

Terrorism and the Right to a Fair Trial

Can the Law Stop Terrorism?

A Comparative Analysis

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April 2010 - A Paper presented to the British Institute of International and Comparative Law

The destruction of the Twin Towers in September 2001 shattered the confidence of the western world. In many countries, there followed the rapid enactment of legislation designed to prevent such a catastrophe occurring again. Ironically, the passing of this legislation spawned a flood of criticism against the new laws, suggesting that the very freedoms to be protected were being put at risk. Personal liberty, the right to a fair trial, the presumption of innocence and the right to confront one's prosecutor – all concepts enshrined in western law - were said to be now at risk.

A compelling comparison of the situation as between the United Kingdom and the United States is contained in Lord Bingham's book "**The Rule of Law**"(1) in a chapter dealing specifically with terrorism. It is interesting to observe that many of the author's observations are similar to a number of the criticisms levelled at Australian legislation following September 11. Critics included barristers, academics, civil libertarians and a number of retired Judges. This paper does not intend to follow precisely the track pursued by Lord Bingham. I will mention, albeit briefly, several of the legislative measures enacted in Australia, especially those which have excited particular comment and criticism. But my main focus will be to examine aspects of the terrorism legislation, which are most likely to confront trial and appellate Judges. I have published an earlier paper which examined the issue of the difficulty facing an accused person in obtaining a fair trial in a terrorism related matter(2). That paper focused on prejudice and bias, among other things. It is not

my intention to repeat the detail those matters although I have drawn on my earlier paper in contemplating problems arising from non-disclosure, secrecy and public interest immunity claims. In the final part of this paper I comment briefly upon the law's capacity to prevent or control the commission of terrorist related offences.

Two aspects of Australian Terrorism legislation that have drawn criticism and comment

(i) Sedition

One response to the terrorism "situation" in Australia has been the creation of new sedition laws. This has prompted much comment and criticism. The law of sedition prohibits words and conduct intended to incite discontent and rebellion. Statutory sedition offences were introduced into Commonwealth law in 1920. This was at a time when western powers were starting to exhibit concerns following the Russian Revolution, and when self-determination issues were being experienced in various parts of the British Empire. The Commonwealth enacted offences for the uttering of seditious words and for engaging in a seditious enterprise. These offences required the presence of "seditious intention" which was defined by the then legislation as an intention: -

- (a) To bring the Sovereign into hatred or contempt;
- (b) To excite disaffection against the Sovereign, Government or Parliament of the UK;
- (c) To excite disaffection against the Government or Constitution of any British Dominion;
- (d) To excite disaffection against the Australian Government, Constitution or either House of the Parliament;
- (e) To excite disaffection against the Imperial ties of the British Dominions;
- (f) To excite others to alter Commonwealth laws by other than lawful means;
or
- (g) To promote feelings of ill-will and hostility between different classes of subjects so as to endanger the peace, order or good Government of the Commonwealth.

There were exceptions to this regime including the proposition that it was lawful to “endeavour in good faith” to show that Government policy was mistaken, and to “point out in good faith” errors or defects in the Government or Constitution of the UK, any British Dominion, or the Commonwealth of Australia.

Not surprisingly, there was much criticism at the time of these laws on the basis that they had the power to compromise seriously freedom of speech.

It is not without interest to note that two successful prosecutions under the **1920 Commonwealth Seditious Offences** were upheld in 1949 by the High Court. Each case involved the prosecution of a Communist Party member by the Chifley Government. The High Court held that convictions could be sustained despite the lack of incitement to violence and public disorder. The last Commonwealth seditious trial was in 1953. The Menzies Government was responsible for an unsuccessful prosecution against three members of the Communist Party. The charges were all dismissed in September 1953. The focus of the trial was an article published in the Communist Review about the time of the Coronation of the Queen. The article criticised the Monarchy and asserted that it was “an instrument of class rule”. It is reported that the Sydney Morning Herald, hardly a vehicle for left wing views, described the outcome of the case as “a verdict for freedom of speech in Australia”.

In September 2005, the Howard Government announced that it would “modernise” the seditious offence and adapt it to the counter terrorism context. Schedule 7 of the **Anti-Terrorism Act (No 2) 2005 (Cth)** repealed s 24A of the **Crimes Act 1914 (Cth)** and replaced it with five new offences in s 80.2 of the **Criminal Code Act 1995 (Cth)**. The new seditious offences proscribe the following activities, (with the elements of the offence further defined): -

- (a) Urging the overthrow of the Constitution or the Government by force or violence
- (b) Urging another person to interfere by force or violence in Parliamentary elections;

- (c) Urging a group or groups to use force or violence against another group or groups within the community;
- (d) Urging a person to assist the enemy; and
- (e) Urging a person to assist those engaged in armed hostilities.

In the case of each offence, the maximum penalty is seven years imprisonment. In addition, the specific “good faith” defences to the sedition offences are listed in s 80.3 of the **Criminal Code Act 1995 (Cth)**. They include, but are not limited to: -

- Good faith efforts to show that various Governments officials are mistaken in their “counsels, policies or actions”;
- Pointing out in good faith errors or defects in the Government, Constitution, Legislation or Administration of Justice with a view to its or their correction;
- Urging in good faith a person to attempt to lawfully procure a change in law, policy or practice;
- Publishing in good faith a report or commentary about a matter of public interest.

It appears that the principal aim of the new sedition offences may have been to overcome the difficulty of prosecuting an individual who advocates terrorism, but who fails to advocate a specific terrorist act, or who fails to connect his or her speech to a specific terrorist organisation.

In his article “**Speaking of Terror: Criminalising Incitement to Violence**”(3), Dr Ben Saul makes the point that propaganda has long been the handmaiden of violence. It “ploughs the ground” for violence by softening our psychological defences to it and desensitising us to its brutalising effects. Terrorist trials in Australia have shown that, on occasions, young Muslim men have in their possession, often shared between members of a radical group, media material that contains disturbing images of executions of hostages, the death and wounding of soldiers and glorification of the September 11 “martyrs” and Osama bin Laden. This media material often contains exhortation to Muslims, in the name of religion, to kill

or drive out those who have invaded Muslim lands. Dr Saul asks “How does – and how should – the law respond to words or images that encourage a climate conducive to terrorism, without directly inciting specific terrorist acts?”(4).

The article traces the development of European and United Nations Conventions leading at least in temporal terms, to the decisions by the UK Government to create a new “offence of condoning or glorifying terrorism” whether in the UK or abroad. This proposal was undoubtedly influenced by the July 2005 terrorist bombings in London. The original proposal however, was altered in the final UK Terrorism Bill with a narrower offence of “encouragement of terrorism”. This plainly is a wider offence than that contemplated by the existing law of criminal incitement (5).

While I have not, for the purposes of this paper, made a close study of the UK legislation, I note that it was originally contemplated in 2005 that there would also be enacted a “power to order closure of a place of worship which is used as centre for fomenting extremism” and the listing of non-citizen Muslims “not suitable to preach, who will be excluded from Britain”. As I say, I do not know whether these proposals ever came to fruition, but I would be interested to know whether there is a civil power to close Mosques or to shut down “unsuitable” preaching.

Returning to the Australian legislation, it is fair to note that, in some respects, the new law “narrows” the vague concepts involved in the 1920’s legislation. On the other hand, the legislation widens the existing law of sedition in ways that have drawn criticism and adverse comment. For example the old offences required an intention to utter seditious words or engage in seditious conduct (with a seditious intention), with the further intention of causing violence or creating a public disorder or disturbance. The new offences do not appear to require any such further intention to cause violence. The first three offences may be committed where a person recklessly urges others to commit violence, without any specific intention to cause violence. The burden of proof in relation to the “good faith” defences lies on an accused person. Although the defences may appear wide in their content, it is fair to say that most of the defences are directed towards protecting political speech at the expense of other types of expression. The defences do not, for example, appear to extend to statements made in good faith for academic, artistic, scientific, religious or

other public interest purposes. They may be construed to have a wider ambit than the expressions used, but it is impossible to say that a wide construction will be given. Dr Saul argues that “the range of human expression worthy of legal expression is much wider than these narrowly drawn exceptions, which appear more concerned about not falling foul of the implied constitutional freedom of political communication than about protecting speech as inherently valuable”. A number of commentators have also noted that the defences provide no express immunity for members of the media who simply report, in good faith, the statements made by others.

Where does the situation now stand in Australia? On 12 August 2009, the Government released a Discussion Paper containing proposed legislative reforms to Australia’s Counter-Terrorism and National Security legislation(6). This included proposed reforms relating to the sedition laws. The recommendations made by the Australian Law Reform Commission (ALRC) in the report accompanying the Discussion Paper recommended: -

- (a) Removal of the word “sedition” and its replacement with a more accurate description of the offences; (“urging violence”)
- (b) Repeal of offences (d) and (e) above, namely, “urging a person to assist the enemy”; and “urging a person to assist those engaged in armed hostilities”. The ALRC noted that the equivalent already exists under the treason offences. Nevertheless, it also recommended that those treason offences be amended to make clear that “mere rhetoric or expression of dissent, is not enough and that the prosecution must prove that the defendant has materially assisted an enemy wage war”.
- (c) Importantly, the ALRC recommended that in a prosecution for sedition, the prosecution will be required to prove that the defendant intended that the force or violence urged would occur. (This first recommendation was, as I understand it, adopted by the Government as a proposal in its Discussion Paper).

- (d) The ALRC rejected arguments that all five sedition offences be repealed and argued that it is necessary to retain a number of sedition offences because the existing incitement laws would not be “sufficient”. According to the ALRC, the Government had made a deliberate policy decision to criminalise general exhortations to use force or violence for broadly political or anti-social ends. Accordingly, there needed to be sedition offences that were less constrained than the existing offence of incitement.
- (e) Finally, the ALRC recommended that the Government consider expanding the “urging violence within the community” sedition offence. Currently, it is limited to instances in which:
- A person urges a group or groups distinguished by race, religion, nationality or political opinion
 - To use force or violence against another or groups as so distinguished, and
 - The use of that force or violence would threaten the peace, order and good Government of the Commonwealth.

The ALRC recommended that the Government consider expanding the offence to cover the situation where a person urges another person, in addition to a group, or urges another group not distinguished by race, religion, national origin or political opinion, to use force or violence against a group or groups in the community distinguished by any of those factors.

Considerable input has been made by many groups and organisations into the future fate of the Discussion Paper. Indeed, a Reform Bill has recently been introduced in which a number of these changes have been adopted. (**National Security Legislation Amendment Bill 2010**). As I understand it, Law Reform Commissions in England and Wales have recommended abolition rather than modernisation of their nation’s sedition offences. I am unaware at the present time whether those submissions have met with approval in the UK. It remains to be seen what will finally

emerge from the proposal for legislative reforms in Australia, at least so far as these sedition offences are concerned.

(ii) **Detention and Question, Control Orders and Preventative Detention**

Loss of liberty in the absence of a judicial order following a finding of guilt is rightly to be abhorred. Detention without trial, it has been said, smacks of the practices of a totalitarian regime. Laws of this kind, enacted throughout western countries following September 11, have excited considerable controversy, debate and criticism. The position in Australia is no different.

In response to 9/11, the Australian legal landscape has been radically altered with a number of preventative measures governing questioning and detention. These were first adopted in 2003(7). The same laws were enlarged in 2005(8) to authorise orders for the control or the preventative detention of a person. I will briefly outline the current law as to the powers of ASIO in relation to both questioning and detention.

Questioning and detention warrants - Generally

ASIO has extensive powers to question and detain people for up to seven days. This extends to those who are not terrorist suspects, but who may provide security information. ASIO can apply to an 'issuing authority', who is a Federal Magistrate or Judge to issue the warrant, with the consent of the Attorney General. In giving consent and in issuing the warrant, both the Attorney and issuing authority must be satisfied that reasonable grounds exist for believing that the warrant will 'substantially assist the collection of intelligence that is important in relation to a terrorism offence'. The Attorney must be satisfied that 'relying on other methods of collecting that intelligence would be ineffective'. As I have said, a person may be the subject of these warrants even if he or she is not suspected of a terrorism offence.

Questioning warrant - Procedure

ASIO can obtain a questioning warrant under which they can question a person and require him to provide records or other things. The warrant may be issued for as long as 28 days.

ASIO can question for as long as 24 hours, however individual periods of questioning must generally be limited to eight hours.

Questioning with an interpreter, however, can last for 48 hours. In general terms, a lawyer is permitted to assist the person during the questioning.

A person can be punished for up to five years if he or she refuses to answer questions or give false or misleading answers. The right against self-incrimination cannot be asserted. However, the answers given may not be used in a criminal prosecution against the person, save as a basis for a perjury charge.

Questioning and detention warrant - Procedure

This warrant authorises a police officer to take a person into custody for questioning before a prescribed authority. Before giving its consent, the Attorney-General must be satisfied that 'if the person is not immediately taken into custody and detained, the person:

- (i) may alert a person involved in a terrorist offence that the offence is being investigated; or
- (ii) may not appear before the prescribed authority for questioning; or
- (iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce'.

Detention under this warrant is authorised for as long as seven days and enables questioning for periods of no longer than eight hours. Upon expiry, ASIO can obtain a further warrant if the Attorney and the issuing authority are satisfied it is necessary

as there is 'information that is additional to or materially different from that known to the Director-General' to the previous warrant request.

While the warrant is in force, a person cannot give any other person any information about the warrant, not even that it has been issued. Furthermore, with limited exceptions, for two years after a warrant has expired, a person cannot inform any other person of 'operational information' that was obtained under the warrant.

I now turn to describe the operation of preventative detention orders.

Preventative Detention

Preventative detention is aimed at either preventing an imminent terrorist attack from occurring, or preserving evidence relating to a recent terrorist act. The order can be used to detain persons suspected of some involvement with terrorism but where there is insufficient evidence to justify a formal charge.

A senior Australian Federal Police (AFP) officer may apply to an 'issuing authority' for a preventative detention order. The 'issuing authority' can be a present or retired judge or a federal Magistrate. A preventative detention order can be issued ex parte in two situations:

- (a) An order is made when the issuing authority consider it "reasonably necessary" and is satisfied that making the order would substantially assist in preventing a terrorist act, which is imminent and expected to occur within 14 days, from occurring and there are reasonable grounds to suspect that a person is involved either by way of planning or participation.
- (b) A preventative detention order can also be made if the issuing authority is satisfied that it is reasonably necessary to detain the person in question for the purpose of preserving evidence relating to a terrorist act which has occurred within the last 28 days, and that the period of detention is necessary for that purpose.

Once the order has been made, the AFP can take a person into custody and detain him or her for 24 hours. The order can be extended for another 24 hours. Further extension is then possible, under State law, which operates in conjunction with the Commonwealth Criminal Code. The **NSW Terrorism (Police Powers) Act 2002**, for example, enables detention for a maximum of 14 days.

(This type of detention has not been addressed in the Reform Bill I mentioned earlier).

If the order is disclosed to anyone, by the person the subject of the order, there is a maximum penalty of five years imprisonment. This is to ensure that other members of terrorist organisations do not learn that the individual is being detained under a preventative detention order. However the order must allow contact with a family member (but solely for the purposes of saying that he is safe, but unable to be contacted for the time being) or another person or lawyer (for advice and representation) at specified times while in detention. These communications would be monitored by police officers. There is limited access to reasons for detention.

The use of preventative detention and control orders is believed to have been limited. The exact number of orders for questioning is not precisely known. There has been no reported case of abuse of such powers, although the case of **Mohammad Haneef** is one such case which, in an allied area, has raised considerable controversy in recent years(9).

Dr Haneef was an Indian national who graduated with a degree of Bachelor of Medicine from a Medical College in Bangalore. He travelled to the United Kingdom where he worked in a number of hospitals between mid-2004 and August 2006. He returned to India and then decided to undertake post-graduate training in Australia. He and his wife arrived in Australia in September 2006. Dr Haneef secured employment with the Southport Hospital in Queensland.

On 29 June 2007, an event occurred in London which set off a chain of events that led to the detention of Dr Haneef and ultimately the cancellation of his visa and his

confinement in immigration detention. In the early morning of 29 June 2007, a bomb was discovered in a green coloured Mercedes car parked outside a nightclub in Haymarket. The explosive device was manually defused. Later that day a second car was found in Park Lane in Mayfair containing a similar device. It was also defused.

On the following afternoon a Cherokee Jeep was driven into the front doors of Terminal 1 at Glasgow Airport. The vehicle burst into flames and two persons were found at the scene.

Arising out of these events, authorities in the United Kingdom arrested a number of people on suspicion of having been involved in the commission of/or preparation for an act of terrorism contrary to the United Kingdom legislation. Advice was provided to the AFP by the English authorities that Dr Haneef was a person of interest to their investigation because of his alleged association with two of the suspects who had been detained in the United Kingdom. These men were second cousins of Dr Haneef. There was, it seems, a significant volume of security information passing between the UK Counter-Terrorism Command and the AFP in Australia.

There was enormous media interest in the 'affair', this interest being greatly increased by leaks of apparently sensational aspects of the investigation and the extended detention of Dr Haneef. Dr Haneef was held in pre-charge detention for 12 days by the AFP on suspicion of committing a terrorism offence, namely of providing resources to a terrorist organisation. During that time, the initial investigating period was extended to 48 hours and the AFP also obtained an order for a specified reasonable period of time (a 'dead time period') during which the suspension or delay of questioning could be disregarded. Haneef was then charged with providing resources, namely a SIM card to those involved in the UK incidents. It was believed, it seems, that the SIM card had been found in the burnt-out vehicle in Glasgow, although this "fact" was later found to be untrue. Dr Haneef was granted bail but was immediately issued with a detention order under the migration laws. The Minister for Immigration was later found to have acted unlawfully, although by then, Dr Haneef had left the country. He was later acknowledged by the AFP to be "no longer a person of interest".

The **National Security Legislation Amendment Bill 2010** now posits a maximum seven-day period for disregarded or “dead” time following arrest. This is a direct response to the **Haneef** situation.

Control Orders

Control orders were introduced with the 2005 amendment to terrorism laws ‘to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist attack.’ However, the issue of a control order does not depend on an imminent risk of terrorist attack. It can operate for as long as a year and can be renewed at the end of the year. A person does not have to be convicted of a terrorist offence or other offence to be the subject of a control order. It is not even necessary for there to be a finding that the person concerned is suspected of committing a crime.

Operation

Control orders are issued for the purpose of monitoring, restricting and directing the activities of persons who may engage in acts of terrorism.

The terms of a control order can vary from minor restrictions, to far reaching interferences with, a persons’ freedom. For example, an order can prohibit an individual from being at specified areas or places, from communicating or associating with a particular person or persons, or from using certain forms of telecommunication or technology.

It can require a person to do things such as wear a tracking device or remain at a specified place for certain periods or to report at specified times and places. It can impose a curfew.

Issuing Authority

An interim control order may be sought from the Federal Court, Family Court or Federal Magistrates Court by a senior member of the AFP with the Attorney General's written consent. This initial application is heard ex parte.

Types

1. For an interim control order to be issued the Court must be satisfied on the balance of probabilities that 'making the order would substantially assist in preventing a terrorist act'; or
2. 'that the person the subject of the order has provided training to, or received training from, a listed terrorist organisation.'

The court may declare, at a confirmation hearing, that an order be void, if it is satisfied that there were no grounds for making the original order. The order may be confirmed, varied, or some of its restrictions or obligations altered. The person the subject of the initial order is entitled to be heard and represented at the confirmation hearing.

Punishment

Breach of a control order is an offence punishable by up to five years imprisonment.

Issue of Control Orders

So far there have been very few situations in which control orders have been issued. There have, however, been two somewhat controversial illustrations of the use of control orders, those of Jack Thomas and David Hicks.

Jack Thomas was detained by Pakistani authorities for five months during which time he was kept in cells, including a kennel-like cell for approximately two weeks, where he was deprived of food for about three days. He was interrogated throughout this by Pakistani, American and Australian officials. He claimed he was interviewed by

AFP and ASIO officers during this time. He was often blindfolded, hooded and shackled. Initially, he had claimed that he was a student who had been travelling and visiting Pakistan but after a second questioning session he decided to cooperate, whereupon he was given food and his circumstances of detention changed.

Thomas was then held for three weeks and interrogated on a daily basis by Pakistani officials and a CIA representative. He was returned to Australia and then interviewed by a joint team of Australians on 24 and 26 February. The interview by the AFP, was later admitted as evidence at Thomas' trial.

During the course of questioning, American and Pakistani officials frequently resorted to threats. However, it was acknowledged by the trial judge that Thomas had been treated properly by Australian officers. Threats included water boarding, electrocution and execution.

Thomas was arrested at his home in Melbourne some 17 months after his return. He was charged with terrorism offences including intentionally receiving funds from a terrorist organisation and intentionally providing support to a terrorist organisation and possessing a fraudulently altered passport. He was acquitted of intentionally providing support to a terrorist organisation, although the jury found him guilty of intentionally receiving funds from a terrorist organisation. Thomas was sentenced to five years imprisonment for this offence. His conviction was quashed on 18 August 2006 by the Victorian Court of Appeal on the basis that the crucial evidence had been given under duress.

On 28 August 2006 Jack Thomas became the first person to be subject to a confirmed control order issued by the Federal Magistrates Court. This included restrictions such as not being allowed to use phone or email, having to be home between 5am and midnight (unless he notified the AFP of his change of address), not being able to contact certain people and having to report to police three times a week and have his fingerprints taken. The order had been originally issued ex parte on the basis that "Mr Thomas had admitted that he trained with Al Qaeda in 2001 and that while at the training camp, he undertook weapons training". Thomas was prohibited from leaving Australia without police permission. He was prohibited from

acquiring or manufacturing explosives, communicating with named individuals and using certain communications technology. The constitutionality of the control order was challenged, however this was upheld by the High Court(10). Freedom and liberty, absent conviction, were, it seems, not absolutes.

Thomas had participated in a televised interview in which he made the same admissions as those previously considered to have been made under duress. This led to his being re-charged. On 23 October 2008, Thomas was found not guilty of the terrorism offences but guilty of a passport offence. He was released after his sentence took into account the time already served, ie some nine months. The public controversy that ensued arose perhaps from the unique situation of Thomas' second trial, rather than from the issue of the control order itself.

David Hicks

A control order was also issued in relation to David Hicks. This was imposed after his release from detention in an Australian prison.

David Hicks was a person who had a history of militant activity including joining the Kosovo Liberation Army, applying but failing to join the Australian Armed forces, converting to Islam and training with LeT, training in weapons and war strategy, and eventually, so it was alleged, graduating to Al-Qa'ida's training camps in Afghanistan where he met Osama bin Laden.

In the wake of 9/11, Hicks was assigned by Al-Qa'ida to various military operations within Afghanistan against the Coalition and Northern Alliance forces. In early December 2001, he was captured in Afghanistan, and was transferred to Guantanamo Bay. Hicks was detained in that notorious institution, without charge, for two and a half years. The first charges laid against him in August 2004 failed when the United States Supreme Court held that the military commissions were unconstitutional.

Hicks was detained at Guantanamo for a further two and a half years before new charges were laid in January 2007. One month later, he negotiated a plea of guilty

to the single charge of “providing material support for terrorism”. He was sentenced to seven years’ imprisonment, all but nine months of which was suspended. He was repatriated to Australia to serve out the nine months in an Adelaide prison. Prior to Hicks’ release from prison, the AFP sought and obtained a control order to restrict Hicks’ movements and activities upon release. The order prohibited overseas travel; required him to report to a police station three times a week; restricted his use of telephones; prohibited any involvement with explosives and weapons; prohibited communications with “member[s] of a terrorist organisation”; required impressions of his fingerprints to be recorded; and imposed a curfew. An important condition of Hicks’ guilty plea was the “gag order”, which prohibited him from discussing his detention and conviction with the media for a period of one year. Hicks’ control order expired in December 2008. The AFP did not apply for it to be renewed. Hicks, so far as is known, now leads a secluded existence, far removed from the controversial circumstances of his past.

Control Orders and the UK Experience: The Belmarsh Case(11)

In the UK, detention is only allowed where deportation is pending under Article 5 of the **European Convention of Human Rights**. To redress the situation where foreign national suspects are at risk of torture in their homeland, the UK provided the avenue of opting out of Article 5 obligations in times of war and public emergency, with Parliament’s blessing. There was a challenge to the lawfulness of the legislation. This regime was constituted with the creation of control orders under the **Prevention of Terrorism Act 2005**, which allowed the Home Secretary (subject to High Court review) to impose obligations to protect the public against terrorism where necessary.

The control orders imposed restrictions such as confining the suspect to an allocated, unfamiliar place. Restrictions may be imposed as to who the person can associate and communicate with, and an electronic tag may be required to be placed on the suspect, making him liable to a search at any time.

A breach of a control order can result in five years imprisonment. At least eighteen such orders have been made. The **Belmarsh** case challenged the legality of control

orders. An 18-hour curfew was considered to infringe the legislation, but a 10-12 hour curfew was considered to be a less rigorous restriction and deemed not to be incompatible. The regime was not, in absolute terms, condemned. A maximum time limit for how long terrorist suspects could be detained without charge was considered to be 28 days.

The Australian situation

In Australia, thus far, there is no reliable indication that ASIO has abused its questioning and detention powers. Up until November 2005, ASIO had obtained 14 questioning warrants. Within a short time, the number had grown to more than thirty. The longest period for which a person was questioned had been 42 hours 26 minutes, which involved use of an interpreter. The longest period of interrogation without an interpreter was 15 hours and 57 minutes. The **Haneef** experience, however, highlighted the difficulty where the authorities, having detained a person for questioning, are urgently seeking further information from overseas to sustain the investigation in the expectation of a possible charge,

National Security Information Act – Secrecy and Non-Disclosure

This legislation was passed, in part, to protect information whose disclosure in Federal criminal proceedings would be likely to prejudice national security. It is quite a complicated piece of legislation. It may be respectfully observed that it gives the appearance of having been drafted by persons who have little knowledge of the function and processes of a criminal trial. I shall now say something about the detail of the legislation. I regret to say that it is impossible to summarise it in other than a discursive manner.

In general, it may be said that the legislation seeks to protect information from disclosure during a proceeding for a Commonwealth offence where the disclosure is likely to prejudice Australia's national security. Specifically, the Act seeks to protect information the disclosure of which would be likely to prejudice Australia's defence, security, international relations or law enforcement interests. These expressions are given very broad meanings in the definition sections 8, 9, 10 and 11 of the Act. For

example, “international relations, means political, military and economic relations with foreign governments and international organisations” (s 10).

It appears to have been the concern of Parliament that the existing rules of evidence and procedure may not provide adequate protection for information that relates to, or the disclosure of which may affect, national security, where that information may be adduced or otherwise disclosed during the course of a federal criminal proceeding (**Explanatory Memorandum 2004**).

The operation of the Act, will ordinarily be “triggered” when the prosecutor contemplates the brief of evidence necessary for the trial. The prosecutor may notify the Court and the parties that a particular case falls within the provisions of the legislation. In fact, however, such notice can be given at any time during the proceedings.

At the commencement of Part 3 the Act contemplates that either the prosecutor or the defendant may apply to the Court for the Court to hold a conference of the parties to consider issues relating to any disclosure in the trial of information that relates to national security or may effect national security. This conference may include consideration as to whether the prosecutor or defendant is likely to be required to give notice under s 24; and whether the parties wish to enter into an arrangement of the kind mentioned in s 22 (s 21(1)(a) and (b)). At any time during a federal criminal proceeding, the prosecutor and the defendant may agree to an arrangement about any disclosure in the proceeding of information that relates to national security or that may effect national security (s 22(1)). The Court may make such order (if any) as it considers appropriate to give effect to the arrangement (s 22(2)).

Relevantly, the central aspect of the operation of the Act is the requirement that a party must notify the Attorney-General at any stage of a criminal proceeding where that party expects to introduce information that relates to, or the disclosure of which may affect, national security. This information includes information that may be introduced through a document or a witness’s answer to a question, as well as information disclosed by the mere presence of a witness (s 24(1) (2) and (3)). On

receiving the advice that the Attorney General has been so notified, the Court must order that the proceedings be adjourned until the Attorney-General gives a copy of a certificate to the Court under sub-s 26(4) or gives advice to the Court under sub-s 26(7) (which applies if a decision is made not to give a certificate).

In a similar fashion, the prosecutor or defendant must advise the Court if he or she knows or believes that a witness may give an answer to a question in a federal court criminal proceeding that will disclose information relating to national security or may affect national security. In those circumstances the Court must adjourn the proceeding and hold a closed court hearing in which the witness provides a written answer to the question. This answer must be shown to the prosecutor. The obligation then falls on the prosecutor, in stipulated circumstances, to advise the Court that he has formed a knowledge or belief that the question relates to or may affect national security. In those circumstances the prosecutor must give the Attorney-General notice in writing of that knowledge or belief. Again, the obligation on the court is to adjourn the proceedings until a certificate is given or not as the case may be (s 25).

Upon notification, the Attorney General considers the information and determines whether disclosure of the information or the calling of the witness is likely to prejudice national security (s 26(1)).

Where the Attorney-General has given a potential discloser a certificate under s 26, the Court must, in any case where the certificate is given to the Court before the trial begins, hold a hearing to decide whether to make an order under s 31 in relation to the disclosure of the information (s 27(3a)) or the calling of the witness.

Where the certificate has been given to the Court after the trial begins, the Court must continue the adjournment formerly granted to hold a hearing to decide whether to make an order under s 31 in relation to the disclosure of the information (s 27(3)) or the calling of the witness.

Any certificates that have been issued must be considered at a closed hearing of the trial or pre-trial court (ss 27(5) and 28(7)). The Attorney-General may intervene in

the proceedings to take part in the closed hearing. If the Attorney-General does intervene in the hearing, he or she is treated as if he or she is a party to the hearing (s 30 sub-ss (1) and (2)).

While the Court has a discretion to exclude the defendant, non security cleared legal representatives of the defendant or non security cleared court officials from the closed hearing, the defendant and his or her legal representative must be given the opportunity to make submissions to the court on arguments relating to the disclosure of information or the calling of witnesses (s 29(2) (3) and (4)). The discretion to exclude only arises where the Court considers that the information would be disclosed to the defendant, the legal representative or the court officials and determines that the disclosure would be likely to prejudice national security.

After holding a hearing required under sub-s 27(3) in relation to the disclosure of information in a federal criminal proceeding, the court must make an order under one of sub-ss (2), (4) and (5) of s 31. In general the court may -

- (a) Agree with the Attorney-General that the information not be disclosed at all or be disclosed other than in the particular form; or
- (b) Disagree with the Attorney-General and order the disclosure of the information either generally or in a particular form. (s 31(1), (2), (4) and (5)).

After holding a hearing required under s 28(5) the Court must order that:

- (a) The prosecutor or defendant must not call the person as a witness in the federal criminal proceeding; or
- (b) The prosecutor or defendant may call the person as a witness in the federal criminal proceeding (s 31(6)).

In deciding what order to make under s 31, the Court must consider the following matters (s 31(7) and (8)):

- “7(a) Whether, having regard to the Attorney-General’s certificate there would be a risk of prejudice to national security if:
- (i) Where the certificate was given under sub-s 26(2) or (3) – the information were disclosed in contravention of the certificate; or
 - (ii) Where the certificate was given under sub-s 28(2) – the witness were called.
- (b) Whether any such order would have a substantial adverse affect on the defendant’s right to receive a fair hearing, including in particular on the conduct of his or her defence;
- (c) Any other matter the Court considers relevant.”

In making its decision, the Court must give greatest weight to the matter mentioned in s 31(7)(a) (s31 (8)).

The legislation provides for a potential series of appeals. They may take place concurrently or, it seems, they may be brought piecemeal. The form of the record itself may generate an appeal if it is thought to pose a threat to national security. So too with the reasons of the Court for its decision. There is, of course, an appeal on the merits of the decision. Each of these requires the adjournment of the proceedings until the appeal points have been determined.

An order made by the Court under s 31 does not come into force until the order ceases to be subject to appeal. It remains in force until it is revoked by the Court (s 34).

Section 19 deals with the general powers of a court in a federal criminal proceeding. It provides: -

- “19(1) The power of a court to control the conduct of a federal criminal proceeding, in particular in respect to abuse of process, is not affected by this Act, except so far as this Act expressly or impliedly provides otherwise.
- (2) An order under s 31 does not prevent the Court from later ordering the federal criminal proceeding be stayed on a ground

involving the same matter, including that an order made under s 31 would have a substantial adverse affect on a defendant's right to receive a fair hearing."

General Comments

It is, I think, fair to make the following general observations: -

1. This legislation poses a very significant challenge to the efficient running of a criminal trial. At the same time, it has, as I shall explain later, the capacity, in an indirect sense, to create a situation where the defendant's right to a fair trial may be significantly impaired.
2. The Act imposes highly unusual obligations on lawyers engaged in Federal proceedings. In particular, lawyers must obtain security clearance to have access to information concerning national security.
3. There is also an obligation on the Court's staff and Court reporters to obtain National Security clearances. The processes for obtaining these clearances are intrusive and, in some instances, upsetting. Not only must the individuals be scrutinised but so also their spouses and partners. Details of their financial and personal lives are examined.
4. As mentioned, if, before or during a hearing, either the prosecutor or the defendant knows or believes that information which relates to or may affect national security will be disclosed, he or she is required to notify the Attorney-General and take a number of other procedural steps as soon as possible. Failure to comply with the requirements exposes the practitioner concerned to imprisonment for up to two years.
5. Delay and disturbance to the trial process is perhaps the most practical potential problem created by the legislation. As I have explained above, there is the possibility of a disruption to the trial itself while the Attorney-General contemplates whether to issue a Certificate. Where a Certificate is issued, there is a need to hold a Closed Court hearing in the absence of the jury. This will presumably take place

days, or perhaps weeks, after the initial adjournment. If the Court decides to make orders after the Closed Court hearing, there are three possible appeals. The first is an appeal relating to the records to be kept. The second is an appeal relating to the reasons for the decision. The third is an appeal against the merits of the decision. In each of these cases there is the capacity for delay and the trial cannot proceed until the appellate court has resolved the issues arising under the various appeals.

It may be appropriate if I mention at this stage that during the trial of **Faheem Lodhi** (in which I was the trial judge), there were a number of strategies selected which, I believe, prevented these delays from intruding unfairly on the trial process. First, it was generally agreed that all aspects of national security disclosure (including the imposition of protective orders) would be dealt with entirely during pre-trial hearings. This had the effect of elongating the pre-trial stage of the proceedings. It had the advantage, however, of ensuring that there was very little delay, if any, in the hearing of the trial itself. In those circumstances, the jury were not inconvenienced by adjournments or appellate delays.

Secondly, there was a considerable degree of co-operation between counsel for the prosecution and the defence. It was plainly the desire of all parties to ensure that the trial proceeded as normally as possible. There was, it must also be said, a degree of co-operation on the part of those representing the Attorney General although their concerns focused, as might be expected, more on the protection of national security and were less concerned with the trial process. Thirdly, a clear dichotomy was maintained between the issue of disclosure of sensitive information on the one hand and the issue as to whether protective orders should be made, or the manner in which evidence was to be given during the trial. There was, during the pre-trial procedures, an appeal to the Court of Criminal Appeal brought on behalf of the defendant in relation to protective orders. There was some delay in relation to this but it was relatively limited. For example, the orders I made (relating to Closed Court hearings and the like) were made on 15 March 2006. The Court of Criminal Appeal heard the appeal on 24 March and dismissed the appeal on 4 April 2006. The important point to note, however, is that the appeal process occurred during the pre-trial proceedings and not during the trial itself. In that way, the jury did not experience the frustration and disruption of an interrupted hearing.

The **National Security Legislation**, in some academic quarters, was said to be unconstitutional. Commentators argued that it purported to usurp the judicial power of the Commonwealth

In **Faheem Lodhi v Regina** (12), the Court of Criminal Appeal had to confront this argument directly. This was an appeal from conviction and sentence arising from the **Lodhi** trial. It was asserted that s 31(8) of the **National Security Information Act** was invalid because it breached Ch iii of the Australian Constitution by usurping the judicial power of the Commonwealth which was vested solely in the judiciary. It was submitted on the appeal that by requiring the Court to give “greatest weight” to the risk of prejudice to national security, the Parliament had usurped the judicial function by directing the Judge hearing the case as to how the case must effectively be decided. The Court decided that the use of the word “greatest” meant no more than that “greater weight must be given to the risk of prejudice to national security than to any other of the circumstances weighed”. If only two circumstances were weighed, it would be construed to mean “greater”. The effect of the sub-section, however, was not to usurp judicial power by requiring that the balance must always come down in favour of the risk of prejudice to national security. Accordingly, sub-section (8) of s 31 was held to be constitutionally valid.

It may be of interest to note that, as trial Judge, I had prohibited disclosure of certain material to the defence after considering the balancing discretionary exercise required by s 31(8). I had, however, ruled that other material sought by the defence should be disclosed notwithstanding the statutory tilt in favour of the risk of prejudice to national security. In my decision I said: -

“(108) The mere fact that the legislation states that more weight, that is the greater weight, is to be given to one factor over another does not mean that the other factor is to be disregarded. ...Read fairly it seems to me that the legislation does no more than to give the Court guidance as to the comparative weight it is to give to one factor when considering it along side a number of others. Yet the discretion remains intact...the legislation does not intrude upon the customary vigilance of the trial Judge in a criminal trial. One of the Court’s

tasks is to ensure that the accused is not dealt with unfairly. This has extended traditionally into the area of public interest immunity claims. I see no reason why the same degree of vigilance, perhaps even at a higher level, would not apply to the Court's scrutiny of the Attorney's certificate in a s 31 hearing".

The principal appellate decision on the point was given by Chief Justice Spigelman in the Court of Criminal Appeal. Three of his Honour's comments are especially noteworthy. Spigelman CJ said: -

"(66) A similar approach is, in my opinion applicable to s 31(8) of the **NSI Act**. The legislative has "struck a different balance". It has, to some degree, "put to one side, the public and private interest in obtaining all potentially relevant information" in favour of "the public interest in national security". This, in my opinion is constitutionally permissible.

(72) The modification of judicial procedures by legislation should not be characterised as a legislative usurpation of judicial power, unless it affects the integrity of the judicial process. As noted above, in certain contexts the common law tilts a balancing process without effect on the integrity of the process. Legislation can also do so, without necessarily having such an effect.

(73) This focus on whether the integrity of the process has been compromised confirms the conclusion to which I have come above. Tilting the balance with respect to the formulation of a broad evaluative judgment, upon which reasonable minds may differ, does not impinge upon the integrity of the process by which the judgment is formed. It may affect the outcome of the process but not in such a way as to affect its integrity."

Spigelman CJ went on to find additionally that the guarantee, contained in the Australian Constitution, of the right to a fair trial was not infringed by s 31(8) of the Act. In that regard his Honour said: -

“I repeat, and emphasise, that all claims for privilege, which the common law had long recognised, necessarily involved the withholding of potentially relevant evidence, even from defendants in a criminal trial. ...a successful claim for public interest immunity does not contradict such a right to a fair trial as may exist under the Constitution. The legislative tilting of the balancing process by s 31(8) of that Act, in my opinion, does not constitute so significant a change as to have such an effect”.

Areas of potential unfairness for an accused in a terrorism trial

The barriers to disclosure in the **National Security Act** will not necessarily pose an unfairness problem for an accused person if those issues can be clarified and resolved during pre-trial session. A more important practical problem, however, arises from the way in which the legislation requires the Court’s discretion to be weighted. On its face, the question as to whether there is a risk of prejudice to national security can, in practice, plainly trump the defendant’s right to receive a fair hearing, including, in particular, on the conduct of his or her defence. This is precisely because the statute requires that “greatest weight” be given to the question as to whether there would be a risk of prejudice to national security if the information were disclosed in contravention of the Certificate, or the witness were to be called. For my part, however, I do not think that the statutory weighting of the discretion in this way necessarily works to the practical disadvantage of the accused. There are two reasons for this. First, the object of the Act, (s 3(1)), is to prevent the disclosure of information where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice. It is not difficult to prove in a particular case that, where a refusal to make a disclosure would have a substantial adverse effect on the defendant’s right to receive a fair hearing, this may be sufficient to “seriously interfere with the administration of justice”. Secondly, where disclosure is not made, the Court maintains the capacity, in an appropriate case, to stay the proceedings (s 19).

Special Counsel

Before leaving the issue of disclosure under the **National Security Act**, I should refer to one other matter: there is a capacity under the legislation for part of the argument addressed in a Closed Court hearing to be taken in the absence of the defendant or his or her non-security cleared legal representative (s 29). There is also the capacity, as occurs in ordinary public interest immunity claims, for affidavit material to be received from the Director of Security on a confidential basis. In either situation, the Court and the defendant may well be assisted by the appointment of special counsel.

In **Lodhi** [2006] NSWSC 586, I addressed the possibility of the appointment of special counsel to represent the interests of the defendant and to assist the Court in the area of national security claims. I traced the development of the practice of the appointment of special counsel in the United Kingdom (see paras 13-16). In particular, I was satisfied that the provisions of the legislation did not prohibit the appointment of special counsel during, or for the purposes of, a hearing under sub-ss 25(3), s 27(3) or 28(3). I was satisfied that the language of s 29(2) was sufficiently wide to allow a person appointed as special counsel to take part in a s 31 hearing.

The appointment of special counsel in Australia is a novel concept. So far as I am aware, special counsel has not been appointed in Australia, either within or outside the confines of the **National Security Act**. Although the utility of the appointment of special counsel has been doubted (see Sir Anthony Mason in a paper given in Brisbane to the ISRCL “**Justice for All**” 2 July 2006), I consider that it could be a useful weapon in the armoury of a trial judge in a situation where there is a clash between a national security claim and a suggestion that the defence will be substantially prejudiced or interfered with in the conduct of the case. The problem is that defence counsel may not be entitled to look at the document, which is the subject of the national security claim. Special counsel, on the other hand, will be entitled to do so. One reason will be because he or she has a security clearance. In addition, special counsel will understand the nature of the defence case but will not have had any direct contact with the accused himself. This means that submissions, helpful to the defendant and of assistance to the trial judge, will be forthcoming to counter the arguments advanced on behalf of the Commonwealth.

For a broad discussion relating to the issue of the appointment of special counsel in the United Kingdom, see **R v H; R v C** [2004] 2 AC 134 at 150-151 per Lord Bingham and the remarks of Lord Woolf CJ in **M v Secretary of State** [2004] 2 All ER 863 at 868. It is, however, worthwhile recalling the cautionary words of Lord Bingham in **R v H; R v C** at para 22: -

“None of these problems should deter the Court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant”.

Lord Bingham stated in the same case: -

“The problem of reconciling an individual defendant’s right to a fair trial with such secrecy as is necessary in a democratic society in the interests of national security or the prevention or investigation of crime is inevitably difficult to resolve in liberal society governed by the rule of law.”

Australia lacks, of course, a domestic Bill of Rights at the Federal level. This is of course, the jurisdiction in which public interest claims based on national security are most frequently invoked. It was my view in **Lodhi** that a staged approach, incorporating the appointment of a special counsel (in appropriate circumstances), could operate to provide a defendant with greater fairness in cases involving public interest immunity claims based on national security.

In **Lodhi**, I concluded, however, that it was premature to appoint a special counsel at the time when the point was raised. As it happened, I later concluded that it would not be necessary to appoint a special counsel at all, as it seemed clear to me that the accused was entitled to receive disclosure of the majority of the material it sought. While I took the initial view that it was premature to appoint special counsel, I considered that three crucial steps might be undertaken before making a final

decision whether extraordinary circumstances existed so as to justify the appointment of a special counsel. These were: -

- (a) The Court should receive the material relied upon by the Government to support the public interest claim;
- (b) The Court should inspect the material over which the claim was made and the reasons for the claim; and
- (c) The Court should invite the prosecution and defence to address the Court on their respective cases with a view to ascertaining whether, and how, the material over which the claim was made could be relevant to those cases.

In relation to the first point, Australian law makes it clear that an affidavit that purports to set out the basis of a claim for public interest immunity should state with precision the grounds on which it is contended that documents or information should not be disclosed. The courts must insist that affidavits claiming public interest immunity contain a precise statement of the harm the Government claims will flow from disclosure. The Court should require the deponent to examine the question whether it is possible to have “layered” levels of disclosure.

In relation to the second point, I am conscious that this represents a significant point of distinction between United Kingdom and Australian practice. As I understand it, United Kingdom courts remain extremely reluctant to inspect documents over which public interest immunity has been claimed. By contrast, in Australia, courts have long accepted the ability to inspect such documents. This is particularly true in criminal matters where the courts have adopted a very liberal approach to inspection.

To my way of thinking, judicial inspection has considerable value. Not only does it assist the Court in its determination of the public interest immunity claim. It also has the capacity to give an accused person reassurance that the judicial officer has independently tested the Government’s claim for immunity. Thirdly, it may be said that judicial inspection may reveal that the appointment of special counsel is not needed at all. The risk of highly prejudicial material being revealed to the Judge is, on balance, one worth taking.

The third point really requires no comment. As a trial Judge in Australia, however, it is often difficult to persuade counsel for the accused to be frank about the nature of the defence case. This is a tendency rooted in tradition that I fear will have to change particularly in the area of complex trials. I am conscious of the fact it has changed already in the United Kingdom but we are presently lagging behind in this area. Change is in the air, but we have a distance to travel before this problem is solved.

The final matter I would mention under this heading is the mechanics of the appointment of special counsel. As to qualification, it can be assumed that the Attorney-General will consider only those counsel who have security clearances as being appropriate to act as special counsel. In the absence of agreement between the parties, the Court may be able to consult the Bar Association of the local State. In **Lodhi**, I suggested that, although the appointment of special counsel was then regarded as premature, there should be consultation between the parties so that the Attorney General might, on a preliminary basis, select a suitable Senior Counsel and notify the defence of the identity of the special counsel so selected. Further, I suggested that appropriate arrangements should be made between the lawyers for the defence and the nominated counsel so that an appropriate briefing in relation to the issues likely to arise could be promptly placed before special counsel, if it became necessary to do so. These were preliminary suggestions only but they indicate that significant delays can be avoided, especially if there is co-operation between the parties.

Can the Law stop Terrorism?

To many Europeans and the British, Australia seems, no doubt, at a very distant remove. Yet the people “down-under” have had an exposure to the evils of international terrorism. While no terrorist attack has actual taken place in Australia itself in the years since September 11, Australians have been killed or injured in overseas attacks. For example, close to home, 88 Australians died tragically in the Bali nightclub bombings in 2002. Many were injured. Australians were injured in the London bombings and more recently in the Jakarta bombings and in Mumbai. True it is, the number of deaths and the number of those injured has been comparatively

small compared to resultant losses elsewhere. But the effect of those deaths and injuries has been profound on the families who have had to endure the resultant loss and suffering. Moreover, the effect on our national psyche has been equally profound.

So the question I pose is a real one. It is a question that requires argument and discussion at an international level. If the laws I have been discussing are worthy of some degree of justifiable criticism, if they threaten our democratic ideals and call into question the rights of citizens (as many maintain they do), is not their practical efficacy an important matter to bring into the equation?

Can the Law stop terrorism? I suppose the first point to make is that the opinion of a sitting Judge may not be any more useful than the opinion of another citizen. Indeed, some of our media, our politicians and academics might argue that the opinion of a sitting Judge is of less value than the opinion of an ordinary citizen. Be that as it may, I would like to offer some comments from my own experience and perspective.

A preliminary observation may be made. As Richard Maudment SC argued in a recent paper “the capacity of law enforcement agencies and the criminal justice system to facilitate successful prosecutions against those engaged in terrorist activity must surely be considered an essential component of the protective shield”(13). Assuming, for the sake of argument, the guilt of a person charged with a terrorism offence, it is plainly important that the investigative activity of police authorities and the agencies responsible for national security be effectively employed against a background of utter probity and integrity. Australia has a myriad of Federal and State laws which govern the way in which investigations are to be carried out. The laws are concerned with the way people are to be interviewed, the situations in which they are detained and the procedure under which searches and surveillance are conducted. It is very important that those investigating a terrorist offence understand fully the dictates of the particular statutory regime under which the investigation is carried out. This has not always been the case in the past. Blunders in the investigative process, even unintentional blunders, have the capacity to derail a trial. The education and training of investigative officers and security agencies should be an important feature of our national program in connection with present and future

terrorist investigations. Equally, international cooperation between the overseas and local agencies needs to be at a high level with a system of double checks in place to ensure mistakes do not occur. The recent **Haneef** case is a good example of the existence of a potential misunderstanding between Australian police and overseas agencies in situations where care is not taken.

Similarly, there is an ever-present need for trial Judges to ensure that a person charged with a terrorism offence obtains a fair trial. There is probably no such creature as a “perfect trial”. The trial Judge, however, carries the heavy burden of ensuring that practical and effective fairness is afforded to a defendant. In this area, the trial Judge can do much to ease the problem of bias and prejudice. It is his task to make sure that those selected for jury duty in a criminal trial are persons who do not bring with them the baggage of unreasonable prejudice. It is his or her task to ensure that the much publicised round of terrorist activities in other countries does not colour or taint the accused in a local trial. Where the police or other agencies have acted unfairly against an accused, the trial Judge has the capacity to exclude evidence obtained as a consequence. It has been my general observation in the trials I have dealt with that considerable care has been taken by the police to ensure that persons accused of terrorism offences were treated fairly, courteously and with dignity. This may not always be the case. It is the duty of a trial Judge to detect and eliminate unfair prejudice and to reject evidence obtained unfairly.

What then is the task of a sentencing Court once an offender has been found guilty of a terrorism offence? It is clear that the common law concepts that are especially important in such a sentencing exercise are punishment, denunciation, deterrence and incapacitation. (The last matter is often described as “protection of the community”). In **R v Martin** (1999) 1 Cr App 477 (at 489), Lord Bingham CJ, as the Senior Law Lord then was, said: -

“In passing sentence for the most serious terrorist offences, the object of the Court will be to punish, deter and incapacitate: rehabilitation is likely to play a minor (if any) part”.

In dealing with preparatory terrorism offences, I have myself stated the principal in the following terms in **R v Baladjam** [2009] NSWSC 449 at 105: -

“The broad purpose of the creation of offences of the kind involved in this sentencing exercise is to prevent and deter the emergence of circumstances which may render more likely the carrying out of a terrorist act. It is to punish those who contemplate action of the prohibited kind. It is to denounce the activities of terrorists and their adherents. It is to incapacitate them so that the community will be protected from the horrific consequences contemplated or made possible by their actions. The legislation is designed to bite early, long before the acts connected with terrorism mature into circumstances of a deadly or dangerous consequence.”

There is an observation made by the Court of Appeal for England and Wales in **R v Barot** [2007] EWCA Crim 1119 at [45] which is germane to this discussion. There the Court said:

“Terrorists who set out to murder innocent citizens are motivated by perverted ideology. Many are unlikely to be deterred by the length of the sentence that they risk, however long this may be. Indeed, some are prepared to kill themselves in order to more readily kill others. It is, however, important that those who might be tempted to accept the role of camp followers of the more fanatic, are aware that, if they yield to that temptation, they place themselves at risk of very severe punishment. Punishment is the other important element of the determination of the sentence for offences such as this.”

This observation was, of course, made in the context of terrorist activity designed to kill innocent people. It has a relevance, however, for terrorism in all its aspects. Specifically, it includes in its ambit those who, intentionally assume, in some form or other, the role of a camp follower and those who may be of a more extreme terrorist bent. Terrorists cannot adequately function without followers, acolytes or assistants. Deadly and lethal acts of terrorism cannot occur without the intentional activities of

those who, motivated by extremist religious fervour, determine to carry out acts in preparation for such acts.

There can be little doubt about the capacity of Australian terrorism laws to achieve punishment, denunciation and protection of the community, at least so far as those who have sentence passed upon them are concerned. The more difficult question is whether conviction and the imposition of a substantial penalty will have a deterrent effect on those sentenced, or on other persons who are minded to be involved in a criminal terrorist act. There is a strongly held view that the imposition of stern penalties has no impact on a committed terrorist. Moreover, the same view tends to suggest that the imposition of strong penalties serves only to inflame the radicalism of the extremists in the Islamic community. They see long gaol sentences as a “badge of honour” for those who endure them. They see Courts as the instruments of repression utilised by an unfair Government. The outcome of the Court proceedings is viewed by extremists as an illustration of the unfairness of democratic countries towards Islam.

As to the position of those in prison for terrorist offences, there is conflicting anecdotal evidence at least in the southern hemisphere. For example, there are significant reports from Indonesia that de-radicalisation programs have been carried out on the many hundreds of prisoners who have been jailed for terrorism offences of one kind or another in that country. It is, of course, impossible to obtain any reliable evidence to suggest that programs of this kind have been universally successful, or for that matter successful at all. Time alone will tell. On the other hand, there is anecdotal evidence emerging from Australian prison conditions to suggest that Islamist radicalisation is occurring among prisoners within the gaol population. Once again, it is impossible to know how accurate reports of this kind are.

As to the position of extremists at large in the community, the position is again uncertain. In February 2010, I sentenced five men who had been found guilty of being participants in a conspiracy to do acts in preparation for a terrorist act or acts. The convictions and sentences are likely to be the subject of appeals to the New South Wales Court of Criminal Appeal. For that reason, I do not propose to make any specific comment about the trial. It was, however, a matter of disappointment to

me that, after the imposition of the sentences, a number of senior Imams in the local Muslim community arranged a meeting to consider the outcome of the trial. They published a notification to the Australian Federal Police describing the trial as “a travesty of justice” and demanded to be shown evidence that would substantiate the proposition that each of the offenders had terrorist intentions in relation to their collection of chemicals, weaponry and ammunition. Public statements of this kind are disappointing. They reflect that some of the “leaders” of the Muslim community are in denial concerning the activities of a minority in their own community. The remarks show an entrenched attitude of hostility to our Court system and to the fairness of jury determinations. An opportunity was missed that might have enabled the senior members of the Muslim community to state publicly that they did not sympathise with terrorist activities, that they did not condone them, and that such activities were to be condemned by the great majority of Australian Muslims. Their remarks inexplicably overlooked the very public fact that four other men, associates of the convicted offenders, had pleaded guilty to serious preparatory terrorist actions involving the same or similar evidence.

Do heavy sentences act as a deterrent for those convicted? My view is that they probably do not. Religious extremism and fundamentalism thrive on the unfounded proposition that our system of justice is unfair. Do heavy sentences act as a deterrent generally within the local Muslim community? Once again, probably they do not.

Indeed, there is some danger that the imposition of stern sentences, no matter that it may be completely justified, has the capacity to inflame resentment and may encourage young Muslim men into an extremist position. But the court’s duty is nevertheless a duty to denounce serious criminality. It would fail in its duty to the community if it did not do so.

What then is the way ahead? In a Canadian paper Elaine Pressman gives chilling examples of early radicalisation in young school children (14). For example, Parvis Khan, the ringleader of a plot to kidnap and behead a British soldier, exposed his extremist views to his three children. He had already indoctrinated his son in Al Qaeda “cultural values” by five years of age. The child is asked “Who do you love?”

he responds "I love Sheikh Osama bin Ladin". He is asked "Who do you kill?" he responds, "America kill, I kill Bush, Blair". The child had already seen violent videos of killings and had been taught the values and attitudes of his father. The author noted that in Canada, which has generous immigration and refugee protection policies, there has been ironically a burgeoning of terrorist organisations. It was described (CBC News April 26 2002) as a "wealthy and modern country that has everything for the discriminating terrorist". Their hardline views, the author said, are being passed from father to son, from generation to generation. The characteristics of the radicalised are that they are second or third generation in western countries, and primarily men. They are 15 to 35 years of age and live in male dominated societies within liberal western democracies. They come mainly from middle class families, and are often students with at least a high school education and some have university education. Some are recent converts to a new faith or ideology. They have little or no criminal history and live ordinary lives. The observations in these studies are plainly relevant to both Australia and Europe, where similar patterns are emerging.

Against this background, western countries will have to give attention to the task of developing effective and reliable counter radicalisation strategies. It is my understanding that programs of this kind have already begun in a number of the Muslim communities in the heavily populated cities of Northern England. I would be interested to learn more about these programs and particularly whether they are meeting with any success. Integration, tolerance and self-help within local communities, especially developing a better understanding of the law, are undoubtedly a valuable step towards preventing radicalisation. The potential for charismatic extremist leaders to radicalise small groups in local communities can be offset surely by a deeper understanding within the community itself. Experience shows that there are a number of contextual risk factors that are often brought to bear on an individual who may be predisposed to radicalisation. Those factors might properly be thought to include the Internet, training and social contacts with extremist religious or politically motivated groups. It will also include factors such as anger at governmental political decisions or other anger directed at the government. Although it is a contentious area, my experience in the trials I have been involved with is that the Internet is a particularly dangerous factor. Extremist websites are easy to access

and they provide a very wide range of radical content. It varies from horrifying videos showing the execution of hostages to precise and detailed instructions in bomb making and the like. Many of these extremist websites overtly promote and justify the use of violent action to achieve ideological goals. Individuals who make frequent use of these websites are clearly at risk of radicalisation, particularly if their close friends and associates share the websites with them.

Considerations of the proposals for de-radicalisation programs presently being considered in many countries of the world must give us cautious hope for optimism. Regrettably, there is a contrary point of view which is quite pessimistic. While it does not express my view, perhaps I should let it have the last word.

In the Spectator (January 2010) the Editor commented: -

“It is time to dispense once and for all, with the delusion that poverty incubates extremism. Or, that the Islamist that would kill us could be in any way assuaged by concessions in foreign policy. The jihadist menace is not born of poverty, or rationality, or any indigenous culture – Arab or otherwise. It is a separate phenomenon, more psychological than political. It does not care if British Ministers do not now refer to a “war on terror”, or if America now has a black President. It does not respond to brinkmanship of any kind.

The simple fact is that, for a whole range of complex reasons, there are people out there who want to kill us and who have not stopped trying. We hear less about it partly because of the work the security services do – but as the IRA said after the Brighton bomb, terrorists only have to be lucky once. We may all be tired with the war on terror. But it is not, alas, yet tired of us”.

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