Under Commonwealth law, some defences — like duress and self-defence — apply to all criminal offences.<sup>58</sup> Other defences can be included expressly by the legislation creating the offence. The next section of this article examines defences expressly created in regard to terrorism offences in the *Criminal Code*.

### Evidential Burdens

#### *Possessing a Thing, or Collecting or Making a Document*

It is an offence under sections 101.4 and 101.5 of the Code for a person to intentionally possess a thing or collect or make a document that is ‘connected with preparation for, the engagement of a person in, or assistance in a terrorist

<sup>52</sup> Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia (2006), p 74.

<sup>53</sup> *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481.

<sup>54</sup> This is codified in *Criminal Code* (Cth), s 13.1.

<sup>55</sup> *Criminal Code* (Cth), s 13.2.

<sup>56</sup> *Criminal Code* (Cth), s 13.4.

<sup>57</sup> *Criminal Code* (Cth), s 13.5.

<sup>58</sup> *Criminal Code* (Cth), Pt 2.3.

act'. The maximum penalty for each offence is either 10 or 15 years' imprisonment, with the higher penalty applying where it can be proved that the person actually knew of the connection, rather than that they were merely reckless as to this. It is a defence, with an evidential burden placed on the defendant, if 'the possession of the thing' or 'the collection or making of the document was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act'.

The fact that a person actually intended to use the thing or document in relation to a terrorist attack is central to the question of the person's culpability. Without this circumstance, a person would be guilty of an offence for possessing a document the person knows is connected with preparation for a terrorist act even if that person had no involvement in the proposed terrorist act. This would include, for example, an academic who downloads a document about a possible terrorist attack for research purposes.

The Commonwealth's *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* outlines the government's policy on defences:

A matter should be included in a defence, thereby placing the onus on the defendant, only where the matter is peculiarly within the knowledge of the defendant; and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

... [W]here a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it is legitimate to cast the matter as a defence. Placing of an evidential burden on the defendant (or the further step of casting a matter as a legal burden) is more readily justified if:

- the matter in question is not 'central' to the question of culpability for the offence,
- the offence carries a relatively low penalty, or
- the conduct proscribed by the offence poses a grave danger to public health or safety.<sup>59</sup>

It is arguable that the defendant's intention is peculiarly within their knowledge. However, this is the case with all fault elements of an offence, yet the prosecution is required to prove these.<sup>60</sup> Without the requisite state of mind, no crime is committed. This is reflected in other provisions of the Code, which include relevant intention as elements for the prosecution to prove — for example, for a person to be guilty of bribing a foreign public official (an offence punishable by up to 10 years in gaol) the prosecution must prove that the person paid money to the official *with the intention* of influencing the official.<sup>61</sup>

Further, in this case, the matter is central to the question of culpability and the penalties are high. While the threat of terrorism poses a grave danger,

<sup>59</sup> Australian Government (2004), pp 27–28.

<sup>60</sup> *Criminal Code* (Cth), s 3.2.

<sup>61</sup> *Criminal Code* (Cth), s 70.2. The exception to this is the drug offences in Division 314, which create a presumption that a matter exists unless proved otherwise.

possession of a document or thing alone does not present this threat. The threat arises when a person possesses the document or thing *and* intends to use it in relation to a terrorist act.

*Training a Terrorist Organisation or Receiving Training from a Terrorist Organisation*

The defence in section 102.5(2) goes a step further in that it places the evidential burden on the defendant to point to evidence suggesting that the relevant fault element, or criminal state of mind, does not exist. It provides:

- (2) A person commits an offence if:
  - (a) the person intentionally provides training to, or intentionally receives training from, an organisation; and
  - (b) the organisation is a terrorist organisation that is covered by paragraph (b) of the definition of **terrorist organisation** in subsection 102.1(1).
- Penalty:* Imprisonment for 25 years.
- (3) Subject to subsection (4), strict liability applies to paragraph (2)(b).
- (4) Subsection (2) does not apply unless the person is reckless as to the circumstance mentioned in paragraph (2)(b).

*Note:* A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3)).

The effect of subsections (3) and (4) is that, after establishing the defendant intentionally provided or received training, the prosecution need only prove that the organisation involved is a terrorist organisation. The application of strict liability to subsection (2)(b) means that the prosecution does not have to prove any fault element for the circumstance in that paragraph.<sup>62</sup> That is, it need not prove that the defendant had any knowledge that the organisation was a terrorist one or even that they were aware of a substantial risk of this, which would otherwise be required under the Code's standard fault elements.<sup>63</sup> Instead, the defendant is required to point to evidence that they were not reckless, or aware of a substantial risk that the organisation was a terrorist organisation before the prosecution is required to prove this state of mind. The defendant is effectively presumed to have a criminal state of mind and must, in the first instance, establish their innocence.

<sup>62</sup> *Criminal Code* (Cth), s 6.1. Sections 6.1(2)(a) and 9.2 provide a defence of honest and reasonable mistake of fact to all strict liability offences. In this case, it would mean that a person would not be guilty of an offence if they considered whether an organisation was a proscribed terrorist organisation and were under a mistaken but reasonable belief that it was not such an organisation. The defendant bears the evidential burden for this defence and so would need to point to evidence supporting that they had a mistaken belief before the prosecution would be required to disprove this beyond reasonable doubt.

<sup>63</sup> *Criminal Code* (Cth), s 5.6.



It is important to note that there is no requirement that the training provided is connected in anyway to terrorism. This means that an organisation providing, for example, computer skills training to a terrorist organisation could be guilty of an offence even if they did not know that the organisation was a terrorist body. It is difficult to know what kind of evidence they could point to in establishing they were not reckless. Would they need to show they checked all organisations signing up for their training against the list of proscribed terrorist organisations? Even if the person knew where to look (for example, on the government's national security website), it would most likely not occur to someone involved in computer skills training to do so.

#### *Associating with Terrorist Organisations*

The defence in section 102.8 presents a different challenge to traditional conceptions of criminal offences. As discussed above, section 102.8 criminalises associating with terrorist organisations. Subsection (6) provides:

This section does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.

*Note:* A defendant bears an evidential burden in relation to the matter in subsection (6). See subsection 13.3(3).

This provision means that the limits of the offence are not clear on the face of the legislation; they can only be determined by challenging the constitutionality of the provision itself. The defendant bears the evidential burden and so must be able to point to evidence suggesting that there is a reasonable possibility that the application of the section infringes the constitutional doctrine of implied freedom of political communication.

The Commonwealth Guide states that the evidential burden should *only* be placed on the defendant 'where the matter is peculiarly within the knowledge of the defendant; and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish'.<sup>64</sup> Quite obviously, neither of these is applicable to the defence in subsection (6). The government, with the assistance of constitutional experts, has not been able to clearly state the constitutional limits of an offence. Requiring a defendant to do so is inappropriate and unjust.

#### *Legal Burdens*

With the exception of drug offences and in regard to mental impairment,<sup>65</sup> the *Criminal Code* rarely places a legal burden on a defendant. The terrorism

<sup>64</sup> Australian Government (2004), p 28.

<sup>65</sup> *Criminal Code* (Cth), Pt 9.1 and s 7.3. These provisions create presumptions: a presumption against mental impairment and, in the case of drug offences for example, presumptions where trafficable quantities are involved. A legal burden of proof is imposed on defendants where a provision creates a presumption that a matter exists unless proved otherwise: s 13.4 of the Code.

offences include two more instances of this rare reversal of the burden of proof.

#### *Membership of a Terrorist Organisation*

Section 102.3 of the Code, set out above, criminalises membership of a terrorist organisation. No offence is committed if the defendant can prove on the balance of probabilities that 'he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation'.

Placing a legal burden on the defendant in this case creates an unjustifiable risk that an innocent person could be convicted of this serious offence because they cannot prove that they took reasonable steps to cease being a member of a terrorist organisation. This was also the view held by the Security Legislation Review Committee in its review of the terrorism offences. It recommended that the legal burden of proof in this provision be reduced to an evidential burden to reduce such a risk.<sup>66</sup>

The Committee referred to UK case of *Sheldrake v Director of Public Prosecutions, Attorney-General's Reference (No 4 of 2002)*.<sup>67</sup> That case concerned section 11 of the *Terrorism Act 2000*, which provides that: 'A person commits an offence if he belongs or professes to belong to a proscribed organisation.' The legislation provides a defence, placing a legal burden on the defendant, if the organisation was not proscribed when the defendant became a member or if the defendant has not participated in the activities of the organisation since it was proscribed. The House of Lords found that the legal burden on the defendant was not a proportionate and justified response to the threat of terrorism: it could result in a breach of the presumption of innocence, which is codified in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as there was a real risk that an innocent person may be unable to establish the defence. Applying the domestic implementation of this right in the *Human Rights Act 1998*, the House of Lords read down the provision to impose an evidential burden on the defendant.

#### *Receiving Funds from a Terrorist Organisation*

Section 102.6 of the Code also places a legal burden on the defendant. The section makes it an offence, amongst other things, to receive funds from a terrorist organisation and places a legal burden on the defendant to establish that the funds were for legal representation in a terrorism-related proceeding or to assist the organisation to comply with Australian law. It may be very difficult for a lawyer to prove that their services fall within the defence because communication between a lawyer and their client made for the purpose of obtaining or giving legal advice is generally subject to legal professional privilege.

<sup>66</sup> Security Legislation Review Committee (2006), p 109.

<sup>67</sup> *Sheldrake v Director of Public Prosecutions, Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264. See Security Legislation Review Committee (2006), pp 106–07.

Legal professional privilege can be waived by the lawyer's client, and so will only present a problem where the client refuses to do so. Where the privilege is not waived, the documents subject to it cannot be produced even if they will establish the innocence of a person charged with a crime.<sup>68</sup> Some Australian jurisdictions, including the Commonwealth, expressly provide that legal professional privilege does not prevent a defendant from adducing evidence unless it is a communication with a co-accused.<sup>69</sup> However, contraventions of Commonwealth criminal offences are generally heard in state courts with state rules of evidence applying.<sup>70</sup> Since not all state jurisdictions provide such an exception to legal professional privilege, in some parts of Australia a lawyer will be unable to adduce privileged evidence in their defence unless the privilege has been waived by their client.

If a lawyer cannot prove that their services provided to a terrorist organisation fall within the legal representation defence, they face up to 25 years in gaol if they knew the organisation was a terrorist organisation or 15 years if they were reckless as to that fact. In recognition of this problem, the Security Legislation Review Committee recommended that the burden be reduced to an evidential one.<sup>71</sup>

### Detention Without Charge, Trial or Conviction

As a general principle, individuals should not be detained beyond an initial short period except as a result of a finding of guilt by a judge or as part of the judicial process (such as when a person is held in custody pending a bail hearing). Otherwise, detention is only justifiable as part of a fair and independent judicial process resulting from allegations of criminal conduct. As Brennan, Deane and Dawson JJ of the High Court stated in *Lim v Minister for Immigration, Local Government and Ethnic Affairs*<sup>72</sup> (with Gaudron J agreeing):

the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

<sup>68</sup> *Carter v Managing Partner, Northmore, Hale, Davy and Leake* (1995) 183 CLR 121.

<sup>69</sup> *Evidence Act 1995* (Cth), s 123. This Act applies to proceedings in a federal or Australian Capital Territory court: s 4. The other states that have adapted the uniform *Evidence Act*, New South Wales and Tasmania, also allow for the exception: *Evidence Act 1995* (NSW), s 123; *Evidence Act 2001* (Tas), s 123. See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (2005), p 455 for a detailed discussion of client legal privilege under common law and the uniform *Evidence Act*.

<sup>70</sup> *Judiciary Act 1903* (Cth), s 68.

<sup>71</sup> Security Legislation Review Committee (2006), p 120.

<sup>72</sup> *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

There are exceptions to this rule where the detention is non-punitive in character, such as detention due to mental illness and infectious disease or, in the case of non-citizens, for immigration-related purposes.<sup>73</sup> The 'categories of non-punitive, involuntary detention are not closed'.<sup>74</sup> Since the 1990s, legislation has been passed at the state level to provide preventative detention for dangerous offenders, such as sexual offenders, who have a high risk of reoffending.<sup>75</sup> However, these laws apply to offenders who have been convicted and have served their sentence.

In late 2005, as part of a suite of changes agreed to by COAG in the wake of the London bombings, Divisions 104 and 105 were added to Part 5.3 of the *Criminal Code*. They enable preventative detention and control orders to be imposed on a person without charge, trial or conviction.

A preventative detention order enables a person to be taken into custody and detained by the Australian Federal Police (AFP) in a state or territory prison or remand centre for an initial period of up to 24 hours, with an option to have the order continued for a total period not exceeding 48 hours.<sup>76</sup> This time can then be augmented under corresponding state law. At the COAG meeting in September 2005, the premiers and chief ministers agreed to enact legislation enabling longer periods of detention that, owing to constitutional concerns, the Commonwealth could not enact for itself. State and territory laws (the amended *NSW Terrorism (Police Powers) Act 2002*, for example) extend the period of detention to a maximum of 14 days.

Under the *Criminal Code*, a preventative detention order is issued in the first instance by a senior police officer and then confirmed by a sitting or retired judge specially appointed for this purpose.<sup>77</sup> There is no hearing; rather, the order is issued personally by the authority and the person subject to the order receives a summary of the grounds on which the order was made.<sup>78</sup>

There are two bases on which a preventative detention order can be made. First, an order may be issued to prevent an imminent terrorist attack where there are reasonable grounds to suspect that a person will engage in a terrorist act or possesses a thing, or do something to prepare for, a terrorist act. Second, an order can be made when it is necessary to detain a person for the purpose of preserving evidence relating to a recent terrorist act, being one that has occurred in the last 28 days.<sup>79</sup>

A control order may impose a variety of obligations, prohibitions and restrictions on a person for up to a year to protect the public from a terrorist act. By order of a court, a control order can allow the AFP to monitor and

<sup>73</sup> See *Al-Kateb v Godwin* (2004) 219 CLR 562 and *Re Woolley; Ex parte Applicants M276/2003 (by their next friend GS)* (2004) 225 CLR 1.

<sup>74</sup> *Kruger v Commonwealth (Stolen Generations Case)* (1997) 190 CLR 1 at 162, Gummow J.

<sup>75</sup> McSherry (2005a), p 94.

<sup>76</sup> *Criminal Code* (Cth), ss 105.8 and 105.12.

<sup>77</sup> *Criminal Code* (Cth), ss 105.2, 105.8 and 105.12.

<sup>78</sup> *Criminal Code* (Cth), ss 105.8, 105.12 and 105.18.

<sup>79</sup> *Criminal Code* (Cth), s 105.4.

restrict the activities of people who pose a terrorist risk to the community without having to wait to see whether this risk materialises. The potential scope of a control order ranges from a very minimal intrusion on an individual's freedom to an extreme deprivation of his or her liberty. The order can include prohibitions or restrictions on the individual:

- being at specified areas or places;
- leaving Australia;
- communicating or associating with certain people;
- accessing or using certain forms of telecommunication or technology (including the internet);
- possessing or using certain things or substances; and
- carrying out specific activities (including activities related to the person's work or occupation).

The order can also include the requirement that the person:

- remain at a specified place between certain times each day, or on specified days;
- wear a tracking device;
- report to specified people at specified times and places;
- allow photographs or fingerprints to be taken (for the purpose of ensuring compliance with the order); and
- if the person consents, they can also participate in counselling or education.<sup>80</sup>

Unlike preventative detention orders, control orders stop short of imprisoning the subject in a state facility. Nevertheless, it is clear that it is possible to detain an individual using an order. If a person must not be at specified places or must remain at specified places at certain times, then this may amount to detention. It effectively provides a means by which an individual may be placed under house arrest. A person who contravenes the terms of a control order commits an offence with a maximum penalty of five years' gaol.<sup>81</sup>

An issuing court (the Federal Court, the Family Court or the Federal Magistrates Court) can make an order if it is satisfied, on the balance of probabilities, that:

- 'making the order would substantially assist in preventing a terrorist act'; or
- 'that the person subject to the order has provided training to, or received training from, a listed terrorist organisation'.

The court must also be satisfied that the obligations, prohibitions and restrictions are 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act'. In determining these matters, the court must take into account the impact of an order on the person's circumstances — including financial and personal matters.<sup>82</sup>

<sup>80</sup> *Criminal Code* (Cth), s 104.5.

<sup>81</sup> *Criminal Code* (Cth), s 104.27.

<sup>82</sup> *Criminal Code* (Cth), s 104.4.

Under neither order is there a need for a person to have been found guilty of, or even be suspected of committing, a crime. Both orders target people not for what they have done, but for what they might do. They can be applied against a person who has been acquitted or who has never been charged. Yet both orders enable significant restrictions on individual liberty. This is more than a breach of the old ‘innocent until proven guilty’ maxim: it positively ignores the notion of guilt altogether.

It is striking that the grounds on which preventative detention orders and control orders can be made are defined as terrorism crimes elsewhere in Part 5.3 of the *Criminal Code*. For example, a control order can be made if the court is satisfied on the balance of probabilities ‘that the person has provided training to, or received training from, a listed terrorist organisation’. This is very similar to the offences found in section 102.5 of the Code, except that section 102.5 employs the higher criminal standard of proof — that of ‘beyond reasonable doubt’. Similarly, a preventative detention order may be issued where there are merely ‘reasonable grounds to suspect’ a range of activities that are criminal offences in Division 101.

It is of real concern that the orders may be used to cover those circumstances where the authorities do not possess sufficient evidence to lay a charge. Both schemes represent an attempt to avoid the accepted judicial procedures for testing and challenging evidence in criminal trials that are normally applied before a person is deprived of their liberty. This is clearly so in respect of the preventative detention orders, which may be issued by an individual officer simply on the basis of reasonable suspicion, but also applies to the use of a lower standard of proof by courts charged with issuing control orders. The broad scope of the latter — as well as their longer duration — makes this concern particularly strong.

The approach taken by other countries in relation to preventative detention and control orders varies considerably. UK legislation provides both for the detention of terrorist suspects and control orders.<sup>83</sup> The control order regime has been cited by the Australian government as the basis for its scheme.<sup>84</sup> However, there are major differences between the two. One is that the UK law, unlike the Australian law, must also be read in light of its *Human Rights Act 1998* and is subject to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. The United Kingdom’s control orders were introduced after a House of Lords’ decision declared the indefinite detention of non-citizens suspected of terrorist activities to be a disproportionate and discriminatory departure from these instruments.<sup>85</sup> Control orders have also been the subject of judicial scrutiny in the UK. For example, the UK Court of Appeal found that certain control orders, which included home arrest for 18 hours a day, were an infringement of Article 5 of

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<sup>83</sup> The control order scheme is established by the *Prevention of Terrorism Act 2005* (UK) and the detention scheme by section 41 and Schedule 8 of the *Terrorism Act 2000* (UK).

<sup>84</sup> See, for example, John Howard (2005).

<sup>85</sup> *A v Secretary of State for the Home Department* [2005] 2 AC 68.

the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which prevents indefinite detention without trial.<sup>86</sup> In this way, the UK scheme, unlike the Australian scheme, is moderated by formal human rights safeguards.

The Canadian scheme, which expired under a sunset clause in early 2007, was different again. Canada's *Criminal Code* provided for the preventative arrest and detention of a person in relation to a terrorism investigation. As part of that scheme, the person could have been brought before a judge who could have ordered that the person enter into 'conditions of recognizance' to keep the peace and be of good behaviour for up to 12 months. If the person refused the conditions or failed to comply with them, they could have been detained for up to 12 months.<sup>87</sup> Canada has also used a security certificate process under its *Immigration and Refugee Protection Act 2001* to detain foreign-born terrorism suspects indefinitely using secret evidence and without charges while their deportations are being reviewed. In February 2007, the Supreme Court of Canada found that the certificates violate the rights to a fair trial and to life, liberty and security of the person, which are protected by the *Canadian Charter of Rights and Freedoms*, and gave the Parliament one year to replace and reform the relevant portions of the Act.<sup>88</sup>

Other countries, such as New Zealand, have not implemented a control order or preventative detention regime. The United States does not have any specific preventative detention or control order scheme. Instead, it applies a number of administrative detention laws to hold terrorist suspects and people who may have information relating to the government's terrorist investigations. For example, it has used immigration violations to detain non-citizens under investigations for links to terrorism and the federal witness statute, 18 USC §3144, to detain citizens and non-citizens as witnesses to grand juries connected with terrorism investigations. The US government has also held suspected terrorists as enemy combatants, including in Guantanamo Bay in Cuba.

In Australia, no preventative detention orders have been issued and only one interim control order. The Government sought a control order against Jack Thomas after the Victorian Court of Appeal unanimously quashed a conviction against him on the ground that Thomas's admission of his terrorism related activities was involuntary.

Thomas was initially convicted by a jury of receiving funds from a terrorist organisation and possession of a false passport. The prosecution's case was based on evidence concerning Thomas's activities in Pakistan from 2001 to 2003. While held without charge by Pakistani authorities, Thomas was placed in a kennel-like cell for approximately two weeks and was without food for about three days. He was assaulted and threatened with torture, indefinite detention and execution. He was told his wife would be raped. Interrogators, including Australians, also offered Thomas inducements for his cooperation.

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<sup>86</sup> *Secretary of State for the Home Department v JJ* [2006] 3 WLR 866.

<sup>87</sup> *Criminal Code*, RS 1985, c C-46, s 83.3.

<sup>88</sup> *Charkaoui v Canada (Citizenship and Immigration)* 2007 SCC 9.



Contrary to guarantees in the *Crimes Act 1914*, he was not able to have a lawyer present for these interviews. The Court of Appeal found that Thomas's detention, the inducements and threats, and the prospect of indefinite detention weighed heavily on his mind at the time of the interview. Thomas' admissions were not voluntary because he effectively did not have a free choice to speak or be silent. The court also criticised the absence of a lawyer during the interview.<sup>89</sup>

In August 2006, less than ten days after his convictions were quashed, and before the Court of Appeal had decided whether he should stand trial again, the AFP obtained an interim control order against Thomas in an ex parte proceeding. This was the first control order issued in Australia. The order meant that Thomas had to remain in his home between midnight and 5am every night and report in person to the police three times a week. He could only use identified telephones and internet services, and could not communicate with a member of a terrorist organisation or 50 specified people, including Osama Bin Laden.<sup>90</sup> The hearing to confirm the control order was put on hold while Thomas challenged the constitutionality of the control order regime in the High Court on the basis that it confers a non-judicial power on a federal court contrary to Ch III of the Constitution, and is not supported by an express or implied head of legislative power. After the High Court rejected Thomas's challenge in August 2007,<sup>91</sup> and several days before the expiration of the interim control order, the order was lifted and Thomas signed undertakings that include similar conditions.<sup>92</sup> Thomas is also facing a retrial based on admissions he made in a television interview and newspaper article.<sup>93</sup>

The interim control order on Jack Thomas shows how the Government is willing to use these schemes in addition to the normal trial process, and even to have a second attempt at detaining a person where there has not been a conviction. Preventative detention orders and control orders may be used by the government to detain people or place them under house arrest when there is not enough evidence to charge a person with a terrorism offence or where no conviction has been recorded against the person after a criminal trial.

## Conclusion

McSherry and Bronitt argue that Australia's legislative response to terrorism is not without precedent, and is 'neither novel nor extraordinary'.<sup>94</sup> It is true that it is possible to find examples of similar laws in Australia and internationally. However, when looked at as a whole, Australia's scheme of anti-terrorism law provides a major challenge to traditional notions of criminal responsibility, particularly given the breadth of the scheme and the severity of its penalties.

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<sup>89</sup> *R v Thomas* (2006) 14 VR 475.

<sup>90</sup> *Jabbour v Thomas* (2006) 165 A Crim R 32.

<sup>91</sup> *Thomas v Mowbray* [2007] HCA 33.

<sup>92</sup> Robinson (2007), p 3.

<sup>93</sup> *R v Thomas (No 3)* (2006) 14 VR 512.

<sup>94</sup> Simon Bronitt and Bernadette McSherry (2005), p 893.



This challenge is also evident in other Western countries, like the United Kingdom and Canada, which have also responded to the threat of terrorism with legislative action.

The challenge is posed not just by how the laws themselves depart from traditional understandings of criminal justice, but how they set a precedent for other areas. These departures may over time come to be seen as legitimate so as to displace existing traditional principles and create new norms. If this occurred, what is applied today in the terrorism context might be extended tomorrow to other parts of the criminal law in Australia. For example, why not apply some of the departures from traditional notions of the criminal process to gangs, the 'war on drugs' and pedophiles? This is occurring in the United Kingdom, where limitations on the right to silence of terrorism suspects introduced in response to attacks by the IRA have spread to all suspects. As Lucia Zedner puts it: 'measures introduced against putative terrorists in conditions of emergency have an uncanny way of being perpetuated beyond that emergency and extended to offences of lesser gravity'.<sup>95</sup>

This does not mean that Australia's response to terrorism should be timid or that departures from traditional criminal justice principles are all unjustified. For example, if terrorism is to be specifically criminalised, then motive as a distinguishing characteristic of terrorism must be an element of the offence. It does, however, mean that the case for departing from accepted principles must be fully justified and proportionate to the harm. In addition, the laws should be treated as the extraordinary laws they are and should not be seen as setting new general standards for criminal justice in Australia.

Caution is also justified by the speed with which many of these laws have been enacted. They have often been passed so quickly, sometimes in the wake of a terrorist attack, that detailed justification for new laws and any departures from established principles has not been adequately provided. The laws passed after the 2005 London bombings were even enacted so that they came into force before two ongoing inquiries into the effectiveness of the existing laws could report. As a result, laws were introduced without sufficient justification as to why change, and especially why such exceptional change relating to matters such as sedition, preventative detention and control orders, was needed.

The challenges presented by the anti-terrorism laws are not just a concern for the system of criminal justice. They also reveal structural weaknesses in Australia's legal system, as compared with that of other countries like the UK. Australia's federal anti-terror laws are unique in the democratic world in being unconstrained by a national Charter or Bill of Rights that spells out and protects fundamental rights. An Australian Charter of Rights would ensure that departures from fundamental criminal law principles are identified and put to a high test of justification before enactment. Departures would still be possible, but would be less likely, and even then may be limited to the time for which they are needed.

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<sup>95</sup> Lucia Zedner (2005), p 515.

The Victorian *Charter of Human Rights and Responsibilities 2006* for example, sets out rights in criminal proceedings, including the presumption of innocence. Section 25(1), entitled 'Rights in criminal proceedings', provides that 'A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law'. Clear statements of law and principle like this can provide a point of reference in assessing anti-terrorism laws against basic principles of criminal justice. Where departures from such principles are necessary and justified, a Charter ensures that their exceptional status is clear so that they are unlikely to create a new precedent for the justice system.

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