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SPECIAL ISSUE: NATIONAL SECURITY AND THE LAW

Guest Editor: Dr James Renwick CSC SC

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THE AUSTRALIAN LAW JOURNAL

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ARTICLES

NATIONAL SECURITY AND COUNTERTERRORISM LAWS

Dr James Renwick CSC SC; Guest Editor of this Special Issue

The relationship between national security and the law is often under strain. The past 20 years have seen many Commonwealth laws passed in quick response to counterterrorism attacks, and more recently, acts of foreign interference and espionage. This article explains the scope of this special edition while reflecting on the challenges facing each branch of government, and law-reform, in this increasingly important area of the law. 744

THE CHANGING LEGAL FRAMEWORK OF THE AUSTRALIAN INTELLIGENCE COMMUNITY: FROM HOPE TO RICHARDSON

The Hon Michael Kirby AC CMG

Intelligence and security agencies in Australia have been reviewed by judicial inquiries, including two Royal Commissions conducted by Justice RM Hope (1974–1976) and (1983–1985), and later investigations by officials, culminating in the Comprehensive Review (2018–2019) by Mr DJ Richardson. Seeking a balance between civil liberties and suggested security needs, the article traces the two inquiry models. It outlines the dangers presented by the past targeting of communists, homosexuals and political adversaries; the comparative weaknesses of Australia's constitutional protections for individuals; and the need for regular reviews of such agencies given radical changes in social values, geopolitics, alliances and technology. Reconciling the demands of intelligence and security with democracy and basic rights is never easy and is now increasingly difficult. 752

SENTENCING TERRORIST OFFENDERS – THE GENERAL PRINCIPLES

The Hon Mark Weinberg AO QC

Sentencing is an exercise always fraught with difficulty. Fortunately, there is now a body of sentencing law, derived from both statute and common law, to which judges can turn in carrying out this task. There are well-established general principles which provide guidance while, at the same time, recognising the breadth of the discretion vested in judges in performing this function. The modern phenomenon of global terrorism has led to a number of cases, in this country, which have focused upon this process. This paper explores some of the recent developments in this area, noting the significant departures

from ordinarily accepted principles that the sentencing of convicted terrorists now seems to entail. 766

REFLECTIONS ON OVERSIGHT OF INTELLIGENCE AGENCIES: PROMOTING COMPLIANCE, TRUST AND ACCOUNTABILITY

The Hon Margaret Stone AO

Secrecy is both necessary for the effective operation of Australia's intelligence agencies and inimical to the protection of personal rights and liberties that are fundamental to a liberal democracy such as Australia. This tension poses a challenge for accountability. In meeting this challenge trust, independence and a robust culture of compliance are crucial. The value of administrative review in meeting this challenge is considerable. 780

MECHANISMS FOR REVIEWING AND MONITORING NATIONAL SECURITY LAWS: THE UK AND AUSTRALIA COMPARED

Dr Jessie Blackbourn

The United Kingdom and Australia each have a strong mechanism for reviewing the necessity, proportionality and operation of national security laws, although the latter has more explicit statutory basis and powers. After each office escaped abolition, their continuing role now seems clear, indeed the Republic of Ireland recently introduced a Bill for an Independent Examiner of Security Legislation, drawing on elements of each model. 786

THE CONDUCT OF TERRORISM TRIALS IN ENGLAND AND WALES

The Rt Hon Sir Charles Haddon-Cave

The manner in which terrorism trials are conducted is a mark of how civilised a society we are, and a litmus test of our adherence to the Rule of Law. Terrorism trials present unique challenges because of their complexities and subject matter and the heightened public concern surrounding terrorist offences. The role of the courts is to ensure a fair trial within a reasonable timescale. This article seeks to explain the practices and procedures relating to the conduct of terrorism trials in England and Wales. We continue to learn from our colleagues in other jurisdictions in the Common Law world who face similar challenges. 798

WHAT MAKES TERRORISM TRIALS DIFFERENT?

The Hon Anthony Whealy QC

Terrorism trials in Australia have demonstrated, and continue to demonstrate, features which make them markedly different from the general run of criminal trials. This article focuses on the personal experience of a retired Supreme Court judge in relation to several such trials. It highlights the following differences: criminal behaviour based on a religious or ideological persuasion; inherent bias; the impact of national security protection laws and public interest immunity; the complexity of our terrorism legislation and the sentencing principles relevant to persons convicted of a serious terrorist offence. Against this background, the article addresses, from a practical perspective, the sometimes complex nature of the steps necessary to ensure a fair trial in an Australian terrorism trial. 806

NATIONAL SECURITY AND THE LAW – WHAT LIES AHEAD?

Lord Carlile of Berriew CBE QC

Assessing what lies ahead for national security and the connected law is a complex, multifaceted process. As the world comes to terms with the scale of the impact of the COVID-19 pandemic and grapples with the profound social, economic and political shifts it has inflicted, the most pertinent issues that will affect the relationships between national security and the law are still forming. With the publication of its "Integrated Review", the United Kingdom has reassessed its place in the world, made choices with serious strategic consequences, and presented a series of plans to deal with the changing situation. An example from the legal context is extensive sentencing reforms, which have created an upward trajectory of imprisonment. By examining how the United Kingdom now perceives its own national security in a global context and has adapted its approach, with particular reference to trends in international terrorism, we can draw some initial conclusions about what lies ahead. 819

NATIONAL SECURITY AND THE LAW – REFLECTIONS OF A FORMER AUSTRALIAN ATTORNEY-GENERAL

Hon George Brandis QC

Until 2017, the Attorney-General of Australia was also the Minister responsible for domestic security. The Abbott and Turnbull governments implemented the most extensive reforms to Australia's national security laws in a generation. The peculiar nature of the Attorney's office – both within politics, and apart from it – encouraged an approach to these reforms, which reflected the importance of seeking bipartisanship in national security policy. This article reflects on that approach and sets out the broad outlines of the several tranches of legislation – including reforms to the Australian intelligence community, counter-terrorism laws, critical infrastructure and foreign interference. 828

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Current Issues

Editor: Justice François Kunc

NATIONAL SECURITY AND THE LAW

Last year's special issue explored privacy and the law. This year's topic of national security and the law is in many ways the other side of that coin. In this field of discourse two fundamental public policies are in perpetual tension: the right of individual citizens to keep their business to themselves and the right of the state to intrude into that business to protect the state and other citizens. At what point, it might be asked, does the social contract become a Faustian bargain?

In the Western tradition, the first accounts of spying, intelligence and counter-intelligence are to be found in the Pentateuch. Since then, the threats and the methods of dealing with them have changed, but the human factor has remained the same. Today national security is played out not only in the physical world, but also in cyberspace. Balancing what is done in the name of the public to protect the public and the state with the demands of the rule of law has become commensurately more complex. The number of relevant statutes and body of case law has expanded rapidly. Many Australians were deeply disturbed to learn that in the case of "Alan Johns" a trial could be conducted and a sentence served entirely in secret.[1] The legal proceedings concerning Witness K and his lawyer Bernard Collaery continue to generate controversy over what needs to be done in secret.

The General Editor is grateful that former Independent National Security Legislation Monitor Dr James Renwick CSC, SC accepted the invitation to be the guest editor for this issue. Dr Renwick's expertise has been further recognised by his recent promotion to Commodore in the Royal Australian Navy coupled with his appointment as Deputy Judge Advocate General (Navy). Dr Renwick has assembled an outstanding group of Australian and United Kingdom authors to whom the Journal also offers its thanks on behalf of readers. The contributions make up a thought-provoking issue on a topic of great importance, not least in the context of the additional security challenges posed by developments such as COVID-19 and its aftermath and escalating tension with China.

THE CURATED PAGE

In keeping with the theme of this month's special issue, the back page of this part features three ASIO surveillance photographs of a bygone era. These come from a touring exhibition presented by the National Archives of Australia (NAA) entitled "Spy: espionage in Australia". This year is the 60th anniversary of the establishment of the NAA as an agency of the Commonwealth, originally known as the Commonwealth Archives Office.

Thank you to the NAA for making these photographs available. Many readers will have followed recent media reports about the serious funding shortfall which the NAA faces to preserve some of our most fragile historical records. Although special funding has been made available by the Commonwealth, the NAA welcomes public financial support. Readers are encouraged to visit the NAA website to find out how they can help.[2]

FK

[1] Dr Renwick's successor as INSLM, Grant Donaldson SC, will shortly report on his review into "The operation of section 22 of the *National Security Information (Criminal and Civil Proceedings) ACT 2004* (Cth) as it applies in the 'Alan Johns' matter": see <www.inslm.gov.au>.

[2] <www.naa.gov.au>.

National Security and Counterterrorism Laws

Dr James Renwick CSC SC; Guest Editor of this Special Issue*

The relationship between national security and the law is often under strain. The past 20 years have seen many Commonwealth laws passed in quick response to counterterrorism attacks, and more recently, acts of foreign interference and espionage. This article explains the scope of this special edition while reflecting on the challenges facing each branch of government, and law-reform, in this increasingly important area of the law.

A proper understanding of laws concerning national security and counterterrorism is ever more challenging, both because it encompasses aspects of international, constitutional, criminal (substantive, procedural and sentencing), public and human rights law, and because the body of statute and case law proliferates. A special edition on this topic is therefore timely and I thank the General Editor for the opportunity to produce it. While I was Independent National Security Legislation Monitor (INSLM) between 2017 and 2020, I had the good fortune to have official dealings with each of the authors of articles in this volume. I thank them all for their respective contributions in this increasingly significant area of the law, aspects of which they highlight, as well as those who provide informative comparisons between laws and practices in Australia and the United Kingdom. I trust that judges, legislators, academics and practitioners will find this edition useful and thought-provoking, and that it fires the imagination of students.

The First Century of Federation

During the first century after federation in Australia, there were a few national security laws creating federal criminal offences on such matters as espionage, sabotage and official secrets, but there were no federal laws creating terrorism offences. In contrast to the United Kingdom position, where, for example, the Irish "troubles" resulted in a number of new offence-creating terrorism laws, the complete absence of such laws in Australia reflected at least two matters. First, terrorism was almost unknown to occur in Australia, or to affect Australians, until the 21st century.[1] Second, the *Constitution* confers no specific federal legislative power for such matters, nor, indeed, "crime" generally: other heads of power, including referrals of power from State Parliaments under s 51(xxxvii), as well as the defence power in s 51(vi), the external affairs power in s 51(xxix),[2] the implied nationhood power and the express incidental power in s 51(xxxix) coupled with s 61,[3] were relied upon when the need to legislate emerged.[4]

* Senior Counsel, Honorary Professor, Australian National University, Independent National Security Legislation Monitor (INSLM) between February 2017 and June 2020. I acknowledge the work of the other INSLMs, the Hon Roger Gyles AO QC, Bret Walker AO SC and Grant Donaldson SC. This article draws on my published reports as INSLM (see <http://www.inslm.gov.au>) and on a recent unpublished address to the Anglo-Australian Lawyers Society, *Terrorism and Foreign Interference: Some Comparisons between Australian and United Kingdom Laws and Responses* (18 May 2021).

[1] From 1977, for example, as well as the bomb exploding outside the Hilton Hotel in 1978 during the Commonwealth Heads of Government meeting, see *Alister v The Queen* (1984) 154 CLR 404, there were actual or attempted bombings or firebombings (ie arson) at various consulates and embassies, serious attacks on Jewish and Chinese targets, and the assassination of the Turkish Consul-General and his bodyguard in 1980, and the kidnapping and wounding of the Indian Defence Attache and his wife in 1977: see, Council of Australian Governments, *Australia's Counter-Terrorism Strategy – Strengthening Our Resilience, Commonwealth of Australia 2015*, Report (July 2015) iv <https://www.nationalsecurity.gov.au/Media-and-publications/Publications/Documents/Australias-Counter-Terrorism-Strategy-2015.pdf>.

[2] That power extends to making laws with respect to "places, persons, matters or things physically external to Australia": *XYZ v Commonwealth* (2006) 227 CLR 532, [10] (Gleeson CJ), [30] (Gummow, Hayne and Crennan JJ).

[3] *Burns v Ransley* (1949) 79 CLR 101, 116 (Dixon J).

[4] See, eg, the discussion in *Thomas v Mowbray* (2007) 233 CLR 307, which held that laws providing for the making of control orders for the purpose of protecting the public from a terrorist act were supported by s 51(vi).

National security was, with one notable exception, generally conducted under the authority of the executive power of the Commonwealth in s 61 of the *Constitution*, which "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth". For example, neither Australia's domestic intelligence agency, the Australian Security Intelligence Organisation (ASIO),[5] nor the foreign intelligence agency, the Australian Secret Intelligence Service (ASIS) were created by statute, but instead they were established under the executive power of the Commonwealth. The Australian Signals Directorate,[6] which recently became a statutory agency in the Defence portfolio,[7] was part of the Department of Defence.

The notable exception was for laws conferring intrusive powers, especially ASIO's search warrant powers authorising inspection of postal articles and, later, warrants for listening devices, tracking devices, and computer access. The fact that ASIO's powers under the Australian Security Intelligence Organisation Acts of 1956 and 1979 have been in force far longer than those conferring similar powers upon the British Security Service, MI5,[8] which relied for many years upon the Crown's prerogative power, reveals an important difference in approach between the United Kingdom and Australia. This is despite the common law of both countries recognising the authority of what Gageler J, in *Smethurst v Commissioner of Police*, called:[9]

> [T]he celebrated judgment of Lord Camden in *Entick v Carrington* [(1765) 19 St Tr 1029] [which] cemented the position at common law that the holder of a public office cannot invade private property for the purpose of investigating criminal activity without the authority of positive law.

In his memoirs,[10] Sir Garfield Barwick QC recalled that when he was the Australian Attorney-General in the 1950s:

> The English authorities took the view that telephone interception fell within the Royal Prerogative and needed no parliamentary authority. Their justification was that historically the access of the public to the Royal Courier Service, the predecessor to the Royal Mail, was given on terms that the sovereign could open any mail, no doubt as a counter-measure to anti-Royalist plotting. So inspection of letters carried by the Royal Mail was taken to be within the Royal Prerogative … The British extended this prerogative to communication by telephone, the telephone service being also provided by the executive government. I was not prepared to accept this view for Australia. I could see no logic or authority justifying the inclusion of telephone interception within the ambit of the Royal Prerogative, even if indeed that prerogative applied to our Mail services. So I questioned the validity of ASIO's practice.

In the result, he introduced legislation for telephone interception warrants for ASIO for the first time in 1960,[11] and such powers have been extended as technology has evolved both for legitimate activities and those by criminals and other bad actors.

After 9/11

Both the law and practice of counterterrorism have developed rapidly since the events of 11 September 2001, as the following Australian statistics show:

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[5] As Mason J said in *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 56–57: "The Act does not expressly incorporate ASIO. Section 6 refers to ASIO as 'the Organization that was continued in existence' by the repealed statutes and goes on to continue it in existence. Section 4 of the Act of 1956, as amended, up to 1973 had referred to ASIO as 'the Organization established in pursuance of a directive given by the Prime Minister' on 16 March 1949 and had continued it in existence. … it seems, ASIO is a department of the executive government, placed under the control of the Director-General and staffed by Crown servants. Unlike other government departments the Minister's control of it is qualified by s.8(2)."

[6] Formerly the Defence Signals Directorate.

[7] See *Intelligence Services Act 2001* (Cth) s 27A.

[8] Security Service, MI5 <https://www.mi5.gov.uk/law-and-governance>; Independent Reviewer of Terrorism Legislation David Anderson QC (now Lord Anderson QC), "Report of the Investigatory Powers Review: A Question of Trust" (Report, June 2015).

[9] *Smethurst v Commissioner of Police* (2020) 94 ALJR 502.

[10] Garfield Barwick, *A Radical Tory*: *Garfield Barwick's Reflections and Recollections* (Federation Press, 1995) 136.

[11] *Telephonic Communications (Interception) Act 1960* (Cth), repealed by *Telecommunications (Interception) Act 1979* (Cth).

(1) between 2001 and 2019 the Commonwealth Parliament "passed more than 124 Acts amending the legislative framework"[12] for the national intelligence community, including many laws creating offences;
(2) 88 people have been convicted of terrorism offences, with seven acquittals;
(3) and the Commonwealth Attorney-General[13] recently stated:

> [S]ince 2014, 133 people have been charged as a result of 61 counter-terrorism operations around Australia. There have been nine attacks, 21 major counter-terrorism disruption operations and around 120 Australians and former Australians have travelled to Syria or Iraq and are believed to have died; about 45 people have returned to Australia after travelling to Syria or Iraq.[14]

The many Australian laws enacted since 2001 have often been in response to a particular terrorist incident or threat, including those occurring overseas: for example, 11 September 2001 in the United States, the 12 October 2002 Bali Bombings, the 7 July 2005 London bombings; and to international law obligations, notably the United Nations Security Council Resolution (UNSCR) 1373, adopted on 28 September 2001. By that Resolution, all nation states were required to:

> a) "Prevent and suppress the financing of terrorist acts";
> b) "Deny safe haven to those who finance, plan, support, or commit terrorist acts," and, significantly;
> c) "Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and *ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations* and that the punishment duly reflects the seriousness of such terrorist acts."[15]

Although UNSCR 1373 applied equally to the United Kingdom and Australia, the former has enacted far fewer laws in response, and, notably, often punishes terrorist acts under the general law – say, by charging with the offence of murder – rather than Australia's approach of specifically criminalising a terrorist act which intentionally causes loss of life.

Most of Australia's counterterrorism laws are located in Pt 5.3 of the *Criminal Code 1995* (Cth) and are built around the central notions of a "terrorist act" and a "terrorist organisation". The former definition essentially provides that a terrorist act is an act, or a threat to act,[16] that:

(a) intends to coerce or influence the public or any government by intimidation to advance a political, religious or ideological cause, and
(b) causes one or more of the following:
    - death, serious harm or danger to a person;
    - serious damage to property;
    - a serious risk to the health or safety of the public (such as a biological attack);
    - cyber-crime, such as serious interference with, disruption to, or destruction of critical infrastructure such as a telecommunications or electricity network.

A penumbra of offences is linked to the concept of "a terrorist act", such as committing it, providing or receiving training for it, possessing things connected with it, and, significantly, doing any act in preparation for it. Of the last-mentioned offence, Whealy J in sentencing in *R v Elomar*,[17] repeating what he had said in *R v Lodhi*, remarked:

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[12] Dennis Richardson AC, "Comprehensive Review of the Legal Framework Governing the National Intelligence Community" (Report, December 2020) Vol 1, 3.9.

[13] Senator the Hon Michaelia Cash, as reported in James Massola, "New Law Would Allow AFP to Track Terrorists for Three Years after Jail Release", *The Sydney Morning Herald*, 30 May 2021 <https://www.smh.com.au/politics/federal/new-law-would-allow-afp-to-track-terrorists-for-three-years-after-jail-release-20210528-p57vzw.html>.

[14] The UK Home Office publishes detailed statistics on such topics every quarter, as I recommended (as INSLM) that the Australian authorities do.

[15] UN Doc S/RES/1373 (28 September 2001) (emphasis added).

[16] Advocating, protesting, dissenting or taking industrial action are not terrorist acts where the person doing the activity does not intend to cause serious harm to a person or create a serious risk to public safety.

[17] *R v Elomar* (2010) 264 ALR 759.

> The broad purpose of the creation of offences of the kind involved in the present sentencing exercises is to prevent the emergence of circumstances which may render more likely the carrying out of a serious terrorist act. Obviously enough, it is also to punish those who contemplate action of the prohibited kind. Importantly, it is to denounce their activities and to incapacitate them so that the community will be protected from the horrific consequences contemplated by their mindset and their actions. The legislation is designed to bite early, long before the preparatory acts mature into circumstances of deadly or dangerous consequence for the community. The anti-terrorist legislation, relevantly for the present matter, is concerned with actions even where the terrorist act contemplated or threatened by an accused person has not come to fruition or fulfilment. Indeed, the legislation caters for prohibited activities connected with terrorism even where no target has been selected, or where no final decision has been made as to who will carry out the ultimate act of terrorism. The maximum penalty of life imprisonment testifies to the seriousness with which the present offence is to be regarded.[18]

Three articles in this edition are focused on the criminal law, both the conduct of terrorism trials generally and terrorism sentencing in particular.

Sentencing

In his article on sentencing in this issue, the Hon Mark Weinberg AO QC cites Professor Arie Freiberg who has said that the law of sentencing "has developed to a state where it is probably as extensive, detailed and complex as that of the substantive law of crime".[19] The sentencing article considers some of the many complexities involved in sentencing for terrorist offences, and, indeed, there is no doubt that the sentencing remarks have become very long. The contrast with sentencing in England and Wales is considerable. Take the example of Naa'imur Zakariyah Rahman who was convicted of offences including engaging in conduct in preparation for terrorist acts which had in view the killing of then Prime Minister Theresa May. He was sentenced by Haddon-Cave J (a contributor to this edition) to a life sentence,[20] in terms which clearly explained to the prisoner, the public, the media and any appellate court why that sentence was imposed. The remarks take up 12 pages. In Australia they would be far longer, largely because of the matters Freiberg complains of. Given that sentencing, fundamentally, comes down to the application – difficult as it no doubt can be – of the four factors set out by the High Court in *Veen v The Queen (No 2)*: namely "protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform",[21] legislators may think it timely to consider the benefits of the English approach and what the ever-greater complexity of criminal sentencing laws in Australia actually achieves.

What Makes Terrorism Trials Different?

This edition features articles by the former Presiding Terrorism Judge of England and Wales, the Rt Hon Sir Charles Haddon-Cave, and the Hon Anthony Whealy QC, who at the point of his retirement was Australia's most experienced judge in terrorism trials.

The common themes remarked upon by each concern the exceptional complexity (and sometimes the length) of the trials, the need for the most senior judges to hear them, ensuring there is adequate disclosure by the prosecution to the accused, and the need to ensure that the jury are not inflamed by the publicity surrounding terrorism events and commentary generally or arising in the particular case.

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[18] *R v Elomar* (2010) 264 ALR 759, 779 [79].

[19] Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 2.

[20] R v Naa'imur Zakariyah Rahman, *Sentencing Remarks of Mr Justice Haddon-Cave* (2018) <https://www.judiciary.uk/wp-content/uploads/2018/09/r-v-rahman-sentencing.doc.pdf>.

[21] *Veen v The Queen (No 2)* (1988) 164 CLR 465, 495 (Mason CJ, Brennan, Dawson and Toohey JJ): "However, sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."

[22] See, eg, *R v Keane* [1994] 2 All ER 478; *R v Richards* [2015] EWCA Crim 1941.

A point of difference is that in England and Wales, committals having been abolished, within weeks of charging, the matter comes on for its first directions before a senior judge, often the trial judge, who sets the matter down on a timetable with a hearing date, and carefully then case manages the matter to trial, including by setting the terms of Crown disclosure[22] at an early stage.

As to disclosure, Sir Brian Leveson, then President of the Queen's Bench Division and Head of Criminal Justice has said, "[T]echnology serves an increasingly vital function in our society, but these facilities have created one of the greatest challenges ever to be faced by the criminal justice system: that of disclosure."[23] Those challenges will increasingly be felt in Australia.[24] That is because the vast quantity of material disclosable in terrorism trials is likely to test even the most experienced judge, including:

(1) because of the immense quantities of metadata, video,[25] emails, and other electronic materials which, to complicate matters further, may have been encrypted or be in a language other than English,
(2) the interaction between the duty of disclosure and the doctrine of public interest immunity which will be invoked to protect secret intelligence and police sources and methods,[26]
(3) the developing jurisprudence led by the High Court concerning the implications for the accusatorial process of disclosure to the prosecution of material obtained by means of compulsory examination or other compulsory evidence gathering powers.[27]

Judicial educators may thus wish to provide specific training on such matters. Further, the heavy workload of judges in both jurisdictions means that the former practice (and continuing entitlement) of superior court judges to regularly visit prisons to which they sentence prisoners has fallen away. Consideration could be given to renewing this practice, especially in the case of terrorism prisoners who are often put in special prison conditions.[28]

Another aspect of importance in Australia is the adaptation of the laws originally designed for serious sex offenders and then serious violent criminal offenders, to terrorist offenders, such that, if at the point where offenders are liable to be released, having served their criminal sentence, they remain an unacceptable risk to society, a judge may make further orders restricting their liberty on a spectrum between continued incarceration in a prison, to limitations on movement or freedom of communication. Such provisions although found to be constitutionally valid in a line of cases, beginning with *Fardon v Attorney-General (Qld)*,[29] will continue to test the legal system given the difficulties of prediction of human behaviour coupled with the significant impact on society of terrorist acts which are carried out.[30]

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[23] Sir Brian Leveson, President of the Queen's Bench Division and Head of Criminal Justice, "The Slynn Memorial Lecture on Criminal Justice: The Past and the Future" (12 June 2019) <https://www.judiciary.uk/wp-content/uploads/2019/06/Sir-Brian-Leveson-Slynn-Memorial-Lecture.pdf>.

[24] See, eg, *Grey v The Queen* (2001) 75 ALJR 1708; *Mallard v The Queen* (2005) 224 CLR 125; *R v Spiteri* (2004) 61 NSWLR 369, [20]; *Cornwell v The Queen* [2010] NSWCCA 59, [210]; *Button v The Queen* (2002) 25 WAR 382, [14]; *R v Farquharson* (2009) 26 VR 410, [213]; *R v TSR* (2002) 5 VR 627, [73]; *D v Western Australia* (2007) 179 A Crim R 377, [6]; *R v Andrews* (2010) 107 SASR 471, [19].

[25] In *R v Elomar* (2010) 264 ALR 759, the evidence of surveillance of the accused took up about half the time that evidence was adduced before the jury.

[26] *Sankey v Whitlam* (1978) 142 CLR 1, 38–39 (Gibbs ACJ); *R v Reardon (No 2)* (2004) 60 NSWLR 454, [46]–[47]; *R v Lipton* (2011) 82 NSWLR 123, [86]; *R v Solomon* (2005) 92 SASR 331.

[27] See, eg, *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v The Queen* (2014) 253 CLR 455; *Strickland (A Pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325.

[28] See Independent National Security Legislation Monitor, *Report to the Prime Minister: The Prosecution and Sentencing of Children for Terrorism* (2019) xxix <https://www.inslm.gov.au/reviews-reports/prosecution-and-sentencing-children-terrorism>.

[29] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

[30] See the discussion of Continuing Detention Orders in *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166, my INSLM review in 2017 of Divs 104 and 105 of the *Criminal Code 1995* (Cth) (Control Orders and Preventive Detention Orders) including the interoperability of the control order regime and the *High Risk Terrorist Offenders Act 2016* (Cth) <https://www.inslm.gov.au/reviews-reports/inslm-statutory-deadline-reviews>.

THE NATURE OF THE THREATS

Terrorism

Both in the United Kingdom and in Australia, the primary threat was and remains religiously motivated violent extremism, in particular, Sunni Islamist Extremism which accounts for almost all of the 88 persons convicted of counterterrorism offences in Australia, and most of those before courts now. Ideologically motivated violent extremism, formerly called radical right-wing terrorism, is an increasing problem in Australia and charges have been and continue to be laid in that regard. Such motivation by terrorists does not always involve membership of an established terrorist group. The trend for some time has been for terrorism to be planned and carried out by lone actors rather than a co-ordinated group. Although sometimes such individuals assert that they are acting in the name of, or even on behalf of, an existing terrorist group this is often without command and control from the leadership of such groups: indeed, the lone actor may just be adopting the name of the group in a "franchise" type of model.

What is the nature of the threat? It is more and more the threat of an opportunistic use by such lone actors of an everyday item, such as a knife or a car, to randomly murder people or maim them. The time between an offender deciding to conduct the attack and acting on that decision has markedly decreased from the typical plots a decade or more ago, thereby making the job of police and intelligence far more difficult.

Take London's Westminster Bridge attack in 2017, where Khalid Masood drove his car at high speed across the bridge injuring 50 people, five of whom later died, before crashing his car at New Palace Yard and stabbing a police officer to death, then being shot dead himself. *The entire attack took 82 seconds*.[31] There was no warning.

But as a co-ordinated attack in Australia and the United Kingdom cannot be ruled out, it must be prepared for. On 13 November 2015, for example, there were three simultaneous attacks in Paris: first, suicide bombers at the Stade de France, second, gunmen killing restaurant goers, and third, the taking hostage of 1,500 theatre-goers at the Bataclan Theatre before a mass killing. The immediate death toll of victims was 120, with over 350 injured, many severely.

The spectre of a simultaneous terrorism attack on more than one target is of great concern to police and intelligence authorities in both countries: as is an opportunistic attack in the aftermath of an unrelated attack where the authorities are understandably preoccupied.

Foreign Interference

What of foreign interference? It is quite striking that in the last few years, it has come to much greater attention,[32] and although it is hardly new, technology has greatly increased its scope and possibilities. In considering issues of foreign interference, there is an important distinction to be made between foreign interference amounting to espionage and sabotage, which have always been among the most serious crimes,[33] and foreign influence, which is open and transparent, such as legitimate diplomacy or transparent lobbying. Of course, there is a contestable "grey" area in between.[34] In his article, the Hon George Brandis QC, former Australian Attorney-General, notes how the United Kingdom is now adopting Australian law reforms on this topic.

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[31] Chief Coroner's Report, *Inquests Arising from the Deaths in the Westminster Terror Attack of 22 March 2017* <https://www.judiciary.uk/wp-content/uploads/2018/12/Westminster-Terror-Attack-2018-0304.pdf>.

[32] See, eg, Australian Government, *Director-General's Annual Threat Assessment* (2021) <https://www.asio.gov.au/publications/speeches-and-statements/director-generals-annual-threat-assessment-2021.html>.

[33] *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) amended Div 82 "Sabotage" and Div 91 "Espionage".

[34] The type of offence considered by the High Court in the challenge to the search warrant in *Zhang v Commissioner of Police* [2021] HCA 16 involves an offence – *reckless foreign interference* contrary to s 92.3 of the *Criminal Code 1995* (Cth) – that does not constitute espionage or sabotage under any traditional understanding of those terms.

Future Threats?

The final article in this edition is one of thoughtful prediction by former UK reviewer Lord Carlile QC. Events concerning counterterrorism, espionage and foreign interference, have had the capacity to surprise both the Australian and UK authorities from time to time, a notable example being the almost universal failure to predict the rise of ISIS. The nature of terrorism is at its most obvious when people are killed or severely injured. But the definition of a "terrorist act" extends beyond acts of harm causing death or serious injury, to the cyber realm and that is an area, together with biological attacks, which may well be the next frontier in this area of the law.

Oversight in a Democracy: Trust but Verify?

In Australia there have been many Royal Commissions and similar inquiries into the operation and powers of the security agencies, and these are reflected upon in the article by the Hon Michael Kirby AC. One of the recommendations arising from one of the Royal Commissions[35] was the establishment of the intelligence Ombudsman: the Inspector-General of Intelligence and Security (IGIS) and we have an article from the most recent IGIS, namely the Hon Margaret Stone AO. In *Reflections on Oversight of Intelligence Agencies* she writes:

> The tension between secret intelligence and civil rights and liberties is not reconcilable; inevitably, secrecy threatens rights, and rights weaken secrecy. Each is compromised. In broad terms, it is for government and the Parliament to decide what is an appropriate compromise between the secret collection of intelligence and the protection of civil rights and liberties and to embody that compromise in legislation. What is clear from Australia's present legislation is that the Parliament has agreed that the intelligence agencies should be accountable for the way in which they discharge their responsibilities and, except where secrecy demands otherwise, that accountability should be transparent.

Another oversight mechanism is the Independent National Security Legislation Monitor, whose role is based on the Independent Reviewer of Terrorism Legislation in the United Kingdom: each role is considered in an article by Assistant Professor Jessie Blackbourn.

While the role of the courts is vital, it is necessarily piecemeal, as in federal jurisdiction it depends upon the particular matter commenced. Apart from the constitutionally entrenched judicial review capacity conferred by s 75(v) of the *Constitution* to review the actions of officers of the Commonwealth (which certainly includes federal intelligence officers and police), challenges, both collateral and otherwise, often emerge in criminal prosecutions.

There is also the particular role in Parliament and in government of the Attorney-General who combines both political and legal functions as the first Law Officer and who, even after the creation of the Department of Home Affairs in Australia, uniquely retains the power to grant search warrants and other warrants under the *Australian Security Intelligence Organisation Act 1979* (Cth): search warrant powers are otherwise vested in current or former judges or tribunal members.[36]

The final type of accountability is provided by the increasingly important Parliamentary Joint Committee on Intelligence and Security (PJCIS) which now provides the principal forum for parliamentary consideration of new laws.[37] The increased workload and importance of the PJCIS is notable, as at June 2021 it had 14 inquiries on foot, many of great complexity. It remains to be seen whether its powers and functions will be significantly expanded, but it seems clear they need greater resources to perform their important work in a timely fashion.

[35] Royal Commission on Australia's Security and Intelligence Agencies (the "second Hope Royal Commission") 1984.

[36] See the detailed discussion in Trust But Verify: my 2020 INSLM report on *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* and related matters <https://www.inslm.gov.au/reviews-reports/telecommunications-and-other-legislation-amendment-act-2018-related-matters>.

[37] The INSLM considers the operation, necessity and proportionality of existing laws but not bills; the UK's Independent Reviewer sometimes comments on bills.

In conclusion, I predict that the nature and consequences of terrorist acts, and the increasing appreciation of the level of foreign interference and espionage affecting Australia, will continue to challenge all three branches of government in Australia to respond proportionately and in a manner protective of fundamental human rights, while being clear-eyed about the nature of threats. I therefore commend this special edition to a wide readership.

The Changing Legal Framework of the Australian Intelligence Community: From Hope to Richardson

The Hon Michael Kirby AC CMG*

Intelligence and security agencies in Australia have been reviewed by judicial inquiries, including two Royal Commissions conducted by Justice RM Hope (1974–1976) and (1983–1985), and later investigations by officials, culminating in the Comprehensive Review (2018–2019) by Mr DJ Richardson. Seeking a balance between civil liberties and suggested security needs, the article traces the two inquiry models. It outlines the dangers presented by the past targeting of communists, homosexuals and political adversaries; the comparative weaknesses of Australia's constitutional protections for individuals; and the need for regular reviews of such agencies given radical changes in social values, geopolitics, alliances and technology. Reconciling the demands of intelligence and security with democracy and basic rights is never easy and is now increasingly difficult.

Security and Intelligence: Humble Beginnings

In his mid-century book *Prosper the Commonwealth*,[1] Sir Robert Garran surveyed lawmaking in the first 57 years of federal government in Australia. He felt able to do so without any scrutiny of the issues of national intelligence and security. Two world wars came and went. The battles of Gallipoli, El Alamein and Korea were fought. The Fenians, anarchists, Nazis, fascists, communists and anti-imperialists all took their toll on the new nation. Although, Garran witnessed 22 parliaments and 32 federal Ministries, there was no mention in his book of spies or terrorism.

It was not until 9 March 1949, during the second Chifley government, that a Directive for the establishment of a national security service was issued. Yet even this move, did not rank a mention among the countless enterprises of nation building that Garran records. Insofar as there was any Australian arrangement concerning intelligence and security in its first 50 years, it was substantially found in executive government activities for Imperial co-operation with the United Kingdom and its officials. A loose and non-statutory initiative was ultimately established. As the Chifley Government was moving to its close, that initiative came to be known, in August 1949, as the Australian Security Intelligence Organisation (ASIO).[2]

Surprisingly, no reference was even made by Garran to the dramatic defection to Australia of the Soviet intelligence operatives, Vladimir Petrov and his wife Evdokia, in March 1954. Nor did he refer to the Royal Commission on Espionage, established as a consequence in April 1954 (Justices Owen, Philp and Ligertwood). This was so despite the fact that the impact on politics and law of those events was large and long lasting. Although the Royal Commission on Espionage found that the Soviet Embassy in Canberra had been used for the purposes of spying from 1943 to 1954, when its agents were expelled, it also found that the only locals who had collaborated were known communists or sympathisers. The Soviets made little or no headway in securing secret information, and still less in spreading disaffection among the general Australian population. The fear that they might occasion widespread disloyalty to the

* Justice of the High Court of Australia (1996–2009); President of the International Commission of Jurists (1995–1998); Co-Chair of the Human Rights Institute of the International Bar Association (2018–2021).

[1] RR Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958).

[2] David Horner, *The Spy Catchers: An Official History of ASIO 1949-1963* (QBD, 2015); John Blaxland and Rhys Crowley, *The Secret Cold War: An Official History of ASIO 1975-1989* (QBD, 2015).

Crown, the Commonwealth or the people of Australia was found to be unproved.[3] Nevertheless, that fear was skilfully played for a decisive political advantage by Prime Minister Robert Menzies.

The serious split in the Australian Labor Party (ALP) that followed the publication of the report of the Royal Commission on Espionage, and the way in which the ALP leader, Dr HV Evatt, responded to it, occasioned bitterness and suspicion among ALP politicians and supporters concerning allegations of spying and sedition. Although ASIO had been founded by Chifley, some ALP members were affronted by what they saw as the anti-ALP bias on security issues that ASIO had generally appeared to evidence.

In December 1972, the first ALP Government in 23 years was returned to office. Soon after, in March 1973, the Attorney-General of the Whitlam Government, Senator Lionel Murphy, led unheralded "raids" on ASIO offices in Melbourne and Canberra. The Attorney-General was accompanied on his visit by media and attracted much public attention. The raids were justified as an assertion of the Attorney-General's ministerial right to ensure effective accountability on the part of ASIO to the Federal Parliament and the elected Australian government. ASIO's response to the raid allegedly involved the "leakage" of documents by the organisation, designed to contradict the Prime Minister's account of what had happened. This, in turn, produced a determination on the part of Whitlam and Murphy that ASIO and the intelligence community should be rendered more accountable to democratic controls in Australia. They should be subjected to new legal requirements and removed from what had come to appear to them as effective political untouchability and unquestionability.[4] A proposal during the first term of the Whitlam Government to establish a judicial inquiry into ASIO matured into a promise to establish a Royal Commission if the ALP were returned to office in the June 1974 federal election. When this happened, Justice Robert Hope AC CMG, a senior Judge of the New South Wales Court of Appeal, was appointed to conduct an inquiry into national intelligence and security in Australia. This was the First Hope Royal Commission.

Justice Hope's specific task was to make recommendations on the intelligence and security services that the Australian nation "should have available to it and on the way in which the relevant organisations can most efficiently and effectively serve the interest of the Australian people and Government". He later declared that the files and records of ASIO, as he found them in his inquiry, were "in such disorder" that he considered it necessary to concentrate on issues concerning future reform rather than sorting out the many alleged wrongs of the past. Justice Hope concluded that Australia's intelligence agencies, as already part of the five nation (Five Eyes) arrangement with the United States, United Kingdom, Canada and New Zealand were "too close to those in the UK and US".[5] The longer Justice Hope was involved in the scrutiny of the intelligence community, the more doubtful he became about the extent of their co-operation with his inquiries. He also became more committed to recommending institutional means to ensure that an ongoing process of reform would be put in place that was compatible with the liberal democratic polity provided for in the *Australian Constitution*.

The Hope Approach and Principles

The First Hope Royal Commission resulted in eight separate reports, five of which were tabled in the Federal Parliament in 1977. These reports helped to outline the future structure of the Australian security and intelligence services; the ambit of intelligence gathering that should be legally permitted; and the machinery for ministerial control, direction and co-ordination of the agencies comprising the intelligence community. The Commission resulted in the enactment of the *Australian Security Intelligence Organisation Act 1979* (Cth); the enactment of the *Office of National Assessments Act 1977* (Cth); and the establishment of the Office of National Assessments (ONA). The ONA was a new intelligence agency, accountable to the Prime Minister, created to provide independent assessments and analysis on political, strategic and economic developments and to coordinate foreign intelligence derived

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[3] National Archives of Australia, *The Royal Commission on Espionage, Report* (1955).

[4] CJ Coventry, *Origins of the Royal Commission* (MA Thesis, UNSW, 2018) 119.

[5] Coventry, n 4, 119. See generally Peter Edwards, *Law, Politics and Intelligence: A Life of R.M. Hope* (New South Publishing, 2020) 147–171.

from members of the Australian intelligence community. Such intelligence included that derived from relationships with foreign intelligence agencies. In time, the ONA achieved a leadership role in the Australian intelligence community, through its work of co-ordination and evaluation of multiple sources of intelligence information gathered by other agencies. Simply collecting more data, without analysis and assessment, was not the way to go.

In May 1983, a further Royal Commission on Intelligence and Security (the Second Hope Royal Commission) was established by the new ALP Government led by Prime Minister RJ Hawke. Once again Justice Hope was appointed to conduct it. Its task was to survey the progress made in implementing the earlier Commission's recommendations; to report on the development of additional policies, priorities and co-ordination; and to assess the success in achieving effective ministerial and other accountability, financial oversight and the proper handling of complaints where these were made. As with the First Hope Royal Commission, important parts of the second report were not made public when the Commission completed its work. Even when, later, additional material was published, much of it was unintelligible because of extensive redactions.

In 1995, a further judicial Commission of Inquiry was established by the Keating Government under Justice Hope's erstwhile judicial colleague, Justice Gordon Samuels AC CVO, former Judge of the New South Wales Court of Appeal. Justice Samuels was joined in his inquiry by the retired Secretary of the Prime Minister's Department, Mr Mike Codd AC. Reflecting the ongoing concern to secure effective accountability to civilian government, the Samuels and Codd Inquiry was charged with investigating intelligence held by the Australian Secret Intelligence Service (ASIS), allegedly on tens of thousands of Australian citizens. This Inquiry's findings concluded that, while files of that description existed, the suggested quantity did not. However, the Minister acknowledged that some files did exist on Australian citizens although the brief of ASIS had been limited to foreign targets outside, rather than inside, the Australian Commonwealth. The Commissioners affirmed the existence of legitimate concerns about the effectiveness of grievance procedures that had been put in place. They found that these tended to "elevate conformity to undue heights and to regard the exercise of authority rather than consultation as the managerial norm". They recommended the assessment of staff grievances by access to an independent tribunal and the provision of a statutory basis for ASIS. These reports were not made public.[6]

At this stage, in March 1996, the Howard Government assumed office replacing the ALP administration. The security and intelligence scenes were soon altered by the attacks of the Al Qaeda Islamic organisation on targets in the United States and other friendly states, on "nine eleven" 11 September 2001.

ASIS had originally been created by an Executive Order in 1952, within the Department of Foreign Affairs. However, responding to further inquiries, the *Intelligences Services Act 2001* (Cth) was enacted. It converted ASIS to a statutory body, headed by a further Director-General. The legislation enumerated the functions of ASIS and the constraints imposed on fulfilling those functions. In particular, the use of weapons, except in self-defence and the conduct of violent or paramilitary operations by ASIS officers were curtailed. In order to enhance accountability, provision was made for the establishment of a parliamentary committee to provide oversight of the burgeoning agencies within the "national intelligence community" (NIC).[7]

The conduct of inquiries, some of them mentioned above, into the evolving network of the NIC continued in conjunction with the passage of further federal legislation that substantially enhanced the responses of the Commonwealth to international terrorism, foreign espionage and the exercise of influence upon Australian citizens and institutions by foreign agents for purposes unconnected with, or hostile to, Australia's national interests.

[6] Coventry, n 4, 167, 168.

[7] Australia, *Office of National Assessments, R.M. Hope and Australian Public Policy*, Archived from original, National Archives of Australia, 26 January 2014.

In 2004, a new inquiry into the Australian intelligence agencies, was conducted by a senior Australian diplomat, Mr Philip Flood AO.[8] It focused on the co-ordination and evaluation of Australia's foreign intelligence activities and the assessment of international developments of "national importance" to Australia. it recommended a substantial increase to the ONA's budget, which was doubled as a consequence. However, this inquiry was essentially an internal one. Its chair was an insider so far as intelligence agencies were concerned. Between 1995 and 1996 Mr Flood had served as the Director-General of ONA.

In 2017, another inquiry, described as the Independent Intelligence Review (IIR), was established. Despite its description, it involved a further shift away from the earlier practice of appointing independently-minded judges to conduct such inquiries. Instead, senior bureaucrats were appointed, also with earlier close engagements with Australia's intelligence and security apparatus.

The 2017 investigation was undertaken by Mr Michael L'Estrange AO and Mr Stephen Merchant, PSM.[9] The former was a long-time senior officer in the Australian Department of Prime Minister and Cabinet and later Secretary of the Department of Foreign Affairs (2005–2009), the latter a Deputy Secretary in the Department of Defence. He had also served as head of the National Security College (2009–14). The IIR inquiry found that numerous amendments to the legislative framework over a number of years had resulted in imposing an "*ad hoc* character" upon the federal statutes. The result had been the grant of substantial new powers and the adoption of different thresholds for the issue of warrants under legislation permitting ever more intrusive functions. These and other features of the legislation resulted in the potential for the enactments to create uncertainty because of the very rapid expansion of institutions and the adoption of differing tests and criteria for intrusive action.

The L'Estrange and Merchant inquiry resulted in the enactment of the *Office of National Intelligence Act 2018* (Cth). This envisaged yet another agency within the NIC: the Office of National Intelligence (ONI). In keeping with the arrangements in force in each of the "Five Eyes" countries, ONI was to become the single national point of contact and co-ordination for Australia's national intelligence arrangements with friends abroad.[10]

In 2017 the Turnbull Government announced its intention to establish the ONI. Additionally, at first under administrative arrangements, the Government established a Ministry of Home Affairs portfolio to bring security, intelligence, law enforcement, counter-terrorism, counter foreign interference, border security, transport and critical infrastructure security and cybersecurity capabilities under a single federal Minister serving in Cabinet. In 2018 the *Home Affairs and Integrity Legislation Amendment Act 2018* (Cth) gave statutory effect to the departmental move, and it created the powerful new portfolio of Home Affairs. The broad sweep of its responsibilities was explained by the need to create a "comprehensive, integrated source of advice" to the government on all of the perceived main threats to Australia's security.[11] The IGIS and the INSLM, while retaining their independence, were moved from the Prime Minister's portfolio to that of the Attorney-General.

On 30 May 2018 the Federal Attorney-General announced the commissioning of yet another review on the "legal framework of the national intelligence community". This implemented another recommendation contained in the 2017 IIR report that a comprehensive review of the Acts governing Australia's intelligence community be undertaken to ensure that all agencies would operate under a legislative framework that was clear, coherent and contained protections for Australians. From the context it is clear that the "protection for Australians" referred to was protection from the alleged acts of intelligence, security terrorists and other wrongdoers not protection, as such, from excessive burdens on their liberties. To undertake this further "comprehensive review", Mr Dennis Richardson AC was appointed as Reviewer.

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[8] PJ Flood, Inquiry into Australian Intelligence Agencies, *Report* described in Australia, *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community* (2020) Vol 1, 149 [6.194]–[6.195].

[9] Australia, Comprehensive Review of the Legal Framework of the National Intelligence Community (AGPS, 2019) Vol 1, 150 [6.197]–[6.198] (*Richardson Report*).

[10] *Richardson Report*, n 9, Vol 1, 150 [6.197]–[6.201].

[11] *Richardson Report*, n 9, Vol 1, 151 [6.206].

His appointment constituted the ultimate departure from the earlier model involving the enlargement of senior State judges (Owen, Philp, Ligertwood, Hope, Samuels and Sheller). That model had also been partly followed in the appointment of senior independent barristers (Bret Walker AO SC; Hon RV Gyles AO QC; and Dr James Renwick CSC SC) as Independent National Legislation Monitor and a former Federal Court Judge (Hon Margaret Stone AO) as Inspector-General of Intelligence and Security. Mr Richardson, on the other hand, was the quintessential "insider". He was selected to perform the comprehensive review. The word "independent" was missing from the title of his investigation.

Mr Richardson had held numerous high offices in federal administration. These included as Director-General of ASIO (1996–2005); Australian Ambassador to the United States (2005–2009); Secretary of the Department of Foreign Affairs (2010–2012); and Secretary of the Department of Defence (2012–2017). His experience and knowledge were beyond reproach. His integrity was unquestioned. However, he would have been the first to acknowledge that his appointment lacked the feature of manifest independence earlier thought vital to such appointees in this area of activity. A similar feature had been evident in the election of the previous chair of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) (Hon Andrew Hastie MP). He was a former captain in the Australian Special Air Service Regiment. He was assigned to Afghanistan (2009–2010)); a participant in Australian Special Operations (2013); and engaged in the Middle East (2014–2015). By such appointments, emphasis was placed on the office-holder's prior knowledge and experience in a specialised field of activity. However, manifest neutrality of the subjects of investigation may be affected by the appearance (and possibly the reality) of special empathy with the Australian intelligence community, simply by virtue of earlier intense professional engagements. Yet, do such appearances matter in the selection of personnel to oversee the institutions, legislation and activities of reviews of Australia's laws and practices concerning intelligence and security?

It can be inferred that those who have lately selected close "insiders" were not concerned about the supposed advantages of investigations by "outsiders". If they considered such advantages at all, they may have considered it a mistake to try to import into the supervision of intelligence and security, whether in Parliament or in the executive government, the stricter standards that are expected in Australia where decision-making is performed in the judicial branch of government?[12] Where the conduct concerned is undertaken by elected legislators or submitted for ultimate decision by elected members of the executive government, is it sufficient to rely on the effectiveness of electoral sanctions? Electoral defeat can be invoked if the community is dissatisfied by either the methodology, the conclusions of elected officials, or the checks and balances put in place to ensure respect for basic human rights and fundamental freedoms.

Hope and the Value of Outsiders

Justice Hope expressed his own views on this issue when he explained the approach that the Royal Commissions he chaired had adopted and the justifications he saw for his approach. The opening chapter of the fourth report of the Second Hope Royal Commission, *General Report*, described the way in which, before his inquiry in 1974, the NIC had operated. To a large extent, it had operated outside the law and outside much knowledge on the part of the democratic branches of government:[13]

> After World War II Australia's intelligence and security agencies carried on their activities for many years in considerable secrecy. They were accountable, directly or indirectly, to Ministers, who were, in turn, accountable to the Parliament, but any public knowledge of what they did and indeed, in some cases, of their existence, was very limited. Although at times incidents like the defection of the Petrovs and the subsequent Royal Commission lifted the curtain to some extent, for the most part they and their activities remained substantially hidden, with the Government relying on what it was told for most of its knowledge about them.

It was this state of affairs, largely beyond any real operation of the rule of law, that the Hope Royal Commissions were determined to correct. Moreover, in order to achieve such correction, the politicians who created the two Commissions obviously thought it would be beneficial (possibly essential) to appoint outsiders to conduct the investigations and to provide the recommendations.

[12] See, eg, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Johnson v Johnson* (2000) 201 CLR 488.

[13] Australia, Royal Commission on Australia's Security and Intelligence Agencies, *General Report* (December 1974) 2 [1.1].

In approaching his tasks, Justice Hope specifically referred to the particular features of his own appointment that he saw as involved in his selection to be the royal commissioner. These were considered especially useful to two special sub-inquiries that were involved in the fourth report of the Second Hope Royal Commission. One of these concerned the "Ivanov/Combe affair".[14] The other related to an incident at the Sheraton Hotel in Melbourne involving disproportionate activities by officers of the security agencies.[15] While these two matters involved specialised investigations, they had a consequential value that Justice Hope, as the royal commissioner, explained:[16]

> Those inquiries were valuable for the purposes of the wider inquiry [by] throwing light on aspects of the activities of ASIO and ASIS.

Like any experienced judge, Justice Hope was inclined to value an ounce of clear evidence over many pounds of opinion, assertion and generalities. He was also conscious of an advantage which many years in the performance of judicial duties had afforded to him, involving rigorous independence from other public actors; knowledge about the general operations of the law; awareness of the overall protections of individual freedoms; and familiarity with the rules obliging proportionality in the intrusions of public officials into the lives of citizens:[17]

> [A]n inquiry of this kind makes considerable demands on time and effort upon the agencies subject to it. … [A]n inquiry such as this can have an unsettling effect upon an agency. … At the same time, it has become apparent to me that, regardless of the outcome of my inquiry, the process of the inquiry itself has had positive effects. The very fact of questioning *by an outsider* can stimulate an organisation to think again about its functions and the way it is carrying them out. I have seen in each of the agencies internal reviews or changes initiated as a result, in part at least, of matters to which I have drawn attention.

This approbation of externality and bringing the light of outsiders to the scrutiny of the performance of intelligence and security operations, runs through the Hope reports. It is also reflected in his recommendations. For example, to an experienced judge like himself, the notion that an agency with large powers and responsibilities to the democratic government of the Commonwealth could operate almost entirely beyond the effective reach of the law and real accountability to elected ministers, was shocking. Thus, in describing the changes that he saw in ASIO when he returned to his functions of royal commissioner in 1984, Justice Hope wrote:[18]

> Perhaps the greatest changes that I have found in ASIO is the degree of concern for compliance with the requirements of the law and of propriety. It is not to be inferred from this statement that in 1974 ASIO disregarded law and propriety. The environment in which the Organisation operated was then significantly different from the environment today. In 1974 it had little legislation, governmental guidance or direction as to what it should or should not do. A lot of what it did was based on implied powers, or on the vague support of the prerogative. Ministers generally distanced themselves from its activities, although at times Ministers had misused it or expected too much from it.

This was the context in which, in the reports of the Second Royal Commission, Justice Hope emphasised the importance of externality and the advantage of bringing an *outsider's* perceptions to the task of scrutiny. Thus, in 1984, he recommended the establishment of the office of Inspector-General of Intelligence and Security.[19] He explained the importance of that office by reference to the same values of externality, independence and fresh insights:[20]

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[14] Concerning the activities of a Soviet intelligence operative Valery Ivanov and David Combe, a lobbyist, who was a past National Secretary of the ALP having previous close associations with the Government Party then in office. The Hope Inquiry found that Mr Combe had been targeted; but that there was no threat to national security. See Edwards, n 5, 264–277.

[15] Concerning an event at the Sheraton Hotel, Melbourne, in February 1984, after the establishment of the second Hope Royal Commission in May 1983 but referred to the Commission as permitted by the Prime Minister's authority. See Edwards, n 5, 278–281; *A v Hayden* (1984) 156 CLR 532.

[16] RCASIA, *General Report*, 2 [1.4].

[17] RCASIA, n 16, 3 [1.10] (emphasis added).

[18] RCASIA, n 16, 7 [7.3].

[19] RCASIA, n 16, 25 [3.26].

[20] RCASIA, n 16, 25 [3.19] (emphasis added).

> I recommend the establishment of the office of Inspector-General with power to enquire into and report upon ASIO's compliance with the law and with propriety, and the appropriateness and effectiveness of its internal procedures. This recommendation is not intended to divert or to intrude upon the responsibility of the Attorney-General or the Director-General of Security but to provide an *independent oversight* of ASIO's activities, to give the public a *greater assurance* that those activities are proper ones, and to clear ASIO, or to bring it to task, as the case may be, if allegations of improper conduct are made against it.

It was this faith in the value of effective external scrutiny of activities of the NIC that reinforced Justice Hope's conclusion not to recommend creation of a PJCIS. When the time came to implement the second Hope report, the Hawke ALP Government differed from Justice Hope's conclusion in this respect. It favoured the creation of a parliamentary joint committee. By inference, Justice Hope had concluded that such a parliamentary committee would be dazzled by the asserted dangers and too willing to surrender increasing powers to the security officials, occasionally sharing their redacted secrets with members of the Parliament. Alternatively, it might politicise issues of security; result in leakage of confidential material; or have a chilling effect on accountability. He concluded that, relevantly, a parliamentary committee would not be sufficiently an outsider for the purpose of monitoring the Australian intelligence community's powers and responsibilities.

The Hawke Government had a larger confidence in the capacity and willingness of elected Australian legislators and their scepticism and willingness to call the intelligence community to account. Hence, the Parliamentary Joint Committee on Security was established (under successive names), comprised of elected representatives of different political parties. Sometimes the Hawke Government's optimism in this committee has been vindicated. However, the capacity and willingness of the Parliamentary Joint Committee to question, and sometimes to reject, proposals for enlarged powers can be cited to support both opinions. The vast amount of security legislation, and the ever-expanding ambit of its subject matter and of administrative claims for more powers and resources have arguably revived concern that greater protection for basic civil rights may be afforded by independent-minded guardians who are outsiders than by politically accountable insiders. The latter may be prone to act cautiously in contesting, or doubting, "experts" warning of "dangers" whose appetite for ever larger powers, personnel and budgets appears unquenchable. Since the establishment of the Parliamentary Joint Committee, few proposals for enlarged legislation at the behest of the NIC have been modified. Still fewer, have been rejected.[21]

Of the major security reforms recommended by the Parliamentary Joint Committee in 2018, apart from listing the approval given for several enactments that had significantly increased the powers of intrusion by the NIC, the Committee acknowledged only one accepted recommendation for protecting competing values, namely journalists' confidentiality. Yet that was a topic strongly supported by the already vocal voice of media owners and journalists. Absent such support, the alternative voice of civil liberty, if it is heard at all, is seemingly less persuasive to the PJCIS than the voice of the NIC.[22]

Justice Hope's rejection of the proposal for a parliamentary committee was therefore based not so much on a hostility towards parliamentary scrutiny as on a scepticism. This was seemingly derived from Hope's judicial, and post judicial, acquaintance over many years, with the disappointing features in the lawmaking performance of parliamentary committees. In this respect, his belief seems to have been that a parliamentary committee would manifest relatively little scepticism and exercise scant real scrutiny so far as upholding proportionality in civic protections and the proper limits on enlarged powers for the NIC officials. The resulting danger would be the creation of a *semblance* of democratic supervision but a *reality* of political untouchability that had been Attorney-General Lionel Murphy's concern when carrying out his raids on ASIO in 1973. Justice Hope obviously considered it more likely that independent judges would be more effective in monitoring, questioning and holding the intelligence community to

[21] Edwards, n 5, 290–295; see Greg Carne, "Reviewing the Reviewer: The Role of the Parliamentary Joint Committee on Intelligence and Security – Constructing or Constricting Terrorism Law Review" (2019) 43 *Monash University Law Review* 470. Sarah Moulds, "Who's Watching the 'Eyes'? Parliamentary Scrutiny of National Identity Matching Laws" (2020) 45 *Alternative Law Journal* 266, 269.

[22] See Australia, Parliamentary Joint Committee on Intelligence and Security 2018, *Wikipedia* entry inferentially prepared with the participation of the Committee, <https://en.wikipedia.org/wiki/Parliamentary_Joint_Committee_on_Intelligence_and_Security>. Compare G Brown and O Caisley, "Labor to Oppose Terror Law Extension", *The Australian,* 30 July 2019, 6.

account. The tenure of the judges in office; their acquaintance with judicial review of ministers and other high officials; and their familiarity with, and sympathy for, traditional civil rights was much more likely to afford protections from the overreach of a secretive bureaucracy than the chimera of a parliamentary committee constituted by ambitious political officeholders.

JUSTIFIABILITY OF EFFECTIVE SCRUTINY

Although Justice Hope's views in this regard were overruled by the Hawke Government and the Parliamentary Joint Committee on ASIO was established in 1988 (later succeeded by the present parliamentary joint committee) a number of additional considerations arguably lend weight to superimposing more vigilant and effective scrutiny and control over the ever increasing enlargement of the Australian intelligence community; the enhancement of the powers of its agencies; and the pressure to reduce effective limitations on the deployment of such powers. Stated in summary form, the considerations suggesting the need for heightened vigilance and greater effective controls on the NIC include the following:

- *Constitutional context*: Although Australia has democratic political traditions, the protective presumptions of the common law that sometimes uphold basic civil and human rights and certain statutory protections, its constitutional arrangements, federal and State, are weaker in the provision of enforceable civil rights than those of other similar countries.[23] Thus, citizens in Australia have fewer and less effective constitutional protections than can be deployed against security and like agencies than any of the other "Five Eye" nations with which we often compare ourselves. By majority, the decision of the High Court of Australia in *Australian Communist Party v Commonwealth*,[24] invalidated the *Communist Party Dissolution Act 1950* (Cth). In doing so the Court deployed strong interpretive reasoning based in part on constitutional inferences rather than any express textual protections that could be called in aid. Recent decisions of the High Court of Australia have expanded the local applicability and deployment, in the civilian context, of the constitutional defence power.[25] They have displayed a far greater willingness to broaden the concepts of "constitutional facts" and of "judicial notice" than was tolerated by the High Court in the *Communist Party Case*. In 1950, the Menzies Government's assertion that the nation was on a "semi-war footing" in its struggle against communism cut no ice with the High Court specifically Dixon J. In *Thomas v Mowbray*,[26] by way of contrast, the ambit of federal power over persons declared "terrorists" was enlarged by a majority judicial decision. Additional evidence of a retreat from an approach of strictness to Executive Government claims for self-defined "emergency" powers became clear in the later decision of *Pape v Commissioner of Taxation*.[27] Hayne and Kiefel JJ, invoking language reminiscent of that of Dixon J in the *Communist Party Case*, cautioned against governmental action whose validity rested on "notions as protean and imprecise as 'crisis' and 'emergency' [which would render the] executive's powers in such matters… self-defining". Concerns of this kind become all the more troubling because, unlike the other "Five Eye" countries, Australia lacks a constitutional charter of rights or even a national statute of basic rights providing enforceable civil rights that can be invoked to counterbalance official powers in security or anti-terrorism legislation criticised as disproportionate or unjustifiable by reference to fundamental legal rights.

[23] *Fardon v A-G (Qld)* (2004) 223 CLR 575; *Al-Kateb v Godwin* (2004) 219 CLR 562 and see, eg, the recent decision of the High Court of Australia in *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166, 190 [74]–[75] (Gageler J (diss)), 195 [103] (Gordon J (diss)); S Zifcak, "Australia's Human Rights Failings Seriously Exposed", Pearls and Irritations, John Menadue (29 March 2021) <https://johnmenadue.com/australias-human-rights-failings-seriously-exposed/>.

[24] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J). See Paul Latimer, "Unexplained Wealth Orders in Australia: Limits to Transparency and Responsibility for Other People's Wealth" (2021) 95 ALJ 31, 43.

[25] *Australian Constitution* s 51(vi).

[26] *Thomas v Mowbray* (2007) 233 CLR 307, 486–487 [530]–[533], 502–506, [582]–[589].

[27] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

- *Red and Lavender "scares":* A further consideration suggesting a particular need in Australia for more effective checks and balances against activities of the NIC may be found in the history of the targets selected by the NIC in the past for surveillance, data gathering and national intelligence strategies. At least four targets of ASIO in earlier generations would now probably be regarded as unjustified or even perhaps intolerable. I refer to the targeting of "reds" (communists international socialists and fellow travellers);[28] "lavender boys", being homosexuals and other suspect sexual minorities;[29] opponents of the wars in Vietnam, Afghan, Iraqi or Syria; and noisy student politicians and university "trouble-makers".[30] It was my misfortune when growing up in the 1950s–1970s to be associated with all of the foregoing categories.[31] The consequence is that (as I later discovered) I accumulated a small but intrusive ASIO file based on surveillance of my innocent and undeserving activities. The results of such surveillance are now available to Australians on application pursuant to legislation. The first entry in the present writer's ASIO file disclosed his presence, aged 12, at the Taronga Park Zoo in Sydney in company with his grandmother's second husband, Jack Simpson. He had been an original ANZAC but, at the time, he was the national treasurer of the Australian Communist Party. Other surveillance arose out of later activities in student politics which also involved many later national leaders. Citizen surveillance is only justified in very limited circumstances. The discovery of the breadth of earlier NIC surveillance and its unjustifiability demonstrates the need for effective controls lest the enthusiasm for collection outweighs the legitimacy of officials' monitoring citizens and the dangers that can arise in consequence.
- *Asking fundamental questions:* While the democratic features of the *Australian Constitution* suggest the need to constantly submit public policy (particularly matters of life and death) to democratic accountability, there are inherent difficulties in doing so when it comes to intelligence, security and terrorism. From the outset of colonial government it was assumed that Australia's security would ultimately be protected by its legal and political relationship with the United Kingdom. This assumption lasted, largely unquestioned, until the fall of Singapore in 1941. The existential crisis of the Pacific War led to the switch of many such engagements to the United States. The Korean War was fought under the flag of the United Nations; but in practical terms it was under the command of the United States. For decades, through the military operations in Vietnam, Afghanistan, Iraq and Syria, it has generally been assumed that Australia's security interests coincided with those of the United States. Yet this assumption has lately been questioned in fundamental ways. Prime Minister Julia Gillard commissioned a federal white paper from a committee chaired by Dr Ken Henry AC on *Australia in the Asian Century*.[32] This document suggests that Australia's national and security interests may become a much more open question than they had been in earlier decades. Essentially, the greater questioning of fundamentals derives from existential concerns about the expense and dangers of particular military weapons (especially nuclear); the questioning of military alliances; and the changing features of Australia's contemporary ethnic make-up. Although New Zealand is a member of the "Five Eyes" intelligence alliance and a party to its treaty for joint co-operation in signals intelligence, the revelation in recent times that "Five Eyes" personnel are conducting surveillance on one anothers' citizens and sharing the collected information with each other has led to fundamental questioning.[33] The difficulties of engaging with fundamental questions concerning a nation's long-term national interests, are obvious. Much relevant knowledge is in the possession of comparatively, indeed numerically, few people. Most such people are "insiders". By disposition,

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[28] Stuart Macintyre, *Reds: The Communist Party of Australia from Origins to Illegality* (Allen & Unwin, 1998) xii + 482.

[29] Peter Shinkle, *Ike's Mystery Man: The Secret Lives of Robert Cutler* (Steerforth, 2018) as reviewed by James Kirchick, "How a Gay White House Adviser Helped Purge Homosexuals from Government", *The Washington Post*, 20 January 2019, B7; Douglas M Charles, *Hoover's War on Gays: Exposing the FBI's "Sex Deviates" Program* (Kansas University, 2015).

[30] Meredith Burgman, *Radicals: Remembering the Sixties* (NewSouth Publishing, 2021); Meredith Burgmann, *Dirty Secrets – Our ASIO Files* (NewSouth Publishing, 2014) 49.

[31] See, eg, actions of President Nixon described in Charles, n 29, 299–301.

[32] KR Henry (Chair), "Australia in the Asian Century" (White Paper, Australian Government, 2011, publicly released 2012).

[33] Peter Beaumont, "NSA Leaks. US and Britain Team up on Mass Surveillance", *The Guardian*, 31 December 2013.

training and experience many of them are unlikely to ask, or persist with, fundamental questions. A huge bureaucracy has grown rapidly in recent years to sustain the fundamentals of the inherited status quo. Imposing, or facilitating, attitudes that question fundamentals may not be common, at least in the Australian political context. From colonial times, Australia has faced a paradox presented by its imperial history and racial past that sit uneasily with its Asia-Pacific geography. New Zealand appears more prone to address its similar paradox as seen by comparing its decision to sign and ratify the *Nuclear Weapons Ban Treaty*. Although that treaty originated in initiatives of civil society in Australia, acknowledged by the award of the 2017 Nobel Prize for Peace, Australia has neither signed nor ratified that treaty, although it has now come into force.[34] Any rational system of accountability for laws, policies and practices on intelligence and security would arguably publicly address potential dangers for human as well as national survival.

It may be said that any such "fundamental questions" properly belong only to the elected government, not to unelected officials or judges. In theory this may be correct. However, in practice, such an assertion may be unrealistic. The security context is constantly changing. The relevant technology is highly complex. Much of the relevant data essential to informed decision-making is unavailable to citizens. The elected personnel are lay people, commonly prone to defer to professionals on "operational" matters. The stakes are potentially very large. The experts have huge resources to back them up. They normally have strong support from most outlets in the Australian media.[35] It took a change of government after 23 uninterrupted years to produce the first Hope Royal Commission in 1974. After the controversial dismissal of that government and its aftermath the second Hope Royal Commission emerged. It took these circumstances to produce the reports of a confessed "outsider" with a determination to assert civilian control over the national intelligence community. It took all these circumstances to result in the appointment of Robert Hope. He was not only a greatly talented lawyer and senior judge. Many did not know or care that he was also a past President of the Council for Civil Liberties, alert to the needs and opportunities for real legal and institutional change.

The Richardson Report

The terms of reference for the *Comprehensive Review of the Legal Framework of The National Intelligence Community* in Australia were released in June 2018. The secretariat for the review was provided by the Federal Attorney-General's Department. The review submitted a "classified" report on 19 December 2019. It provided a "declassified" version on 1 July 2020.

The declassified version was then released by the Attorney-General (Hon Christian Porter MP) on 4 December 2020. The declassified report comprised approximately 1,300 pages and four volumes. It contained 203 recommendations, of which 13 remain classified. As the review itself acknowledged the report was, a "long" one, seeking to answer detailed terms of reference. The government had allocated $18 million and a full-time secretariate of over 20 persons to work on the task for 18 months. Mr Richardson, was almost certainly not the person whom the L'Estrange and Merchant report envisaged to conduct the review when it recommended it. Their suggestion that a "suitably qualified person" be chosen they probably had in mind, as Professor Peter Edwards has remarked:[36]

> [S]omeone like Justice Robert Marsden Hope … whose two royal commissions … laid the foundation of legislation, structures, oversight arrangements and operational doctrines of the intelligence community for the next 40 years.

At the outset of his report, Mr Richardson acknowledges:[37]

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[34] *Treaty on the Prohibition of Nuclear Weapons*, UN Treaty Collection, effective 27 January 2021. See (2021) 95 ALJ 10–11. Compare JA Camilleri, M Hamel-Green and F Yoshida, *The 2017 Nuclear Ban Treaty: A New Path to Nuclear Disarmament* (Routledge, 2019) 254.

[35] When New Zealand declined to sign on to the "Five Eyes" criticisms of China in 2020–2021 it was criticised heavily in News Ltd publications: see editorial: "Crucial Five Eyes alliance must not become 4½ eyes", *The Australian*, 22 April 2021, 10.

[36] P Edwards, "Richardson Intelligence Review: Much More Than an 'Inside Job'", *The Strategist*, 2020, xi.

[37] *Richardson Report*, n 9, Vol 1, 2 [1.2].

> Very few readers of this report will have a need (or inclination!) to read the whole four volumes. But in addition to exploring and analysing the precise nature of proposed reforms in one of the most complex areas of legislation, the report provides a template for the reform process.
>
> The report acknowledges assistance from the National Intelligence Community (NIC) as well as local authorities and eminent persons and legislative frameworks in "comparable democracies" stated to be "each of the Five Eyes, as well as France and the Netherlands".[38]

The present author was one of the small number of persons invited by the Review to make submissions.[39] Properly, a number of concerning features of the laws adopted in recent times were identified by the Review:[40]

> The legislative framework within which agencies operate is complex. In a great many cases, the complexity is the result of the inherent tension in a liberal democracy between protecting and promoting the rights of the individual and broader, collective interests – in particular, national security and public safety.
>
> However, there are some areas in which the legislative framework is unnecessarily complex, leading to unclear and confusing laws for those NIC officers who must interpret and act in accordance with them. The sheer volume of the laws agencies must deal with on a daily basis can add to its complexity. The original number of pages in the Acts named in our terms of reference was 729; today it is 2,310. As a single example, the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act) comprised 19 pages when originally enacted; it now numbers 411.
>
> The majority of the growth in the legislative framework has taken place following the terrorist attacks of 11 September 2001. Between that date and 1 August 2019, the Parliament passed more than 124 Acts amending the legislative framework for the NIC, making more than 14,500 individual amendments, ie inclusive of the minor and technical … complex laws … undermine public trust and confidence. It should be clear to the Australian public what intrusive powers are available to NIC agencies, the circumstances in which they may be used and the limits, controls, safeguards and accountability mechanisms that arise.

The list of 203 recommendations made by the Review covers 24 pages. Of the 203, a comparatively small number, 13, are classified and not reproduced. It is beyond the purpose and scope of this article to identify and analyse the published recommendations.

An important recurring feature of the recommendations is the response to technological changes. These include changes in the technology of communications interception; in the internet; in cyber espionage; and in the potential for artificial intelligence and bulk data analytic techniques to be used in conducting intelligence activities.[41] The result of the technological changes and the need to harmonise and simplify present legislation is predicted to require 2–3 years.[42] Also time consuming will be the development of responses to "cyber-attacks launched for foreign state-sponsored actors" that constitute a new threat to Australia's national security.[43] Even passing familiarity with the impact and dangers of the alleged cyber-attacks on the 2016 and 2020 United States Presidential Elections will indicate the potential of this new technology to present serious challenges to the constitutional assumptions of the Australian nation.

While artificial intelligence for intelligence purposes may potentially require legislation in the future, no comparable western country has yet introduced statutory controls. The Review recommends, for the time being, that the requirement to "have human involvement in significant or adverse decisions made by automated capabilities for AI should be maintained".[44] These proposals are made with respect to the overall design of the Australian legislative framework; management and co-operation among the 10 NIC agencies; the provisions governing authorisations and immunities; the role of the Attorney-General as

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[38] *Richardson Report*, n 9, Vol 1, 21 [1.6].

[39] *Richardson Report*, n 9, Vol 1, 163 [7.43].

[40] *Richardson Report*, n 9, Vol 1, 33 [3.7]–[3.8].

[41] *Richardson Report*, n 9, Vol 1, 43–44 [3.62]–[3.64]. (See also J Renwick SC, *Trust But Verify, a Report by the 3rd INSLM on the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and Related Matters* (2020); Anderson QC, Independent Reviewer of Terrorism Legislation, *A Question of Trust: Report of the Investigatory Powers Review 2015* (2015)).

[42] *Richardson Report*, n 9, Vol 1, 45 [3.67].

[43] *Richardson Report*, n 9, Vol 1, 46 [3.76].

[44] *Richardson Report*, n 9, Vol 1, 50–51 [3.96]–[3.98].

the First Law Officer; the facility of emergency warrants; the deposit of, and access to, archival material; and the protection of identities and other national security information.[45]

The completion of the Review in a tight timetable and the completion of the government's consideration of the recommendations is extraordinary. This is especially so if the funds devoted to the tasks, the official time and staff assigned to the project and the swift presentation of the documents are contrasted with normal standards of law reform projects in federal jurisdiction in recent years.[46] Issues of intelligence and security are important in a democratic society, sometimes extremely urgent and occasionally affecting the lives and wellbeing of many individuals. On the other hand, general law reform in Australia has fallen into serious neglect and under-investment in recent years. Retaining an audited and constantly updated procedure for systematic reform of the law is also vitally important to a rule of law society. Devoting huge funds and enormous financial resources to intelligence, security and anti-terrorism, while allowing general law reform to languish, is dangerous for the future of the rule of law in a democratic society. Some of the efficiency funding, personnel and priority evident in the conduct and follow-up to the *Richardson Report* need to be deployed on issues of general law reform, also vital to the achievement of the objectives of the *Australian Constitution*.

CONCLUSIONS ON THE REVIEW

Mr Richardson went about his duty of review with the professionalism that such a senior "insider" could be expected to deploy. He reported with commendable speed. The orchestrated consultations included federal, State and Territory governments; all of the agencies in the NIC; and overseas interests, especially in the Five Eyes. Substantially, this was an inquiry in which the main actors had a shopping list they had been accumulating for years. In Dennis Richardson, they had secured what must have seemed a perfect *alumnus* to deliver a sympathetic report with as few obstacles as possible to impede the once-in-forty-year opportunity that the government had provided.

The present writer came to know Mr Richardson when he was serving as Ambassador to the United States and afterwards when conducting an inquiry for the United Nations Human Rights Council relating to human rights in North Korea.[47] The ensuing discussions were useful, emphasising the inescapable interaction of security and human rights; themes reflected in the *Richardson Report*, although described as involving the clash of efficiency and "values".[48]

As a consummate professional, Mr Richardson was careful to consult some members of relevant civil society organisations who might be expected to be sceptical both of him and of his review.[49] He held private consultations with Professor George Williams AO and Dr Kieran Hardy and with Honourable Margaret Stone AO (IGIS), Mr Bret Walker SC AO (former INSLM) and this writer. After these consultations, Walker SC and the writer supplemented earlier submissions with a suggested shopping list of our own, relevant to the proposed report. The disclosed consultations were relatively narrow and selective, although the review did publish advertisements calling for submissions from civil society organisations, academics, jurists, officials and the public. Workshops were held. However, a list of the attendees suggests that, other than the named consultants, the Law Council of Australia and the Human Rights Law Centre, virtually all of the bodies engaged with were official and governmental. The voice of civil liberties was muted.

Nevertheless, in a number of places it is clear that the Review was affected by the "non-official" consultants. Commentary on the declassified report, when released, has been very limited. Professor

[45] Attorney-General's Report, *Commonwealth Government Response to the Comprehensive Review of the Legal Framework of the National Intelligence Community* (December 2020) 52pp.

[46] See, eg, MD Kirby, "The Decline and Fall of Australia's Law Reform Institutions – And the Prospects of Revival" (2017) 91 ALJ 841.

[47] MD Kirby, "The United Nations Report on North Korea and the Security Council: Interface of Security and Human Rights" (2015) 89 ALJ 714.

[48] *Richardson Report*, n 9, Vol 1, 162 [7.37], "The Importance of Values, Principles and Propriety. See also Vol 1, 162 [7.42].

[49] In an Oversight and Transparency Workshop for the Richardson Review held on 1 April 2019.

Edwards describes this as remarkable, given the importance of the topics.[50] He ascribes that lack of submissions to, and comment upon the Review to the daunting "size, scope and technical complexity" of the subject matter. He points to the range of the Reviewer's experience beyond his service in ASIO and his specific attention, like Justice Hope, to the "culture" of the agencies. He refers to the acknowledged consultations with persons with reputations sympathetic to civil liberties.[51] However, it is asking a lot of that small group to counterbalance in their submissions the overwhelming and well-funded attention to the official voice.

Professor Edwards correctly draws attention to the tone of the *Richardson Report*. It frequently pays tribute to the "fundamental principles laid down by Hope" and finds them "still valid today". It is also "scathingly critical of attempts by the agencies to dismiss the legal constraints upon them as unnecessary, outdated or unreasonably burdensome". Edwards suggests that only a senior official who, with Sir Arthur Tange, held the top posts in the Departments of Foreign Affairs and Defence[52] would have felt able to reject so sharply the demands by agencies for relief from supervisory powers. One area in which this is evident relates to the distinction established by the Hope Royal Commission between surveillance of Australian citizens and of non-citizens. The suggestion that this had been a mistake by the Parliament or that it was an approach overtaken by modern technology gets short shrift from Dennis Richardson:[53]

In those instances where the Richardson review has not accepted recommendations of the intelligence community, Professor Edwards suggests that it is likely that the agencies will come back, at the time of the next review, for yet another attempt to remove obstacles, either in the review itself, or the decisions of a federal government even more biddable to change.

Taken as a whole, the security agencies enjoyed substantial success in the *Richardson Report* in the acceptance of their submissions. Occasional sharp language in rejecting a particular proposal;[54] and the extent that the *Richardson Report* has diminished the requirement of independent *judicial* warrants to permit surveillance (or has diminished such judicial control by permitting the substitution for judges of magistrates and administrative tribunal members)[55] these must be seen as retrograde steps. In the "Five Eye" countries it is not unusual, indeed it is common, to permit authorisation for exceptional surveillance and other action by security agencies to have the authority of judges or retired judges. This too was not something accidental in the recommendations of Justice Hope. It derived from his conviction that scrutiny of exceptional intervention by the State and its agents into the lives of individuals in a country like Australia should be submitted to the sharp scrutiny of those accustomed to such duties and not afraid to rebuff powerful and opinionated ministers and officials, namely: judicial officers and retired judicial officers.[56] Those who work in a bureaucratic hierarchy, unaccustomed to challenging powerful colleagues, may not always feel comfortable in discharging the authorisation power as a judge or former judge will do.

One point made by Professor Edwards should be endorsed. This is his proposal that the "next independent intelligence review be upgraded to a Royal Commission".[57] To this should be added, with no disrespect to

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[50] Edwards, n 36, 2.

[51] Such as B Walker, "The Information that Democracy Needs" (Whitlam Oration delivered at the Western Sydney University, 5 June 2018).

[52] Sir Arthur Tange was the only other person to have served as Secretary of both Departments.

[53] *Richardson Report*, n 9, Vol 1, 39 [3.35]–[3.36].

[54] See, eg, *Richardson Report*, n 9, Vol 1, 39 [3.34] and [3.35]–[3.38].

[55] Compare these contrary in Renwick, n 41, Chs 10 and 11.

[56] *Australian Security Intelligence Organisation Amendment Act* 2020 (Cth) noted (2021) 95 ALJ 87. See also ICJ Australia, *"Grave Concern" over Changes to Surveillance Act Denham Sadler Innovation Aus* <https://www.innovationaus.com/grave-condern-over-changes-to-surveillance-act/>. Compare John Menadue, "We Need a Standing Royal Commission to Supervise Our Intelligence Agencies", *Pearls and Irritations*, John Menadue (31 August 2020) <https://johnmenadue.com/we-need-a-standing-royal-commission-to-supervise-our-intelligence-agencies/?mc_cid=659b5c4c80&mc_eid=[f5b6278e6a]>. The author was Secretary of the Department of Prime Minister and Cabinet 1974–1976.

[57] Edwards, n 36, 2.

Dennis Richardson or the other high officials who have conducted security reviews in the past 25 years, that there is merit in appointing experienced, and independent-minded, judges and jurists to undertake such functions. Experience in this domain has demonstrated that judicial royal commissioners like Hope, Samuels and Sheller (and other senior lawyers and former judges conducting special security tasks) can be swift, efficient and practical in the delivery of their reports. Moreover, they can bring to bear in their recommendations a deep knowledge of the values, principles and propriety expected by the common law that afford the context, derived ultimately from the *Australian Constitution*, from which balance, proportionality and individual justice must be inferred for want of more express protections.[58]

Justice Robert Hope was correct in believing that the fact that he was an "outsider" made him specially suitable to perform the definitive work of the two Royal Commissions on intelligence and security that he conducted. This consideration has become more, and not less, important given the huge expansion of official powers of the NIC; the complexity and potential of new technology; and the abiding failure of the Australian legal system to deliver an effective and enforceable charter of fundamental rights, to which citizens and others might appeal to safeguard their rights against official intrusion.

The Richardson Comprehensive Review of the Legal Framework of the National Intelligence Community was less damaging to fundamental rights than might have been feared. Yet basic issues still need to be addressed. They are likely to be larger and more pressing the next time around.

[58] For reviews of some of the main recent Australian legislation on counter-terrorism, intelligence and security as well as of judicial and other responses, see Nicola McGarrity, "Reconciling Security and Human Rights: The Australian Experience" in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2021) Ch 16. For other useful reviews of recent Australian legislation, see also Kieran Hardy and George Williams, "Free Speech on Counterterrorism Law and Policy" in Ian Cram (ed), *Extremism, Free-Speech and Counter-Terrorism Law and Policy* (Routledge, 2019) 172–189; F Davis, N McGarrity and G Williams, *Surveillance, Counter-Terrorism and Comparative Constitutionalism* (Routledge, 2014); Joo-Cheong Tham and Keith Ewing, "Limitations of a Charter of Rights in the Age of Counter-Terrorism" (2007) 31 *Melbourne University Law Review* 462, 462–488; George Williams, "A Decade of Australian Anti-Terror Laws" (2011) 35 *Melbourne University Law Review* 1136.

Sentencing Terrorist Offenders – The General Principles

The Hon Mark Weinberg AO QC*

Sentencing is an exercise always fraught with difficulty. Fortunately, there is now a body of sentencing law, derived from both statute and common law, to which judges can turn in carrying out this task. There are well-established general principles which provide guidance while, at the same time, recognising the breadth of the discretion vested in judges in performing this function. The modern phenomenon of global terrorism has led to a number of cases, in this country, which have focused upon this process. This paper explores some of the recent developments in this area, noting the significant departures from ordinarily accepted principles that the sentencing of convicted terrorists now seems to entail.

It has been said that the law of sentencing "has developed to a state where it is probably as extensive, detailed and complex as that of the substantive law of crime".[1] Undoubtedly, sentencing an offender is one of the most difficult tasks that a judge must undertake.

There is a substantial body of legal doctrine concerning the general principles that govern sentencing right across the board. One such example is the requirement to assess the objective gravity of the offence. The maximum penalty available for the particular offence provides some, albeit limited, guidance in this regard. The process to be adopted is one of "instinctive synthesis",[2] whereby the judge identifies the factors relevant to sentence, discusses their significance, and makes a value judgment as to the appropriate disposition, having regard to all the facts of the case. Sentencing is not a purely logical exercise, and the difficult nature of the task arises in large measure from the need to give weight to each of the purposes of punishment.[3] Indeed, it has been said that sentencing is an art not a science, and therefore does not lend itself to any form of mathematical precision.[4] At the same time, sentencing should not be arbitrary or capricious. The aim should be to achieve consistency, (at least of approach) and if possible, general consistency of outcome.[5]

So it is that in broad terms, matters such as discounts for pleading guilty, and/or co-operation, the relevance of prior criminal history, the need for community protection, the requirement of proportionality and the principle of parsimony, deterrence (general and specific), prospects of rehabilitation, all feature to a greater or lesser extent in sentencing for all crimes.

The rise of global terrorism represents a new phenomenon which has, in recent years, resulted in a substantial increase in the number of individuals being sentenced for terrorism offences.[6]

The National Judicial College of Australia, which maintains a Commonwealth Sentencing Database, has recently included a new page entitled "Sentencing Terrorism Offenders".[7] It observes that terrorism

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* A judge of the Victorian Court of Appeal, between 2008 and 2021, and of the Federal Court of Australia, between 1998 and 2008.

[1] Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 2 (*Fox and Freiberg*).

[2] *Markarian v The Queen* (2005) 228 CLR 357, 378 [51] (McHugh J).

[3] *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ).

[4] *Fox and Freiberg*, n 1, 229. See further *Pearce v The Queen* (1998) 194 CLR 610, 624 [46] (McHugh, Hayne and Callinan JJ).

[5] *Trajkovski v The Queen* (2011) 32 VR 587, 588 [1] (Ashley JA agreeing), 605 [88] (Weinberg JA), 613 [143] (Hargrave AJA agreeing).

[6] It was said that the number of terrorism offenders sentenced had increased significantly since 2016. Notably, 2019 was the first time offenders had been sentenced in Australia for "engaging in a terrorist act", as distinct from what may be described as merely "preparatory" or "ancillary" offences.

[7] National Judicial College of Australia, "Sentencing Terrorism Offenders", *Commonwealth Sentencing Database* <https://csd.njca.com.au/principles-practice-categories-of-federal-offenders-sentencing-terrorism-offenders/>.

represents a growing threat in this country, and predicts that courts are likely, in the future, to see an increase in the number of terrorist offenders to be sentenced.

The threat of terrorism unquestionably requires particular attention to be paid to several of the traditional purposes of sentencing. In that context, sentencing courts are engaging with the general principles of sentencing in new and distinct ways.

INTRODUCTION

The events of 11 September 2001 are etched in the minds of most Australians. The attacks upon the twin towers in New York, and upon the Pentagon, were so horrific as to prompt an immediate rethink in this country of the dangers associated with global terrorism.

These attacks led to the enactment in Australia of a series of anti-terrorism laws the like of which had never previously been seen.[8] One difficulty, however, with drafting laws designed to deal specifically with a new, and unfamiliar, phenomenon is that this can bring about unintended consequences.

In the British tradition, the criminal law has usually been concerned to punish only those crimes that have already taken place. It had rarely sought to create offences that operate in a pre-emptive manner. Societies governed by the rule of law have always been wary of acting against individuals based upon what may be termed the "precautionary principle".[9]

So strongly entrenched in common law was this aversion to pre-emption that, in its earliest state, even the notion of an inchoate offence of attempt did not exist.[10]

After September 11, everything changed. The enactment by the Federal Parliament in 2002 of a number of provisions dealing with the commission of "terrorist acts", and proscribing membership of "terrorist organisations", had as one of its primary effects the criminalisation of conduct that took place long before any resultant acts of violence, or harm to others, had occurred.

The Commonwealth does not have any power, under the Constitution, to enact laws dealing with crime in general. Still less does it have specific power to enact laws dealing with terrorism as such. This absence of legislative power was overcome when, in 2002, the various States and Territories agreed to refer their powers over terrorist acts to the Commonwealth. For all practical purposes, the entire field of terrorist offences is now exclusively Federal.

Regrettably, the provisions of Pt 5.3 of the *Criminal Code Act 1995* (Cth) (the Code) are complex. Provisions within Pt 5.3 create offences having some connection to actual or potential terrorist acts, but the degree of connection varies from offence to offence. At one end of the spectrum is the offence of engaging in a terrorist act, which carries a maximum penalty of life imprisonment.[11] At the other end of the spectrum is the offence of associating with a person who is a member of a terrorist organisation which carries a maximum penalty of three years' imprisonment.[12]

Any analysis of Australia's anti-terrorism laws should begin with the definition, as set out in s 100.1 of the Code, of what constitutes "a terrorist act". Put simply, this means an act done, or threat of action made, with the intention of advancing a political, religious or ideological cause and of coercing a government of the Commonwealth of a State, or intimidating the public or a section of the public.

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[8] Their genesis was Resolution 1373 of the United Nations Security Council, adopted on 28 September 2001. It called upon states to ensure that: "terrorist acts are established as serious criminal offences in domestic laws and regulations, and that the punishment duly reflects the seriousness of such terrorist acts."

[9] In *Everett v Ribbands* [1952] 2 QB 198, 206, Lord Denning famously said "It would be contrary to all principle for a man to be punished, not for what he has already done, but for what he may hereafter do".

[10] The doctrine of attempt as known today in the common law derives from *R v Scofield* (1784) Cald Mag Cas 397 (Lord Mansfield). See generally Dr Eugene Meehan, *The Law of Criminal Attempt – A Treatise* (Carswell Legal Press, 1984) Ch 2. See also Alan M Dershowitz, *Preemption – A Knife That Cuts Both Ways* (WW Norton, 2006).

[11] *Criminal Code Act 1995* (Cth) Sch 1 s 100.1.

[12] *Criminal Code Act 1995* (Cth) s 102.8.

As for the meaning of the term "terrorism" itself, it is worth noting the comments of two leading scholars in this field,[13] who observed:

> Some have likened "the search for the legal definition of terrorism … [to] the quest for the Holy Grail". Others such as Judge Richard Baxter, formerly of the International Court of Justice, writing in 1974, have questioned the utility of a legal definition, stating: "We have cause to regret that a legal concept of terrorism was ever inflicted upon us. The term is imprecise; it is ambiguous; and, above all, it serves no operative legal purpose".[14]

In a previous paper that I delivered about a decade ago, I noted:

> It has been said that "terrorism is a form of asymmetric warfare: an approach that uses non-traditional methods to counter an opponent's conventional military superiority". It pits clandestine methods against open societies, using small teams whose operations are cheap, but demands a response that is enormous in scale and expensive in resources. It exploits the foundations of civil society, such as principles of human rights, efforts to avoid civilian casualties, and adherence to the rule of law – including the laws of armed conflict. It leaves no room for compromise, and seeks no place at the negotiating table. It uses violence to signal its committed path to a final end.[15]

In that paper, I observed that as at 2011, some 37 individuals had been charged under Australia's anti-terrorism laws. Of those, 25 had been convicted.[16] Fortunately, in none of those cases had the planned terrorist act come to fruition. They all concerned what might be described as preparatory conduct, and were all dealt with as what might be termed "prophylactic offences".[17] This is because the risk of harm did not arise straightforwardly from the prohibited act, but only after or in conjunction with further human interventions – either by the original actors or by others.

It might have been thought that once the question of criminal responsibility had been determined, the task of sentencing convicted terrorists would be reasonably straightforward, and carried out in accordance with well-recognised general principles of sentencing. Regrettably, but perhaps predictably, that has not transpired.

A Brief Commentary on General Sentencing Principles

As indicated, the starting point in sentencing any offender must be an assessment of the objective gravity of the offence in question. That in itself may be no easy task. Having completed that exercise, a sentencing judge must always have regard to the offender's personal characteristics, insofar as they are relevant. These may include matters such as age, family background, and previous criminal record, as well as any mental impairment which may bear upon moral culpability.[18]

Matters of this kind are always taken into account as part of the sentencing process for all offences.[19] When it comes to sentencing terrorist offenders, however, it can be argued that there appear to be special factors at play. The general principles that govern sentencing at large seem to operate in a manner that is quite distinctive, and far removed, from the application of ordinary sentencing principles. There are several reasons why this is so.

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[13] See Ben Golder and George Williams, "What Is 'Terrorism'? Problems of Legal Definition" (2004) 27(2) *University of New South Wales Law Journal* 270.

[14] See Golder and Williams, n 13, 270–271 (citations omitted).

[15] Mark Weinberg, "Australia's Anti-Terrorism Laws – Trials and Tribulations" (Paper presented at the International Society for the Reform of Criminal Law, 25th International Conference "Crime and Criminal Justice – Exploring the International, Transnational and Local Perspectives", Washington DC, 24 December 2012) 5 [18].

[16] Weinberg, n 15, 9 [32].

[17] The term was employed by Gageler J in *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166, 186 [56].

[18] *R v Verdins* (2007) 16 VR 269 (Maxwell P, Buchanan and Vincent JJA).

[19] Before turning to the case law dealing with sentencing of terrorist offenders, it should be remembered that national consistency should be sought in sentencing all federal offenders. In *R v Pham* (2015) 256 CLR 550 (French CJ, Keane and Nettle JJ) the High Court held that it would be wrong to sentence federal offenders only in accordance with current sentencing practice of the State or Territory in which they were tried.

THE PREPARATORY NATURE OF SOME TERRORIST OFFENCES

Section 16A(2)(a) of the *Crimes Act 1914* (Cth) (the *Crimes Act*) focuses upon the objective gravity of the particular offence. It provides that a sentencing judge must have regard to the "nature and circumstances" of the offence. This is a key factor in sentencing for all federal offences.

Ordinarily, when assessing the objective gravity of an offence, a sentencing judge will have particular regard for the actual harm suffered by any victim of a crime.[20] The maximum penalty fixed by statute for the offence provides an important "yardstick" by which that assessment is to be carried out.[21]

In most cases "moral culpability" is regarded as a major factor in sentencing. For example, the objective gravity of the particular offence will normally be regarded as heightened according to whether the conduct in question was premeditated or not, and by any level of sophistication associated with its performance. In some cases, motivation will be taken into account, whether by way of aggravation, or as mitigation.

Terrorism offences are, by their very nature, sui generis. They are quite different, in several respects, from most other crimes. Terrorist plots are often detected at an early stage, sometimes right at their inception. In such cases, it may be difficult to identify a particular "victim" who has suffered "harm" in any recognised sense. This makes the actual impact of a terrorist offence (as distinct from its potential for harm) less immediately relevant to the sentencing process.

The fact that so many terrorism offences are "prophylactic" in nature creates a number of difficulties for sentencing judges. In *R v Lodhi*,[22] one of the earliest terrorism cases conducted in this country, this issue was explored in depth. There, the offender was convicted, after a lengthy trial, of three separate terrorism offences.[23]

Lodhi had obtained maps of the Australian electricity supply system with a view to planning an attack upon it. He had also sought information concerning the availability of materials capable of being used to manufacture explosive devices. Finally, he possessed a document containing the ingredients for, and the method of manufacture of, various explosives. Plainly, he was arrested at a time when his planning, such as it was, had been at a very early and quite formative stage. What he had done to that point would fall well short of an attempt to commit a terrorist act.

Whealy J was the trial judge. His Honour had little by way of precedent to guide him in carrying out the sentencing task.[24] Counsel for Lodhi submitted on the plea that his client should be afforded leniency because his plans had been disrupted at such an early stage and no one had suffered any actual harm.

In rejecting that submission, Whealy J observed:

> It is true that the actions carried out by the offender may properly be regarded as at a very early stage of any terror related enterprise. The obtaining of the maps … for example, would have done little by itself to advance a terrorist plot to bomb part of the electrical supply system. In relation to the enquiry of Deltrex Chemicals, it is also true that a good deal more work and preparation would have been necessary to advance the construction of a physically assembled bomb capable of causing destruction to part of the electrical supply system. But, on the other hand, the legislation under which these offences has been

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[20] In *R v Mallinder* (1986) 23 A Crim R 179, 187–188 (Murray, O'Brien and Vincent JJA), the Court observed that a given episode of driving which causes several deaths is punished more heavily than an identical episode which causes a single death. See further *R v Towle* (2009) 54 MVR 543, [92] (Maxwell P, Buchanan and Ashley JJA). At the same time the effects of an unintended catastrophe should not swamp all other sentencing considerations.

[21] *Markarian v The Queen* (2005) 228 CLR 357, 372 [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ). However, statutory maxima must be approached with caution. It has been noted that if the legislative maximum is set at what seems to be an unreasonably high figure and, at the same time, the offence covers a wide range of conduct, the courts will typically place much less credence upon that figure as a touchstone by which to assess objective gravity. See *R v Cubbon* (1984) 34 SASR 596, 600 where Bollen J observed that the maximum penalty of life imprisonment for forgery was regarded as unrealistic, and intolerable (White J agreeing, 597).

[22] *R v Lodhi* (2006) 199 FLR 364 (Whealy J).

[23] The offences arose out of *Criminal Code Act 1995* (Cth) ss 101.5, 101.6 and 101.4.

[24] He ended up imposing a total effective term of 20 years' imprisonment, with a non-parole period of 15 years.

> created was specifically set up to intercept and prevent a terrorist act at a very early or preparatory stage, long before it would be likely to culminate in the destruction of property and the death of innocent people. The very purpose of the legislation is to interrupt the preparatory stages leading to the engagement in a terrorist act so as to frustrate its ultimate commission. An evaluation of the criminal culpability involved in any particular offence requires an analysis not only of the act itself, which may be relatively innocuous, but as well an examination of the nature of the terrorist act contemplated, particularly in the light of the intentions or state of mind of the person found to have committed the offence.[25]

In dismissing Lodhi's appeal to the New South Wales Court of Criminal Appeal,[26] Spigelman CJ commented that although no one had been injured by what Lodhi had done, this should not be regarded as a mitigating factor. The Code provisions dealing with terrorist acts were, after all, specifically directed to conduct that was merely preparatory. The Chief Justice stated:

> By the extended range of conduct which is subject to criminal sanction, going well beyond conduct hitherto generally regarded as criminal, and by the maximum penalties provided, the Parliament has indicated that, in contemporary circumstances, the threat of terrorist activity, requires condign punishment.[27]

This approach to sentencing for terrorist offences was followed in Victoria by both the trial judge in *R v Fattal*[28] and the Victorian Court of Appeal in *Director of Public Prosecutions (Cth) v Fattal*.[29]

In *Fattal* the applicants were convicted, after a trial which lasted for some months, of having conspired to do acts in preparation, or planning, for a terrorist act.[30] Each of the offenders had played a quite separate role in the conspiracy which, as the sentencing judge had noted, was an amateurish and clearly doomed enterprise. Each offender, nonetheless, received exactly the same sentence.[31]

On the appeals and cross-appeals against the sentences imposed, the Victorian Court of Appeal rejected the proposition that the amateurish nature of the conspiracy in some way reduced the moral culpability of the offenders. In citing the passages from Whealy J's sentencing remarks in *Lodhi* to which reference has been made, the Court noted that although the objective gravity of the offences may have been still greater, had further steps been taken towards the commission of the terrorist act planned, the fact that the conspiracy had been detected at a very early stage was not to be regarded as having any particular weight by way of mitigation.[32] That approach stands in stark contrast with the way in which judges ordinarily deal with sentencing for attempt.[33]

This distinction between preparatory offences and the inchoate offence of attempt is all the more significant from a sentencing perspective since, at common law, conduct cannot amount to an attempt unless the acts in question go beyond "mere preparation". Certainly, the types of conduct that can give rise to preparation or planning for a terrorism offence under the Code fall well short of conduct that is capable of amounting to an attempt.[34]

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[25] *R v Lodhi* (2006) 199 FLR 364, 373 [51].

[26] *Lodhi v The Queen* (2007) 179 A Crim R 470, 489 [79] (Spigelman CJ), 527 [211] (Barr J agreeing), 528 [215] (Price J agreeing).

[27] *Lodhi v The Queen* (2007) 179 A Crim R 470.

[28] *R v Fattal* [2011] VSC 681 (King J).

[29] *DPP (Cth) v Fattal* [2013] VSCA 276 (Buchanan AP, Nettle and Tate JJA).

[30] They had intended to attack the Australian Army Base at Holsworthy, in New South Wales, with the aim of killing as many soldiers and others as possible. The prosecution case was that their objective was to advance the cause of Islam, by violence.

[31] 18 years' imprisonment, with a non-parole period of 13 years and six months. See *R v Fattal* [2011] VSC 681, [102] (King J).

[32] *DPP (Cth) v Fattal* [2013] VSCA 276, [164]–[173].

[33] The maximum penalty for attempt is usually far less than that available for a completed offence. An attempt will generally be punished less severely than the completed offence, whether by reason of leniency, or because less harm is thought to have been caused. If deterrence were the only consideration, attempt should be punished as severely as the completed offence. See generally Meehan, n 10, 268, 270–271.

[34] Of course, various legal tests have been proffered as to whether the conduct in question was more than "merely preparatory". These tests range from the narrowest interpretation, as exemplified by the speech of Lord Diplock in *DPP v Stonehouse* [1978] AC 55, 68, applying what is sometimes described as the "Rubicon test" to the far broader view, such as those expressed by Lord Lane CJ in *R v Gullefer* [1990] 3 All ER 882. Many of these tests are singularly unhelpful. See generally D Ormerod and K Laird, *Smith, Hogan and Ormerod's Criminal Law* (OUP, 15th ed, 2018) 426–429. See also *IM v The Queen* (2019) 100 NSWLR 110

The underlying rationale for the wide-ranging approach endorsed in *Lodhi* to sentencing for preparatory conduct is the need for "community protection".[35] That need is accentuated where the offender seems not to have resiled from extremist beliefs, or renounced his or her former intentions.[36]

There is perhaps another unusual feature associated with sentencing for terrorist offences. In ordinary circumstances, conduct carried out within a group, rather than by an individual, is likely to be regarded by that fact alone as inherently more serious. The cases suggest that this approach is not applicable to terrorist acts. Such offences, when committed by "lone wolves", are particularly difficult to detect, and therefore to prevent. For that reason it is often said that they warrant particularly severe punishment, even heavier than that afforded to those involved in a terrorist group.

Aligning Sentences for Terrorism Offences between the Various States

For some time, there was a perception that sentences across the board, and particularly those imposed for terrorism offences, were far greater in New South Wales than those imposed in Victoria.

This point is illustrated by two well-known cases, both involving terrorism trials that were closely linked. They took place in Victoria and New South Wales respectively, and both fell broadly within the ambit of what was described as "Operation Pendennis".

The Victorian trials arising out of that Operation concerned a group led by Abdul Nacer Benbrika.[37] After a trial that lasted about eight months, he and a number of his followers, were convicted of various terrorism offences. Benbrika was unquestionably the main offender. He was sentenced to 15 years' imprisonment, with a non-parole period of 12 years. At that time this would have been regarded as a particularly heavy sentence. His co-offenders received lesser terms of imprisonment.[38] Benbrika's appeal against sentence was subsequently dismissed.[39]

In the New South Wales trial arising out of Operation Pendennis, *R v Elomar*,[40] five offenders were convicted of having conspired to do acts in preparation for a terrorist act, or acts. Their activities included ordering or collecting ammunition, laboratory equipment, and chemicals, as well as possessing instructional or extremist material. They also attended what were described as "training camps".

Whealy J was the trial judge. The offenders were sentenced to lengthy terms of imprisonment ranging from 23 to 28 years. In effect, some received sentences of almost twice that imposed on Benbrika.

(Meagher JA, RA Hulme and Button JJ) where the New South Wales Court of Criminal Appeal reindorsed the remarks of Whealy J in *R v Lodhi* (2006) 199 FLR 364, in a case where the conspiracy in question had barely got off the ground, and was expressed in the most amorphous of terms.

[35] In *R v Azari (No 12)* [2019] NSWSC 314, [184] N Adams J noted that terrorism offences, as defined in the Code and indicated earlier, involve the threat or use of violence as a means of intimidating the community and/or the government to pursue a particular political, religious or ideological agenda. For that reason alone, and bearing in mind the possible consequence of a terrorist act, the community needed to be protected from such conduct. Of course, the expression "community protection" is nowhere to be found in *Crimes Act 1914* (Cth) s 16A(2) . Nonetheless, it is embedded within the section as a result of judicial exegesis.

[36] This was Whealy J's finding regarding Lodhi himself, who had not resiled from extremist beliefs. As to the weight to be given to a finding that the offender may have genuinely renounced terrorist ideology see *DPP (Cth) v Ali* [2020] VSCA 330 (Maxwell P, McLeish and Weinberg JJA).

[37] *R v Benbrika* (2009) 222 FLR 433 (Bongiorno J).

[38] Benbrika's co-offenders received sentences ranging from six years' imprisonment with a non-parole period of four years and six months, to 10 years' imprisonment with a non-parole period of seven years and six months.

[39] *Benbrika v The Queen* (2010) 29 VR 593 (Maxwell P, Nettle and Weinberg JJA). Indeed, after Benbrika had completed the whole of his 15 year sentence (having been refused parole), he was made subject to a Continuing Detention Order which would have the effect of imprisoning him for a further three years. See *Minister for Home Affairs v Benbrika* [2020] VSC 888 (Tinney J). The constitutional validity of that order was upheld by the High Court by a four to three majority in *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166, 195 [100]–[102] (Kiefel CJ, Bell, Keane and Steward JJ, Gageler J dissenting), 196 [109] (Gordon J dissenting), 211–212 [180]–[185] (Edelman J dissenting).

[40] *R v Elomar* (2010) 264 ALR 759.

In his sentencing remarks, Whealy J reiterated what he had previously said in *Lodhi*:

> The broad purpose of the creation of offences of the kind involved in the present sentencing exercises is to prevent the emergence of circumstances which may render more likely the carrying out of a serious terrorist act. Obviously enough, it is also to punish those who contemplate action of the prohibited kind. Importantly, it is to denounce their activities and to incapacitate them so that the community will be protected from the horrific consequences contemplated by their mindset and their actions. The legislation is designed to bite early, long before the preparatory acts mature into circumstances of deadly or dangerous consequence for the community. The anti-terrorist legislation, relevantly for the present matter, is concerned with actions even where the terrorist act contemplated or threatened by an accused person has not come to fruition or fulfilment. Indeed, the legislation caters for prohibited activities connected with terrorism even where no target has been selected, or where no final decision has been made as to who will carry out the ultimate act of terrorism. The maximum penalty of life imprisonment testifies to the seriousness with which the present offence is to be regarded.[41]

All of the appeals against the sentences imposed in *Elomar* were dismissed.[42]

In *Director of Public Prosecutions (Cth) v MHK*,[43] the obvious discrepancy between the sentences imposed upon Benbrika and his group in Victoria, and those imposed upon the offenders in *Elomar*, was raised with the Commonwealth Director in argument before the Victorian Court of Appeal. This led to a discussion concerning the need for greater uniformity in approach to sentencing for Commonwealth offences.

In *MHK [No 1]*, the offender was aged 17 at the time of offending. He had planned to build one or more explosive devices, which were to be fashioned to detonate in highly populated areas. He pleaded guilty to doing acts in preparation for, or planning, a terrorist act. He was said to have been motivated by a desire to promote a particularly extreme form of Islam. He was originally sentenced to seven years' imprisonment, with a non-parole period of five years and three months. Not surprisingly, the Commonwealth Director appealed against that sentence.

The appeal succeeded. As a result, MHK's sentence was significantly increased to one of 11 years' imprisonment, with a non-parole period of eight years and three months. The Court of Appeal specifically followed the principles laid down in *Lodhi*. It said:

> [T]he statutory offence created by s 101.6 of the Code was designed to ensure that persons, who plan to commit dangerous acts of terror in our community, be intercepted early, well before they are able to perpetrate such acts and thereby cause the appalling casualties that invariably result from acts of terror. It is for that reason that an assessment of the criminal culpability of a person, convicted of such an offence, is not measured purely by the steps and actions taken by the offender towards the commission of the act of terror, but, in addition, by a proper understanding and appreciation of the nature and extent of the terrorist act that was in contemplation, and to which those steps were directed.[44]

On the very same day that judgment in *MHK [No 1]* was delivered, the Victorian Court of Appeal handed down judgment in *Director of Public Prosecutions (Cth) v Besim*.[45] That too concerned a very young offender, who was aged 18 at the time of his offending. He had planned to run down a police officer during the course of the 2015 ANZAC Day celebrations. He had then intended to behead his victim, seize his weapon, and use it to shoot as many innocent bystanders as possible. His plan was to keep firing until he himself was killed by police. In that sense, his personal objective included martyrdom.

Besim was initially sentenced to a term of 10 years' imprisonment, with a non-parole period of seven years and six months. The Commonwealth Director appealed against that sentence. The appeal succeeded, and the sentence was increased to one of 14 years' imprisonment. A non-parole period of 10 years and six months was fixed.

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[41] *R v Elomar* (2010) 264 ALR 759, 779 [79].

[42] *Elomar v The Queen* (2014) 300 FLR 323 (Bathurst CJ, Hoeben CJ at CL and Simpson J).

[43] *DPP (Cth) v MHK* (2017) 52 VR 272 (Warren CJ, Weinberg and Kaye JJA).

[44] *DPP (Cth) v MHK* (2017) 52 VR 272, 286 [48] (citation omitted).

[45] *DPP (Cth) v Besim* [2017] VSCA 158, [112] (Warren CJ, Weinberg and Kaye JJA).

It is important to note that the Court of Appeal chose to comment on past sentencing practice for terrorist offences in Victoria. The Court stated:

> In arriving at that new sentence, we are of course aware that in *Benbrika v The Queen* significantly lower sentences were imposed for the very serious terrorism offences there committed. Those sentences may have been regarded as within range at the time. However, having regard to the scourge of modern terrorism, and the development of more recent sentencing principles in this area, they seem to us to have been unduly lenient. No such sentences would have been imposed today.[46]

Since *MHK [No 1]* and *Besim*, it appears that sentences for terrorism offences have greatly increased in Victoria.

For example, in *R v Shoma*,[47] a young woman of 24 pleaded guilty to having intentionally engaged in a terrorist act.[48] She had entered Australia with the express purpose of carrying out such an act in the name of Islamic State. Her plan had been to murder a randomly chosen, and defenceless, civilian by stabbing them to death. It was a cruel irony that the victim in question had actually shown Shoma considerable kindness by providing her, a complete stranger, with temporary accommodation. She repaid this good deed by attacking him while he was asleep and stabbing him in the neck. Fortunately, however, he survived the attack. She showed her callousness by expressing her disappointment.

In ordinary circumstances, Shoma would have been charged with attempted murder, an offence that carries a maximum penalty of 25 years' imprisonment under the *Crimes Act 1958* (Vic).

Shoma, however, was dealt with under the Code, charged with having engaged in a terrorist act. That offence carries a maximum of life imprisonment. She was sentenced to 42 years' imprisonment with a non-parole period of 31 years and six months. In other words, she received a sentence that was more than three times the length of any sentence that she was likely to have been given had she been dealt with for attempted murder, and roughly three times the sentence that Benbrika had been given. It can reasonably be argued that Benbrika's conduct, as terrorist offending, was objectively more serious than that of Shoma. For whatever reason, Shoma did not appeal against her sentence.

In *R v Mohamed*,[49] the three offenders, Ahmed Mohamed, Abdullah Chaarani, and Hatim Moukhaiber, were convicted by a jury of having engaged in and, in the case of Mohamed and Chaarani, having attempting to engage in, a terrorist act. The three men had set fire to and destroyed a Shia Mosque, after an earlier unsuccessful attempt by Mohamed and Chaarani to do so.

The sentencing judge found that each offender continued to adhere to an extremist ideology. There was no accepted evidence of any de-radicalisation. Mohamed and Chaarani were each sentenced to 22 years' imprisonment, with non-parole periods of 17 years. Moukhaiber, who was found to be less culpable, was sentenced to 16 years' imprisonment with a non-parole period of 12 years.

Subsequently, Chaarani and Mohamed, along with another man named Hamza Abbas,[50] were imprisoned for their involvement in a plot to use machetes and improvised explosives to carry out a terrorist attack in Melbourne's CBD during the 2016 Christmas period. For Chaarani and Mohamed, this was their second terrorism conviction.

A lengthy trial had been conducted. The main prosecution witness was Abbas' brother, Ibrahim, who claimed to be the ringleader of the group. He had earlier pleaded guilty and was sentenced to 24 years' imprisonment. The jury were told that the men had purchased machetes, light globes, and batteries to make explosives, and had sought to obtain guns in order to attack people at Federation Square.

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[46] *DPP (Cth) v Besim* [2017] VSCA 158, [121] (citation omitted).

[47] *R v Shoma* [2019] VSC 367 (Taylor J).

[48] This seems to have been one of the first cases brought under this section, as distinct from the preparatory offences discussed above.

[49] *R v Mohamed* [2019] VSC 498 (Tinney J).

[50] *R v Abbas* [2019] VSC 775 (Beale J).

After the guilty verdicts, sentencing was delayed for a lengthy period because Mohamed and Chaarani requested that the plea be postponed until the completion of the trial arising out of offences in relation to the Shia Mosque.

Although the three co-accused pleaded not guilty, they took the unusual and perhaps ambitious course of attempting to persuade the Court that they had turned against Islamic State. In that regard, they each claimed that they had been on a path of de-radicalisation since their arrest. It seems, from the sentences imposed, that this was to little avail.

Mohamed and Chaarani were each imprisoned for 26 years, with 16 years cumulated upon the sentences imposed in relation to the Shia Mosque. That resulted in a total effective sentence of 38 years' imprisonment with a new non-parole period of 28 years. Abbas, who was to wear an explosive vest in the attack, was sentenced to 22 years' imprisonment with a non-parole period of six years and six months.

This trend towards greatly increased sentences in Victoria for terrorist offenders was maintained in *R v Ali*.[51] There the respondent, who was aged 20 at the time of the offence, pleaded guilty to having intentionally done an act in preparation for, or planning of, a terrorist act. The maximum penalty for that offence was life imprisonment. Ali was initially sentenced to a term of 10 years' imprisonment with a non-parole period of seven years and six months.

Ali had planned to carry out a terrorist act at Federation Square in Melbourne. This was to take place during New Year's Eve celebrations 2017. His plan was to kill as many people as he could, targeting a crowd in order to maximise the number of casualties. He intended to fire into the crowd moments before midnight, using a rapid fire assault rifle. He would then take hostages in a neighbouring bar, and force one of them to display an Islamic State flag.

In preparing for these terrorist acts, Ali enquired about obtaining a fully automatic rifle, and up to 210 rounds of ammunition. However, the men that he approached to sell him the weapon happened to be undercover operatives who covertly recorded their conversations with him.

Some months later, the respondent attended at Federation Square in company with the undercover police officers. Together they discussed the details of his plan. In the months leading up to November 2017, when Ali was eventually arrested, he carried out a number of internet searches revealing an interest in, and sympathy for, extreme jihadist ideology.

On the plea, Ali's counsel did not dispute that it had been his client's intention all along to carry out the terrorist act that he had planned. The sentencing judge expressly found that if he had not been apprehended, he would have done just that.[52]

However, there was a difficulty so far as the sentencing judge was concerned. This was the evidence placed before him of the respondent's genuine remorse for what he had done and of his having recently renounced all forms of extremism. The judge accepted that evidence as truthful and accurate, and acted upon it. He accordingly sentenced Ali upon the basis that he had reasonable prospects of rehabilitation.

The Crown appealed against the 10 year sentence imposed. The appeal was allowed.[53] The sentence was increased to one of 16 years' imprisonment. This was so notwithstanding the mitigating factors that the judge had found to be present, and which were not controverted on the appeal.

The Court of Appeal in *Ali* cited both the *Lodhi* and *Fattal* appeal reasons with approval. It recognised that terrorism offences encompassed a wide range of actions, including acts done merely in preparation for, or planning of, terrorist acts. In sentencing for offences of that kind, it was necessary to have regard to the particular act in contemplation, as well as what the offender had actually done. Offending "far advanced" along both these axes would be of the most serious kind contemplated by the legislation, and would call for the most severe penalties.

[51] *R v Ali* [2020] VSC 316 (Champion J).

[52] *R v Ali* [2020] VSC 316, [212].

[53] *DPP (Cth) v Ali* [2020] VSCA 330 (Maxwell P, McLeish and Weinberg JJA).

The Court observed that the really difficult cases were those where the evidence along one axis pointed firmly to the seriousness of the matter, but that evidence along the other axis was towards the lower end of the scale. Thus, a case might involve planning that was in its very infancy, but contemplated the most heinous of consequences. In any such case, principles of general deterrence and protection of the community had to be given paramount weight. Personal circumstances which, in other circumstances, might be regarded as powerfully mitigating would be afforded far less weight.

It can be seen from this brief summary of recent Victorian case law that, to the extent that there once was substantial disparity between Victoria and New South Wales sentences for terrorist offences, that is no longer the case. Sentences for these offences in Victoria are now at a wholly different level.

Youth and Prospects of Rehabilitation as Mitigating Factors

As a matter of basic principle, youth is generally treated as a powerful mitigating factor.[54] It is by no means clear that the same can be said when sentencing for terrorist offences.

There is nothing surprising about the fact that young persons (or indeed, in some cases, even children) can become involved in extremist and violent causes. There is also nothing remarkable about young people being caught up in the commission of terrorist acts.

In dealing with the offender's age (and prospects of rehabilitation) the Court of Appeal in *MHK [No 1]* observed:

> As the authorities, to which we have referred, make plain, while youth is relevant in determining the weight to be given to general deterrence and denunciation in the sentencing equation, its weight is diminished, quite measurably, in cases such as this, in which a youthful offender either participates in, or plans to carry out, actions of extreme violence. The protection of our society, and the upholding of its most fundamental values, necessitate that in cases such as this the sentencing considerations of general deterrence and denunciation must be given primacy above the ameliorating effect of youth.
>
> In the same way, while the potential rehabilitation of the respondent is an important sentencing factor, nevertheless, in a case such as this, it must give way, to a significant degree, to the requirements that the sentence be adequate so as to sufficiently express the court's and the community's repugnance at the actions and intentions of the respondent, and to deter other like-minded other young people from embarking on, and proceeding down, the same pathway that the respondent chose to undertake. In addition, in the present case, while the respondent has, commendably, commenced to undertake important transformative steps, in respect of his attitude to the community, and to the dictates of Islamic State, nevertheless, as the evidence to which we have referred makes plain, and as found by the judge, his reformation, and rehabilitation, is far from complete. In particular, as stated by Mr Coffey, he has not demonstrated, in any sufficient degree, a sense of contrition for the appalling acts of violence that he was intending to carry out. It is also relevant that the transformation that the respondent has undergone has occurred in an environment in which he is, to a significant extent, sheltered from the kind of influences that impelled him to engage in the conduct that constituted his offending.[55]

The reference to "the authorities" in the above passage included, in particular, *Azzopardi v The Queen*.[56]

It can be seen from the outcome in both *MHK [No 1]* and *Besim*, that youth, of itself, may not be a powerful ameliorating factor in sentencing terrorist offenders.

In *Besim* the Court of Appeal said:

> The relevance of youth as a mitigating factor, in cases involving serious criminality, has been considered by this Court on a number of occasions. We reiterate what we said upon that subject in MHK. The greater the objective gravity of an offence, the less likely it is that factors such as general deterrence, denunciation, and retribution will cede to the interests of rehabilitation.[57]

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[54] *Fox and Freiberg*, n 1, 352. See generally *R v Mills* [1998] 4 VR 235, 236 (Phillips CJ and Charles JA agreeing), 241–243 (Batt JA).

[55] *DPP (Cth) v MHK* (2017) 52 VR 272, [66]–[67] (citation omitted).

[56] *Azzopardi v The Queen* (2001) 205 CLR 50.

[57] *DPP (Cth) v Besim* [2017] VSCA 158, [116] (citation omitted).

Of course, it can be argued that neither *MHK [No 1]* nor *Besim* does any more than apply the well-recognised principles laid down in cases such as *Azzopardi* regarding the lesser weight to be accorded to youth, in the context of very grave offending. It is also possible, however, to derive from these two decisions a more powerful rejection of youth as a significant mitigating factor in sentencing for terrorist offences.

Shoma illustrates just how little weight is likely to be given to youth in mitigation of penalty in a terrorist case. She was, as previously noted aged only 24. She had no prior convictions of any kind. She pleaded guilty at a very early stage. Yet she received a sentence of 42 years' imprisonment, with the concomitant non-parole period of more than 30 years. On any view, a sentence of that order would have to be regarded as quite extraordinary. Yet it may represent the way of the future in sentencing for terrorist offences.[58]

General Deterrence as a Sentencing Factor

Both general and specific deterrence are conceptually distinct from cognate concepts, including community protection and denunciation.

It is a curious feature of some of the recent cases that attempts have been made to argue that deterrence should play little role in such cases. Such arguments have focused upon those cases where, for example, the offender has been plainly bent upon martyrdom. It has been suggested that anyone minded to engage in a suicidal attack of this kind is hardly likely to be deterred by the prospect of imprisonment. So much for specific deterrence. A similar argument has been advanced in relation to general deterrence.

In *MHK [No 1]*, these very arguments were put forward and rejected by the Court of Appeal. It said:

> There are a number of responses to that proposition. First, it is not the case that, in each instance, or perhaps even in the majority of instances, terrorists, and intending terrorists, commit, or plan to commit, acts in which they themselves will be killed. Indeed, in the present case, it is not clear, at all, that that was the intention of the respondent. Further and in any event, the submission made on behalf of the respondent contains a logical flaw. In each case, as in the present case, the preparation and planning for a terrorist act takes some time. It is during that time frame that the concept of general deterrence may have some important effect. Put simply, those planning to commit acts of terror must appreciate that, if they are apprehended in the process of preparing to perpetrate such acts, they will forfeit their liberty to live within our community for a very lengthy period of time. It is in that way that those seeking to enjoy a perverted form of glory, or satisfaction, from the perpetration of such acts, can be brought to understand that the cost to them, if they are intercepted, will be particularly high. Further, and in any event, it is not for the courts to "second guess" the mentality of persons intending to embark on acts of terror. No doubt the mindset of such persons may well vary. The law can only do its best to endeavour to deter such acts, by imposing sentences that may alter the calculations of persons minded to commit such abominable acts as those that were under contemplation in the present case.
>
> Further, the authorities have made it clear, and properly so, that the concepts of protection of the community, and incapacitation of the offender, are separate considerations to that of general deterrence. As we have stated, the very purpose of provisions, such as s 101.6, contained in Div 101 of the *Criminal Code*, is to intercept and interrupt planned acts of terror. Persons who commit such an offence ordinarily only desist from doing so because they are apprehended. As such, at the time of their apprehension, they are, a fortiori, persons who pose a very real danger to the community. Unless the courts give adequate weight to the concepts of protection and incapacitation, they would fail to comply with the clear intent of the legislature in creating offences of the type with which this case is concerned.[59]

In *Besim* the Court made exactly the same point when it said:

> The fact that the respondent indicated an intention to himself be killed during the course of the Anzac Day terror attack in no way reduces the importance of general deterrence as a sentencing consideration.[60]

[58] For a further discussion on the relevant law in this area, see Dr James Renwick SC, *Report to the Prime Minister: The Prosecution and Sentencing of Children for Terrorism* (5th Report, 26 November 2018).

[59] *DPP (Cth) v MHK* (2017) 52 VR 272, 288 [53]–[54] (citation omitted).

[60] *DPP (Cth) v Besim* [2017] VSCA 158, [112] (citation omitted). To the same effect were the observations of Johnson J in *R v Alou (No 4)* (2018) 330 FLR 402, 435 [276] where his Honour said: "The Court must have regard to general deterrence: s 16A(2)(ja).

In the *Lodhi* appeal reasons, Spigelman CJ had adopted a somewhat more cautious approach to the relevance of deterrence as a sentencing factor in terrorism cases. His Honour observed that deterrence could properly be given less weight in such cases, at least where they involved suicide attacks. A powerfully held ideological or religious motivation, based on fanaticism and zealotry, was unlikely to be tempered by any notion of deterrence of any kind.

In the end, the difference between the Victorian approach, and that proffered by Spigelman CJ is of little practical import. Even if deterrence carries less weight in such cases, this will be countered by a greater emphasis being given to the need for "community protection". The end result is likely to be the same.

The Special Non-parole Period Requirements for Terrorism Offences

The non-parole period represents the minimum time that an offender should be required to serve, in custody before being considered for release under supervision.

There is no fixed ratio that must be met between the head sentence and the non-parole period.[61] It is common, however, at least in Victoria, for that ratio to be somewhere in the region of between 60% and two-thirds.[62]

For terrorism cases, the legislature has specified in s 19AG of the *Crimes Act 1914* (Cth) that the non-parole period must be at least three-quarters of the head sentence. In practical terms, this results in a significant increase in the severity of any penalty imposed for a terrorism offence.

This raises the question whether a court, in sentencing for a terrorist offence, should ameliorate the head sentence in order to allow for the fact that the prisoner will spend a longer period in custody, before being considered for parole, than any offender convicted of a non-terrorist offence.

In *Director of Public Prosecutions (Cth) v Besim (No 3)*,[63] it was held to be wrong to ameliorate a head sentence, otherwise appropriate, merely to reflect the fact that parole would not be available until three-quarters of that sentence had been served. To approach the matter in that way would be to fly in the face of a clearly expressed legislative intent.

In *Alou v The Queen*,[64] it was argued that s 19AG was constitutionally invalid, under the principles laid down in *Kable v Director of Public Prosecutions (NSW)*[65] because the legislature was forcing the Court to "dispense injustice". Perhaps not surprisingly, that argument was rejected.

Post-sentence Detention

Division 105A of the Code came into force on 7 June 2017. It provides that the Minister for Home Affairs can apply to the Supreme Court of a State or Territory for a "continuing detention order" (for a maximum of three years) in relation to a "terrorist offender". Section 105A.7 confers upon the Court to which the application is made a discretion to make the order if satisfied to "a high degree of probability" that the offender is "an unacceptable risk of committing a serious terrorism offence" if released into the community. An application for such an order can only be made within 12 months before the end of the offender's term of imprisonment. Successive continuing detention orders may be made.

Bearing in mind that, as a result there is now always the prospect of some form of post-sentence detention, (or at least close supervision, which is also an option), the question arises whether a sentencing judge should ameliorate any sentence imposed in order to take into account that possibility.

A very strong element of general deterrence is required in sentencing for terrorist offences. Even more so in a case such as this where the terrorist offence has caused death and even more harm to the community."

[61] *R v Bertrand* (2008) 20 VR 222, 248 [160] (Vincent, Redlich and Weinberg JJA).

[62] *Fox and Freiberg*, n 1, 859.

[63] *DPP (Cth) v Besim (No 3)* (2016) 52 VR 303 (Warren CJ, Weinberg and Kaye JJA).

[64] *Alou v The Queen* (2019) 101 NSWLR 319, 352 [198] (Bathurst CJ, Price J agreeing), 353 [202] (N Adams J agreeing).

[65] *Kable v DPP (NSW)* (1996) 189 CLR 51.

The answer that has been given is that no such amelioration is warranted. In *Besim (No 3)* it was held that the effect of the new continuing detention order regime should not, ordinarily, alter the manner in which the sentencing discretion is exercised. Whether or not such an order may be sought, perhaps far into the future, is purely speculative. Moreover, the possibility that further detention may be ordered has little logical or practical connection with the present need to ensure that the protection of the community, and other relevant sentencing factors, are given due weight at the time of sentencing.

The Likelihood of Deportation as a Sentencing Factor

It is well-established that the likelihood of deportation at the expiration of a sentence can, in some cases, be regarded as a mitigating factor.[66] The question of what weight, if any, is to be given to that likelihood in sentencing a terrorist offender has yet to be definitely determined. It is unlikely, however, that the prospect of deportation will carry any weight at all in cases of this type.

"Verdins Considerations" and Terrorism

There is a live issue as to whether the principles applicable to various forms of mental impairment (what are termed in Victoria as "*Verdins* considerations") have any relevance in the sentencing of Commonwealth offenders in that State.

Assuming for present purposes that the *Verdins* principles can be relevant by way of mitigation, through reducing moral culpability for federal offences, the question arises as to whether there really is any scope for the operation of these principles in sentencing for terrorist offences.[67]

Once again, it seems to me that impaired mental functioning, whether arising from mental illness or not, is most unlikely to be given any significant weight as a mitigating factor in sentencing for terrorist offences. The need for community protection will almost certainly swamp any such considerations.

Conclusion

In a recent paper entitled "Some Issues Arising from Terrorism Trials and Sentencing"[68] Justice Peter Johnson of the New South Wales Supreme Court referred to his sentencing remarks in *R v Alou (No 4)*[69] where he laid down the following general principles for sentencing terrorist offenders:

> The primary considerations on sentence for terrorist offences are the protection of the community, the punishment of the offender, the denunciation of the offending and both specific and general deterrence.
>
> Subjective circumstances and mitigating factors, including considerations of rehabilitation, are to be given less weight: …
>
> The religious and ideological motivation of an offender is relevant to the issue of community protection, as well as to the assessment of the objective gravity of the offence: …
>
> Where it is not established that an offender has resiled from previously held extremist views, the element of community protection will assume even greater importance: …
>
> Weight must be given to the need for general deterrence even if the force of ideological or religious motivations are such that deterrence may not be effective: …
>
> Whilst youth is relevant to determining the weight to be given to general deterrence and denunciation in the sentencing equation, its weight is diminished quite measurably in terrorist cases where the offender participates in, plans or carries out actions of extreme violence. The protection of society, and the upholding of its most fundamental values, necessitates that in terrorist cases, the sentencing considerations of general deterrence and denunciation must be given primacy above the ameliorating effect of youth".

[66] See, eg, *Guden v The Queen* (2010) 28 VR 288 (Maxwell P, Bongiorno JA and Beach AJA).

[67] The factors set out in *R v Verdins* (2007) 16 VR 269 are not to be found in the language of *Crimes Act 1914* (Cth) Pt 1B itself.

[68] Justice Peter Johnson, "Some Issues Arising from Terrorism Trials and Sentencing" (Seminar Paper presented at the Supreme Court of New South Wales, 10 March 2020).

[69] *R v Alou (No 4)* (2018) 330 FLR 402.

> In considering the nature and gravity of terrorist offences, courts in Australia have utilised a number of factors referred to by the UK Court of Appeal in … are:
>
> (a) the degree of planning, research, complexity and sophistication involved, together with the extent of the offender's commitment to carry out the act(s) of terrorism;
> (b) the period of time involved, including the duration of the involvement of the particular offender;
> (c) the depth and extent of the radicalisation of the offender as demonstrated (inter alia) by the possession of extremist material and/or the communication of such views to others; and
> (d) the extent to which the offender has been responsible, by whatever means, for indoctrinating or attempting to indoctrinate others, and the vulnerability or otherwise of the target(s) of the indoctrination, be it actual or intended.[70]

This statement of legal principle seems to me to encapsulate clearly, and accurately, the state of the law in this country regarding sentencing for terrorism offences. As in all other areas of sentencing law and practice, however, the position remains extremely fluid.

It can, however, be confidently predicted that the task of sentencing convicted terrorists will present particular difficulties for years to come. We are in new and unfamiliar terrain, and developments will be closely watched.

[70] *R v Alou (No 4)* (2018) 330 FLR 402, 422–423 [165]–[171], quoted in Johnson, n 68, 58–59 [145] (citations omitted).

Reflections on Oversight of Intelligence Agencies: Promoting Compliance, Trust and Accountability

The Hon Margaret Stone AO*

Secrecy is both necessary for the effective operation of Australia's intelligence agencies and inimical to the protection of personal rights and liberties that are fundamental to a liberal democracy such as Australia. This tension poses a challenge for accountability. In meeting this challenge trust, independence and a robust culture of compliance are crucial. The value of administrative review in meeting this challenge is considerable.

BACKGROUND

The Inspector-General of Intelligence and Security is an independent statutory office created more than 30 years ago under the *Inspector-General of Intelligence and Security Act 1986* (Cth)[1] of the same name (*IGIS Act*). My appointment to the position ran from 24 August 2015 to 23 August 2020. Throughout those five years the Inspector-General's oversight extended to the six intelligence agencies, which, at that time, constituted the Australian Intelligence Community (AIC).[2] The main purpose of that oversight was to monitor their activities for legality and propriety, including consistency with human rights.

Reflection on many aspects of those years might be valuable, but here I propose to consider only a limited part of that experience. Before going any further, however, I must stress that there are many ways of being an effective Inspector-General of Intelligence and Security and the present reflections are about what was important to me during my term. They are not intended to guide my successors or to deny that much of what was important to me was also important to my predecessors.

INTRODUCTION

The part of my experience that I will consider here concerns the fundamental issues of to whom the intelligence agencies are *ultimately* accountable, and how the Inspector-General can contribute to that accountability in the most effective and constructive way. In doing so I accept that some measure of secrecy is both necessary for the effective operation of the intelligence agencies and inimical to the protection of personal rights and liberties that are fundamental to a liberal democracy such as Australia. The challenge always has been, and will always remain, to respect the secrecy required and limit the damage that it can do. For that, there is no easy recipe. Nevertheless, my experience is that a particularly effective way for the Inspector-General to contribute includes not only the finely targeted work of the Inspector-General's office (IGIS Office) in inspections and responding to complaints or even the more in depth and formal inquiries provided for in the *IGIS Act*.[3] It is also strengthened by working co-operatively with agencies to foster a culture of compliance within their operations from planning to execution.

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[1] *Inspector-General of Intelligence and Security Act 1986* (Cth) s 6.

[2] ONI (Office of National Intelligence), ASIO (Australian Security Intelligence Organisation), ASIS (Australian Secret Intelligence Service), ASD (Australian Signals Directorate,) AGO (Australian Geospatial-Intelligence Organisation) and DIO (Defence Intelligence Organisation).

[3] See *Inspector-General of Intelligence and Security Act 1986* (Cth) Div 3.

Accountability

The tension between secret intelligence and civil rights and liberties is not reconcilable; inevitably, secrecy threatens rights, and rights weaken secrecy. Each is compromised. In broad terms, it is for government and the Parliament to decide what is an appropriate compromise between the secret collection of intelligence and the protection of civil rights and liberties and to embody that compromise in legislation. What is clear from Australia's present legislation is that the Parliament has agreed that the intelligence agencies should be accountable for the way in which they discharge their responsibilities and, except where secrecy demands otherwise, that accountability should be transparent.

There are multiple ways in which agencies are held accountable for their activities, including by Parliament acting through the Senate Estimates Committees, by the Parliamentary Joint Committee for Intelligence and Security (PJCIS),[4] by the Australian National Audit Office, the Ombudsman and the Courts and, pertinently, by the Inspector-General of Intelligence and Security. Of these, only the Inspector-General has a specific legislated mandate which gives both breadth and depth to its work. The objects of the *IGIS Act*[5] make the line of accountability clear. In the main, those objects are:

1. *to assist Ministers in the oversight and review of the legality and propriety of the activities of the Australian Intelligence Agencies and their consistency with human rights.*
2. *to assist the Government in assuring the Parliament and the people that intelligence and security matters relating to Commonwealth agencies, especially the activities of intelligence agencies, are open to scrutiny.*

The ultimate accountability of the AIC to the Government and its Ministers was clear from these objectives. It is for the Government to determine whether, considering all advice received, to provide assurance about the functioning of the agencies. It is for the Inspector-General to assist by providing advice.[6] The Inspector-General does so by exercising the position's formidable powers with courage and discretion, and by fostering a culture of compliance. As is the case with administrative review, the Inspector-General can make recommendations to the agencies but has no powers of enforcement. In accordance with the *IGIS Act* the recommendations will be known to the Ministers and may be made known to the public in whole or in a redacted version. However, the power of enforcement lies with the Government supported, if new legislation is required, by the Parliament.

Promoting Trust in the Inspector-General: The Importance of Independence

Public confidence in the Inspector-General's assurances as to the legality and propriety of agencies' conduct is commensurate with trust in its oversight. The secrecy that attends much of the Inspector-General's work has the potential to erode trust; this tension between secrecy and trust makes the independence of the Inspector-General of central importance. The Inspector-General must be free from political pressure, bias or undue influence from any source, including from the Government and from the agencies within its jurisdiction and should be seen to be so. Independence gives credibility to its assessment of, and recommendations to, the agencies and to Government, and also gives legitimacy to the agencies' past and future activities.

Structural and functional features of the *IGIS Act*, coupled with the usual powers of the head of a public service agency, assist in securing the independence of the Inspector-General. Among them are:

- security of tenure for the Inspector-General;
- secure premises to which it controls entry;
- a separate budgetary appropriation;
- the right to select its own staff;

[4] The powers of which are set out in the *Intelligence Services Act 2001* (Cth).

[5] *Inspector-General of Intelligence and Security Act 1986* (Cth) s 4.

[6] This is not to deny that the Government has many other sources of assistance including heads of agencies, State and Federal Police forces and the Defence Forces to name a few.

- unfettered access to premises and records of agencies;
- power to subpoena production of documents and examine persons under oath or affirmation;
- the Inspector-General's power to determine priorities, including when and how inspections and complaints should be handled and whether inquiries should be initiated and pursued; and
- The restriction that only the Prime Minister can require the Inspector-General to inquire into a matter.

In the short space available to me here I do not propose to discuss these powers or the manner of their use. They are fully described in successive Annual Reports available on the IGIS website.[7] It is sufficient to say that careful and targeted inspections followed, if necessary, by investigation of issues and a formal inquiry, can be very effective in revealing breaches of law and propriety. As Inspector-General I and the staff of my office needed to understand the purpose and functions of each agency as well as its policies, operational planning, risk management and approach to compliance. In this I was greatly assisted by the agencies, all of whom were generous not only in responding to our needs but also in anticipating them.

In addition to directly overseeing agency activities, there are several other ways in which the Inspector-General can help promote public confidence in the legality and propriety of the Intelligence agencies' activities. One is an active outreach program, to which in my time the Inspector-General personally and a significant number of IGIS Office staff contributed. That program was directed to explaining how the Office discharges its responsibilities, achieved through lectures to university students, to the courts, to the public and by meetings with specific groups such as Civil Reference groups. Another component of confidence building is the frequent appearance of the Inspector-General before Parliamentary committees such as Senate Estimates Committees and, most importantly, before the PJCIS. In particular, the Inspector-General can assist the PJCIS by providing written submissions in relation to a matter under consideration.

It is a longstanding convention that the Inspector-General does not comment on Government policy other than on policies that may compromise the independence of the office. Despite this constraint, it is possible to assist the deliberations of parliamentary committees by drawing attention in written submissions to the implications of proposed policy changes for the work of oversight, and to make suggestions about how oversight of any new powers might be facilitated; for example, requiring the agency to give the Inspector-General prior notice of its exercise of an infrequently used power. For infrequently used powers, prior notification can save IGIS Office resources by focusing oversight at that point. Failure to notify would be picked up in due course and, depending on context and reason, appropriate action taken. In recent years, the huge volume of legislative change in the intelligence area has made writing these submissions an increasingly time-consuming exercise for the Inspector-General, but one which, I am informed, is valuable for the PJCIS.

A Culture of Compliance

When I was appointed in 2015 the Office had 16 staff. My predecessors recognised that an office of this size could, at best, provide only a finely targeted review of six intelligence agencies. Following a recommendation of the 2017 Independent Intelligence Review I was given funding and instructions to increase staffing over a three-year period to 50, to enable the IGIS Office to extend its oversight to four additional agencies. Difficulties in finding suitable staff and the considerable time it took to obtain security clearances made for slow progress in recruitment but even if we had succeeded in rapidly recruiting the recommended number, the staff of the IGIS Office would still have been vastly outnumbered by the agencies' staff. There can be no doubt that additional staff would make a valuable contribution, especially as the complexity of the Inspector-General's oversight increases with the agencies' use of increasingly sophisticated technology and with any extension to the Inspector-General's jurisdiction should that eventuate. Nevertheless, there will always be a significant disparity between the size of the intelligence agencies and the IGIS Office.

[7] <www.igis.gov.au>.

In the circumstances, maintenance of relevant standards and compliance of agency conduct with law and regulations are best served by the Inspector-General and the agencies working co-operatively; in short, for there to be a culture of compliance. The benefit of this approach is not limited to addressing the disparity in the size of the parties; co-operation also leads to better understanding of the work of reviewed and reviewer and many other oversight offices also rely to a greater or less extent, on working co-operatively with the agencies they oversee. In my view the secrecy attendant on almost all its work makes a culture of co-operation essential for the Inspector-General to discharge its statutory responsibilities even while I acknowledge that the same secrecy can also give rise to concern that the relationship is so close as to compromise independence.

Adversarial and Administrative Review

The argument I am making here is here centres on a distinction – one I consider crucial – between administrative and adversarial review. Adversarial review occurs through a multiplicity of institutions in our society, the most important being the courts. The constitutional concept of judicial power captures the essential features of adversarial review well: a dispute about rights and obligations arising solely from the operation of the law on past events or conduct.[8] This concept of judicial power may raise difficult questions about the difference between the application of law and the development of law; however, that debate is not my interest here.

The features of adversarial review on which I want to focus are first that in most forms it operates *post hoc*, on events that have already occurred; and second, that it involves *enforcement of decisions* which almost inevitably occurs over the objections of at least one party. Adversarial review is an essential part of our constitutional system, to which all institutions are subject. It is an essential element of the rule of law and as necessary in national security as it is anywhere else. The simple proposition I am putting here is that adversarial review is not the whole story.

Administrative review or oversight occurs within the Executive; it involves one office or agency within the Executive overseeing another and occurs in a multiplicity of forms and institutions.[9] In contradistinction to adversarial review, administrative oversight makes recommendations not orders; it may have extensive powers to enforce the process of review, but it does not have power to enforce acceptance or implementation of its recommendations. Among the most important advantages of administrative review is that it can reach into the future: it can focus on proposed activities and policies as well as past occurrences. Administrative oversight may involve consultation on policies and issues relevant to future operations in a way that is designed to *prevent* illegal or improper activities and *to promote* a culture that internalises legality and propriety into the structure of decision-making. In doing so, it reaches into decision-making and therefore can encourage compliance in a way that post-hoc review cannot.

Typically, administrative oversight looks neither wholly to the past nor solely to the future. In many cases, and certainly in the case of the Inspector-General's oversight, it also extends beyond legality to propriety. In addition to addressing events that have already occurred or exercising a power to hear complaints, it often involves engagement with operational officers before there has been any breach of applicable law or standards. In a particular case, the recommendations that flow from administrative oversight can give the head of an intelligence agency the benefit of the Inspector-General's view of the relevant issues. This can make it harder to ignore carefully reasoned recommendations and easier for the agency to weigh operational imperatives against the issues of legality and priority. Administrative oversight can, at its best, assist an agency to avoid any issues of legality or propriety, while still doing all it can to respond to operational challenges. Beyond the instant case, reviewing the past has the power to influence the future. It is at this point that active conversations with the intelligence agencies can, in my experience, lead to improved compliance but also improved regulation and realistic standards. The agency is not just a recipient of a decision but has its own stake in an agreed path to compliance.

[8] *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188–189.

[9] Royal Commissions are a familiar example.

The absence of enforcement powers combined with healthy realism about the propensity of governments to avoid accountability invite scepticism and leave many convinced that administrative oversight achieves little or nothing. In the realm of national intelligence and security the secrecy that necessarily attends the work makes it difficult to rebut that view allowing it to be more persuasive, undermining trust and confidence in the Inspector-General's independence and competence. There are those who genuinely believe that secrecy is so fundamentally inconsistent with liberal democracy that little if any secrecy is acceptable; that is a view that needs to be fought out in the political arena. For those primarily involved in adversarial review, whether by active involvement or study, the contrast between it and administrative oversight is stark and the scepticism is likely to be profound. In this area as in many others, scepticism is valuable although cynicism is not,[10] but scepticism is not an end in itself. The end must be good governance, and the safety of the Commonwealth. In pursuit of that end, administrative review of the kind that I describe here has many advantages.

For administrative review to work well, however, it must be independent and where possible must be seen to be independent. It also must be informed. The Inspector-General's comments must be based on understanding of the agency's activities and in no circumstances are they to include legal advice. It must be clear that the Inspector-General's view of the legalities and proprieties of the proposed operation is an opinion. It is essential to make clear, more than once if necessary, that the agency must get its own legal advice and may proceed in accordance with that advice even if it differs from the Inspector-General's opinion. Depending on the context, the Inspector-General may also seek a further opinion but, if unpersuaded, is not bound to compromise its independence by accepting that view. As a practical matter this will rarely if ever occur as informed discussion between those who value each other's remit, generally leads to consensus. If there is a difference of opinion that cannot be resolved it is essential that the reviewing agency be empowered, and be prepared to insist, on its own judgment as to the standards appropriate for the overseen activity to be compliant. Provided care is taken to avoid giving legal advice to the reviewed agency, it leaves the agency free to get its own advice and to maintain an opinion different from that of the reviewer. Resolution of any conflict will then be in the decision of the ultimately accountable entity (the Government) which will have the benefit of the differing views of reviewer and reviewed.

In an area as complex as national security, myriads of small decisions must be made daily; they are unlikely to come to the attention of those focused on post-hoc review and legal enforcement. Officers involved in surveillance activity might, for example, make many decisions about the scope of the surveillance, the personnel involved, the appropriate technology and the warrants required for the specific activity. Others may make important decisions about the provision and use of weapons, including when weapons are permitted and what weapons should be involved. Inevitably, some of those decisions raise difficult issues of compliance. It may be that there is a way to resolve the difficulty by taking a different route to the operational goal, or by modifying the goals. Either way, the co-operation possible under administrative oversight serves to alert agencies to these issues. Importantly, it also gives the agency being reviewed a stake in compliance and allows for more efficient use of its resources. The opportunity to discuss prospective operations with an objective, informed and independent reviewer can significantly contribute to agency compliance and promote efficient use of its resources.

Here I need to inject a note of caution. My experience is that the security agencies value this approach and, perhaps for this reason, the Inspector-General is most vulnerable at this point to a charge of being too close to the agencies and thus to have compromised the independence of the office. To protect its independence the Inspector-General's comments must be based on understanding the agency's activities but in no circumstances are they to include legal advice. Administrative review is best understood as a powerful partner to adversarial review. It cannot replace strong judicial or other adversarial oversight. However, developing a culture of compliance and legality that may resolve inter-branch conflict is one

[10] Here I am distinguishing between the cynic who has a concluded view (which may or not be supported by information) and is not interested in listening to any contrary analysis; and the sceptic who may lean towards a critical (even a profoundly critical) conclusion but is still willing to consider other views, even if ultimately unpersuaded.

of the keys to good governance in this area. It is a mistake to think that oversight is an all or nothing proposition.

Drawing on the above in relation to the intelligence agencies while I was Inspector-General, I can say with confidence that at no time did any of the agency heads raise resistance to the desirability of a culture of compliance. On the contrary, there were many hallmarks of a genuine commitment from agency leadership, including the establishment of units dedicated to compliance and staffed with both administrative and operational officers. These units were allocated resources to manage the questions that would inevitably arise, to raise awareness throughout an agency of the importance of working with this oversight, and recognition of the role such oversight could play in making efficient use of resources. Officers from the compliance unit would be involved in operations as an essential part of the planning and execution of those operations. This made compliance integral to the operation, not just an administrative burden. In due course the compliance unit might also consider the role of secrecy in limiting trust and whether lifting the secrecy veil on some aspects of the agency's work could increase transparency and increase trust. While, for all agencies, this is a work in progress, all have made considerable progress, and some have taken very considerable strides.

Summary

Looking back on these years I formed the view that, for me, three elements were critical to meet the Inspector-General's mission and the effective exercise of the position's powers. I am assuming of course the good will, competence and integrity on all sides, which I was fortunate to enjoy. The three elements were:

- All involved, from the citizen to the prime minister, from a new recruit to the IGIS Office to the Inspector-General, need to understand the flow of accountability. It is important, in following the flow of accountability, to understand the powers the Inspector-General has and does not have, to understand that there will always be a tension between secrecy and the rights of individual citizens. That tension cannot be eliminated; it must be managed.
- The Inspector-General must be independent of influence, bias and interference; and conversely that independence must be used to optimise the oversight that is the purpose of the position. That independence is under constant pressure as the work of the security agencies adapts to modern realities. Maintaining that independence requires constant vigilance.
- To be effective administrative oversight of intelligence agencies must operate within a culture of compliance. This will promote the legality and propriety of the agencies' activities and allow the IGIS Office to focus its limited resources on ensuring that the work of the agencies always meets their purpose – the security and welfare of the Australian community.

Mechanisms for Reviewing and Monitoring National Security Laws: The UK and Australia Compared

Dr Jessie Blackbourn*

The United Kingdom and Australia each have a strong mechanism for reviewing the necessity, proportionality and operation of national security laws, although the latter has more explicit statutory basis and powers. After each office escaped abolition, their continuing role now seems clear, indeed the Republic of Ireland recently introduced a Bill for an Independent Examiner of Security Legislation, drawing on elements of each model.

INTRODUCTION

In March 2014, then Australian Prime Minister, Tony Abbott, announced that as part of plans to reduce "red tape" in government, the office of the Independent National Security Legislation Monitor (INSLM; Independent Monitor), established by statute in 2010[1] and filled since April 2011,[2] would be abolished.[3] The *Independent National Security Legislation Monitor Repeal Bill 2014* (Cth) was referred to the Senate Standing Committee for Legal and Constitutional Affairs. As part of its inquiry, the Committee called for submissions. In April that year, David Anderson QC, then holder of the equivalent UK office of Independent Reviewer of Terrorism Legislation (IRTL; Independent Reviewer), submitted evidence as to the value of mechanisms for reviewing national security laws. Of his own office, he stated: "It has never, so far as I am aware, been suggested that the office is unnecessary or should be abolished. On the contrary, its value is frequently asserted both in Parliament and in the Courts, as well as by NGOs, academics, community groups and Government."[4] This was perhaps tempting fate as in July 2014, the UK government announced its plans to abolish the office of IRTL and replace it with an Independent Privacy and Civil Liberties Board. Ultimately, both offices were reprieved, but for a few months in mid-2014, it looked as though Australia's short, and the UK's much longer,[5] history of independent review and monitoring of national security laws might come to an end. In the years since the proposed abolition of the INSLM and IRTL, both offices have experienced a period of change and development. This article examines the implications of these changes for the provision of independent review and monitoring of national security laws in Australia and the United Kingdom. It focuses on changes to the mandate and reporting requirements of both offices since 2014 but draws on a 10-year period for its frame of reference. This coincides with the appointment of David Anderson QC as IRTL in February 2011 (replacing the previous Independent Reviewer, Lord Alex Carlile QC, who had held the position since September 2001), and the appointment of Bret Walker SC as the inaugural INSLM in April 2011. The article proceeds as follows. Part I provides a brief history of the establishment of the offices of IRTL and INSLM and sets out their position as they existed prior to their proposed abolition. Part II outlines the changes made to the mandate and reporting requirements of the two offices since 2014. Part III then

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[1] *Independent National Security Legislation Monitor Act 2010* (Cth).

[2] Bret Walker AO SC was appointed to the role of INSLM on 21 April 2011.

[3] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2014, 2355 (Tony Abbott).

[4] David Anderson QC, Submission to the Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *An Inquiry into the Provisions of the Independent National Security Legislation Monitor Repeal Bill 2014* <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/National_Security_Monitor/Submissions>.

[5] The first person appointed to review the UK's anti-terrorism laws on an annual basis was Sir Cyril Philips. His first report was published in 1984.

explores the implications of the changes on these mechanisms for reviewing and monitoring national security laws in Australia and the United Kingdom.

I. Establishing the IRTL and INSLM: A New Era of Monitoring and Review

The United Kingdom has a much longer history of national security and counter-terrorism laws than Australia. In fact, Australia had no federal anti-terrorism laws on the statute books until 2002,[6] when it was prompted by UN Security Council Resolution 1373 to enact legislation in the aftermath of the 11 September 2001 terrorist attacks.[7] Since then, Australia has not been shy in enacting national security laws; in excess of 80 such laws can be found on the Commonwealth and State and Territory statute books.[8] Parts of the United Kingdom, on the other hand, have had national security laws based on wartime powers since 1922.[9] The first contemporary counter-terrorism laws were enacted by the UK Parliament in 1973 in respect of Northern Ireland,[10] and 1974 in respect of the whole of the United Kingdom.[11] Designed as "emergency" and "temporary" legislation, with sunset clauses providing for their expiry after an initial six-month or one-year period,[12] these laws were consistently renewed by Parliament throughout the 20th century until they were replaced by the enactment of the UK's first permanent national security law, the *Terrorism Act 2000* (UK). Despite these very different histories of *enacting* counter-terrorism laws, the United Kingdom and Australia now share a remarkably similar experience of establishing offices to *review* these laws.

In the United Kingdom, the establishment of the IRTL[13] was preceded by a number of ad hoc reviews of national security practices[14] and counter-terrorism laws[15] in the 1970s and early 1980s, not always by lawyers. One of these, a review of the operation of the *Prevention of Terrorism (Temporary Provisions) Act 1976* by Earl Jellicoe, recommended that a new version of the legislation should be enacted with

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[6] George Williams, "A Decade of Australian Anti-terror Laws" (2011) 35(3) *Melbourne University Law Review* 1136, 1139–1140.

[7] SC Res 1373, UN DOC 2001 S/RES/1373 (28 September 2001). See also: Williams, n 6.

[8] Nicola McGarrity and Jessie Blackbourn, "Australia Has Enacted 82 Anti-terror Laws Since 2001. But Tough Laws Alone Can't Eliminate Terrorism", *The Conversation*, 29 September 2019.

[9] The *Civil Authorities (Special Powers) Act (Northern Ireland) 1922* was enacted by the recently established Northern Ireland Parliament in response to sectarian violence following the partition of Ireland. The legislation was modelled on the Restoration of Order in Ireland Acts, and their predecessor, the Defence of the Realm Acts.

[10] *Northern Ireland (Emergency Provisions) Act 1973* (UK).

[11] *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK).

[12] *Northern Ireland (Emergency Powers) Act 1973* (UK) s 30(2); *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK) s 12(1). Both laws were renewed at the end of their sunset clauses and then re-enacted on occasion before being repealed by the *Terrorism Act 2000* (UK).

[13] In its earliest iteration, the Independent Reviewer of Terrorism Legislation was not known by this title, but it has been retrospectively applied to describe the person who was appointed to review, on an annual basis, first the *Prevention of Terrorism (Temporary Provisions) Acts* and subsequently the *Northern Ireland (Emergency Provisions) Acts*. In fact, the term "Independent Reviewer of Terrorism Legislation" was not actually used in statute until 2009: *Coroners and Justice Act 2009* (UK) ss 117(2), 117(5). The term was first used by Lord Carlile, who was appointed to review the *Terrorism Act 2000* (UK) in September 2001 in his first report on that Act. He stated: "In the autumn of 2001 I was appointed as Independent Reviewer of the *Terrorism Act 2000*." Lord Carlile, *Report on the Operation in 2001 of the Terrorism Act 2000* (2002) 1.

[14] See, eg: Sir Edmund Compton, *Report of the Inquiry into Allegations Against the Security Forces of Physical Brutality in Northern Ireland Arising Out of Events on the 9th August 1971*, Cmnd 4823 (1971); Lord Parker, *Report of the Committee of Privy Councillors Appointed to Consider Authorised Procedures for the Interrogation of Persons Suspected of Terrorism*, Cmnd 4901 (1972); Lord Widgery, *Report of the Tribunal Appointed to Inquire into the Events on Sunday, 30 January 1972, Which Led to Loss of Life in Connection with the Procession in Londonderry on That Day*, HL 101, HC 220 (1972).

[15] These included: Lord Diplock, *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland*, Cmnd 5185 (1972); Lord Gardiner, *Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland*, Cmnd 5847 (1975); Lord Shackleton, Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976, Cmnd 7324 (1978); Earl Jellicoe, Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976, Cmnd 8803 (1983).

a five-year life-span, after which, Parliament should be given the opportunity to enact new primary legislation if it considered it necessary to do so,[16] and that "re-enactment should be preceded by a review of the Act's operation and consideration of suggested amendments".[17] When the new legislation, the *Prevention of Terrorism (Temporary Provisions) Bill 1984*, was debated in Parliament, government spokesman Lord Elton accepted this recommendation and announced that in addition to a five-year sunset clause, the legislation would also be subject to annual renewal which would be preceded by a review of the Act.[18] Sir Cyril Philips, who had recently chaired a Royal Commission on Criminal Procedure,[19] was the first person appointed to carry out the review, and in 1988, the review was extended to the *Northern Ireland (Emergency Provisions) Acts*.

Similarly, in Australia, albeit more than two decades later, the office of the INSLM was established following the completion of three ad hoc reviews of Australia's first national security laws. The first of these was the Security Legislation Review Committee (SLRC). In addition to making recommendations about the legislation under review, it also proposed that either an Independent Reviewer similar to the United Kingdom[20] should be appointed to review the laws,[21] or "the government establish a legislative based timetable for continuing review of the security legislation by an independent body, such as the SLRC, to take place within the next three years".[22] The report fed into a review of the same legislation by the Parliamentary Joint Committee on Intelligence and Security (PJCIS).[23] Noting "the fragmented nature of review so far",[24] the PJCIS highlighted that the "limited mandate of each review mechanism has prevented a more holistic assessment of the terrorism law framework".[25] To overcome this, the PJCIS recommended that a "single independent appointee, rather than periodic review by an independent committee" would be the most effective review mechanism.[26] The third ad hoc review was an inquiry into the Australian Federal Police's (AFP) investigation into Dr Mohamed Haneef, conducted by the Hon John Clarke QC in 2008.[27] It also recommended that consideration be given to establishing an "independent reviewer of Commonwealth counter-terrorism laws".[28] A year later, the *National Security Legislation Monitor Bill 2009* (Cth) was introduced into Parliament, and following various amendments, including the inclusion of the word "Independent" in the name of the office, it was enacted as the *Independent National Security Legislation Monitor Act 2010* (Cth).[29]

Ad hoc reviews conducted at the request of the UK and Australian Governments shortly after the enactment of their first anti-terrorism laws both paved the way for, and proposed, more formal mechanisms of review. Within a decade of enacting their national security laws, both the United Kingdom and Australia had established mechanisms for the independent annual review and monitoring of those laws. However, while the two offices share some similarities in their establishment, and at their core have the same basic

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[16] Earl Jellicoe, Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976, Cmnd 8803 (1983) 6.

[17] Jellicoe, n 16, 7.

[18] United Kingdom, *Parliamentary Debates*, House of Lords, 8 March 1984, Vol 449, cols 404–406.

[19] Sir Cyril Philips, *Beyond the Ivory Tower* (The Radcliffe Press, 1995).

[20] Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 202–203.

[21] Security Legislation Review Committee, n 20, 6.

[22] Security Legislation Review Committee, n 20, 201.

[23] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter-Terrorism Legislation* (2006).

[24] Parliamentary Joint Committee on Intelligence and Security, n 23, 16.

[25] Parliamentary Joint Committee on Intelligence and Security, n 23, 18.

[26] Parliamentary Joint Committee on Intelligence and Security, n 23, 20.

[27] John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008).

[28] Clarke, n 27, 255–256.

[29] This was pre-empted by two private members' Bills, the *Independent Reviewer of Terrorism Laws Bill 2008* (Cth), and the *Independent Reviewer of Terrorism Laws Bill 2008 (No 2)* (Cth). The former was removed from the notice paper after receiving very little support in the House of Representatives. The latter passed the Senate but did not attract support from the government in the House of Representatives.

function (to review their respective jurisdictions' national security laws), they differ markedly in a number of key aspects. The main one of these is that while the Australian office of the INSLM is established by a single statute,[30] which sets out the office's appointment process, mandate, terms of reference, reporting requirements, and powers, the UK's mechanism for review has no single statutory basis of authority, no statutory powers of compulsion and no statutory requirement for reports to be made public in a set timeframe. The IRTL's appointment process, mandate, terms of reference, reporting requirements, and powers can be found across a multitude of statutes, Government statements in Parliament, and other informal practices.

The process for appointing the INSLM is laid out in the *Independent National Security Legislation Monitor Act 2010* (Cth). The INSLM is appointed by the Governor-General[31] on the recommendation of the Prime Minister who must first have consulted with the Leader of the Opposition in the House of Representatives.[32] The appointment is for a term not exceeding three years[33] and the INSLM can be reappointed only once.[34] The Act provides for the Prime Minister to be able to appoint an acting INSLM if the position becomes vacant (through resignation or termination for example), or if the INSLM is "absent from duty or from Australia" or is "unable to perform the duties of the office".[35] The Monitor may resign,[36] or their appointment may be terminated by the Governor-General in a specified set of circumstances.[37] In contrast, until recently, the procedure for appointing the Independent Reviewer in the United Kingdom was something of an informal affair. David Anderson QC described the manner in which he was appointed to the position in 2011 in less than complimentary terms:

> I was offered the part-time post of Independent Reviewer by three strangers. They gained access to my Chambers by subterfuge, having told my clerks that their employer, the Home Office, sought my legal advice. Once in the conference room, they revealed their identities and conveyed the wish of the Home Secretary – to whom I had no connection or political affiliation – that I should accept the job … That intriguing, if indefensible, method of appointment will not be repeated. In 2013 the post of Independent Reviewer was reclassified as a public appointment.[38]

This change means that as a public appointment, the post of Independent Reviewer must now be advertised, and an appointment made following a competitive process.[39] Once the IRTL and INSLM have been appointed, they must work according to their distinct mandates, terms of reference, reporting requirements, and powers.

When the office of the INSLM was established, the legislation within its mandate was set out in the *Independent National Security Legislation Monitor Act 2010* (Cth). It included "Australia's counter-terrorism and national security legislation",[40] defined exhaustively in s 4 of the Act,[41] as well as any "other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation".[42] In contrast, there was originally no single statutory basis for the mandate of

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[30] *Independent National Security Legislation Monitor Act 2010* (Cth).

[31] *Independent National Security Legislation Monitor Act 2010* (Cth) s 11(1).

[32] *Independent National Security Legislation Monitor Act 2010* (Cth) s 11(2).

[33] *Independent National Security Legislation Monitor Act 2010* (Cth) s 12(1).

[34] *Independent National Security Legislation Monitor Act 2010* (Cth) s 12(2). None have served a second term, and the first and third INSLM made explicit that seeking a second term would be inconsistent with their independence.

[35] *Independent National Security Legislation Monitor Act 2010* (Cth) s 20(1).

[36] *Independent National Security Legislation Monitor Act 2010* (Cth) s 18.

[37] *Independent National Security Legislation Monitor Act 2010* (Cth) s 19.

[38] David Anderson, "The Independent Review of UK Terrorism Law" (2014) 5(4) *New Journal of European Criminal Law* 432, 434–435.

[39] Cabinet Office, *Governance Code on Public Appointments* (December 2016). See also Home Office, *Independent Reviewer of Terrorism Legislation: Recruitment Information Pack August 2016* (2016) <https://publicappointments.cabinetoffice.gov.uk/wp-content/uploads/2016/08/160805-Independent-Reviewer-of-Terrorism-Legislation-candidate-pack.pdf>.

[40] *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1)(i).

[41] *Independent National Security Legislation Monitor Act 2010* (Cth) s 4.

[42] *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1)(ii).

the UK's Independent Reviewer. In fact, until 1998, there was no statutory basis at all for the review of the UK's counter-terrorism laws; the mandate for the reviewer came from Lord Elton's statement to Parliament in 1984.[43] The *Criminal Justice (Terrorism and Conspiracy) Act 1998* (UK), included a provision requiring the Secretary of State to "lay before both Houses of Parliament at least once in every 12 months a report on the working of this Act".[44] The then Home Secretary, Jack Straw, simply continued to lay before parliament the reports of the reviewer of the *Northern Ireland (Emergency Provisions) Acts* and the *Prevention of Terrorism (Temporary Provisions) Acts*, in fulfilment of this new statutory requirement.[45] When these Acts were replaced by the *Terrorism Act 2000* (UK), a similar review clause was inserted.[46] The specific wording of the review clause meant that the requirement to provide a report on the Act applied only to the *Terrorism Act 2000* (UK). In the aftermath of the September 11 terrorist attacks, the UK Parliament enacted new counter-terrorism legislation, which would not fall automatically within the mandate of the IRTL. If Parliament wanted the legislation to be reviewed, it needed to include review clauses in each piece of legislation. It did so for Pt 4 of the *Anti-terrorism, Crime and Security Act 2001* (UK),[47] *Prevention of Terrorism Act 2005* (UK),[48] Pt 1 of the *Terrorism Act 2006* (UK),[49] the *Terrorist Asset-Freezing etc Act 2010* (UK),[50] and the *Terrorism Prevention and Investigation Measures Act 2011* (UK).[51] These review clauses were more explicit than the one contained within the *Terrorism Act 2000* (UK) in that they stated that a person should be appointed to "review the operation of" the relevant measures.[52] Lord Carlile, who had been appointed to review the *Terrorism Act 2000* (UK) in September 2001, was simply appointed to review each of these laws as well.

In addition to the difference in the mandates of the two offices, the terms of reference of the INSLM and IRTL are also quite different. The *Independent National Security Legislation Monitor Act 2010* (Cth) requires the INSLM to review the operation, effectiveness and implications of Australia's counter-terrorism and national security laws, their consistency with international obligations, their appropriateness at protecting the rights of individuals, and whether they are being used for matters unrelated to terrorism and national security.[53] The INSLM "must give particular emphasis to provisions of that legislation that have been applied, considered or purportedly applied by employees of agencies that have functions relating to, or are involved in the implementation of, that legislation during that financial year or the immediately preceding financial year".[54] In addition, both the Prime Minister[55] and the PJCIS may refer a matter to the INSLM for review.[56] In contrast, there are no statutory terms of reference for the IRTL. They can instead be found in the letters of appointment issued to each reviewer, as well as in Lord Elton's statement to the House of Lords in 1984.[57] They focus on the operation of the legislation: "It would be his task to look at the use made of the powers under the Act. To consider,

[43] United Kingdom, *Parliamentary Debates*, House of Lords, 8 March 1984, Vol 449, cols 404–406.

[44] *Criminal Justice (Terrorism and Conspiracy) Act 1998* (UK) s 8.

[45] See JJ Rowe's letter to Home Secretary Jack Straw at the start of his *Report on the Operation in 1999 of the Prevention of Terrorism (Temporary Provisions) Act 1989* (2000).

[46] *Terrorism Act 2000* (UK) s 126.

[47] *Anti-terrorism, Crime and Security Act 2001* (UK) s 28.

[48] *Prevention of Terrorism Act 2005* (UK) s 14.

[49] *Terrorism Act 2006* (UK) s 36.

[50] *Terrorist Asset-Freezing etc Act 2010* (UK) s 31.

[51] *Terrorism Prevention and Investigation Measures Act 2011* (UK) s 20.

[52] See, eg, *Anti-terrorism, Crime and Security Act 2001* (UK) s 28(1).

[53] *Independent National Security Legislation Monitor Act 2010* (Cth) s 6.

[54] *Independent National Security Legislation Monitor Act 2010* (Cth) s 9.

[55] Since 2018, the Attorney-General may also refer a matter to the INSLM: *Home Affairs and Integrity Agencies Legislation Amendment Act 2018* (Cth) s 5.

[56] *Independent National Security Legislation Monitor Act 2010* (Cth) ss 7, 7A.

[57] Carlile, n 13, 5.

for example, whether he saw emerging any change in the pattern of their use which required to be drawn to the attention of Parliament."[58] An attempt to incorporate terms of reference for the IRTL into the *Terrorism Act 2000* (UK),[59] requiring not only review of the operation of the legislation but also its effectiveness, was explicitly rejected by then Home Secretary, Charles Clarke.[60]

Both the INSLM and IRTL have similar reporting requirements. The INSLM must provide an annual report on the performance of their functions to the Prime Minister "as soon as practicable after 30 June in each financial year and, in any event, by the following 31 December".[61] Similarly, the IRTL is required to produce an annual report on any of the legislation which provides for a review.[62] Reports by the INSLM must be tabled by the Prime Minister, and since the 2018 machinery of government changes, by the Attorney-General, in the Parliament within 15 parliamentary sitting days.[63] Whereas in the United Kingdom, the Secretary of State is required to table any report submitted by the Independent Reviewer "on receiving it", which ideally means as soon as practicable, though there have been some significant delays. The main difference in reporting requirements is that the *Independent National Security Legislation Monitor Act 2010* (Cth) provides a regime to ensure that material that cannot be publicly disclosed is not provided in the report to Parliament. In instances in which this type of material is contained in the INSLM's report, they must provide two reports: a classified report, which is submitted to the Prime Minister, and a declassified report, which can be tabled in the Parliament.[64] A safeguard is built into the Act; material will only be redacted from the reports by the INSLM if they consider that the report contains information that cannot be disclosed by reference to familiar grounds which would attract public interest immunity or Crown privilege.[65]

The issue of classified material also arises in relation to the powers of the INSLM and the IRTL. The INSLM has been granted significant powers to access information under the *Independent National Security Legislation Monitor Act 2010* (Cth). The INSLM may hold a hearing and summon a person to attend,[66] witnesses at a hearing may be required to take an oath or affirmation,[67] and the INSLM may "request, by written notice, a person: (a) to give the Monitor the information referred to in the notice; or (b) to produce to the Monitor the documents or things referred to in the notice".[68] Furthermore these powers are coercive; penalties apply for failing to produce a document or thing or for failing to provide the information requested.[69] Finally, they do not just apply to internal government material, rather they are Royal Commission type powers of general application. In contrast, the UK's IRTL has no statutory powers to access information or compel witness testimony; instead they must simply request the information required from the intelligence and security services, as well as Government departments and Ministers. This access was assured in the original mandate provided for the office by Lord Elton in

[58] United Kingdom, *Parliamentary Debates*, House of Lords, 8 March 1984, Vol 449, cols 405–406.

[59] House of Commons, Public Bills Committee Standing Committee D, 8 February 2000, *Terrorism Bill*, "New Clause 1 Annual Report".

[60] House of Commons, Public Bills Committee Standing Committee D, 8 February 2000, *Terrorism Bill*. In practice, reviewers have tended to review the effectiveness of the legislation, in addition to its mere operation.

[61] *Independent National Security Legislation Monitor Act 2010* (Cth) s 29(2).

[62] See, eg, the original s 126 of the *Terrorism Act 2000* (UK), or the original s 20 of the *Terrorism Prevention and Investigation Measures Act 2011* (UK).

[63] *Independent National Security Legislation Monitor Act 2010* (Cth) s 29(5).

[64] *Independent National Security Legislation Monitor Act 2010* (Cth) s 29(2A). The first INSLM wrote a single classified annex, the third INSLM, two such.

[65] *Independent National Security Legislation Monitor Act 2010* (Cth) s 29(2A).

[66] *Independent National Security Legislation Monitor Act 2010* (Cth) ss 21–22.

[67] *Independent National Security Legislation Monitor Act 2010* (Cth) s 23.

[68] *Independent National Security Legislation Monitor Act 2010* (Cth) s 24(1).

[69] *Independent National Security Legislation Monitor Act 2010* (Cth) s 25(3), (4).

1984 in the House of Lords,[70] and appears to have worked in practice, but there appears much to be said for powers of compulsion even if they need not be used.

Despite the many differences in how the IRTL and INSLM are regulated; with the INSLM a statutory construction and the IRTL something a bit more nebulous, in practice both offices provide for the independent review or monitoring of national security and counter-terrorism laws in their respective jurisdictions. They do so through full access to relevant information and provide reports on an annual basis. Following their attempted abolition in mid-2014, a number of changes were made to both the offices of the IRTL and the INSLM.

II. Updating the IRTL and INSLM

The distinctly ad hoc and fragmented nature of the independent review of terrorism laws in the United Kingdom is a product of the way in which the office was established and evolved from the mid-1980s, as outlined above. The *Counter-Terrorism and Security Act 2015* (UK) overhauled the office of the IRTL, though it still did not provide a single statutory basis for independent review in the United Kingdom, it did consolidate and simplify the position to a significant extent. It made key changes to the mandate of the office, and its reporting requirements.

The *Counter-Terrorism and Security Act 2015* (UK) expanded the mandate of the IRTL to include review of Pts 1 and 2 of the *Anti-terrorism, Crime and Security Act 2001* (UK); the whole of the *Counter-Terrorism Act 2008* (UK); and Pt 1 of the *Counter-Terrorism and Security Act 2015* (UK).[71] A separate mandate to review the *Terrorist Asset-Freezing etc Act 2010* (UK) and *Terrorism Prevention and Investigation Measures Act 2011* (UK) was retained in those Acts.[72] The most significant change to the mandate of the office was in the timing of reviews. While previously the IRTL was required to review the operation of every Act with a review clause on an annual basis, the office now has the discretion to select which aspects of the legislation to review each year, apart from the *Terrorism Act 2000* (UK), which as the foundation of the UK's anti-terrorism regime, must still be reviewed annually.[73] Where the IRTL conducts a review under one of these pieces of legislation, a report must be submitted to the Home Secretary, or in the case of the *Terrorist Asset-Freezing etc Act 2010* (UK), to the Treasury, who must lay a copy of that report in Parliament on receiving it.

The Australian office of INSLM has also seen an expansion to its mandate and amendments to its reporting requirements since 2014. In particular, the Australian Parliament has amended the definition of "counter-terrorism and national security legislation" in s 4 of the *Independent National Security Legislation Monitor Act 2010* (Cth), to include ss 33AA, 35 and 35A of the *Australian Citizenship Act 2007* (Cth), which provide for citizenship loss in the terrorism context,[74] as well as Pt 2 of the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth).[75] But the list of these "own motion" statutes falls significantly short of the full range of counter-terrorism and coercive national security powers.

The Australian Parliament has also added specific reviews to the list of functions of the INSLM in the *Independent National Security Legislation Monitor Act 2010* (Cth). This first was introduced in 2014.[76] It required a report by 7 September 2017 on four sets of measures which were due to sunset a year later: the special powers of the Australian Security Intelligence Organisation (ASIO) to detain and question persons under Div 3 of Pt III of the *Australian Security Intelligence Organisation Act 1979* (Cth); the stop, search and seize powers in Div 3A of Pt IAA of the *Crimes Act 1914* (Cth); the control order and preventive detention order regimes in Divs 104 and 105 of the *Criminal Code Act 1995* (Cth); and the

[70] United Kingdom, *Parliamentary Debates*, House of Lords, 8 March 1984, Vol 449, cols 405–406.

[71] *Counter-Terrorism and Security Act 2015* (UK) s 44(2).

[72] *Terrorist Asset-Freezing etc Act 2010* (UK) s 31; *Terrorism Prevention and Investigation Measures Act 2011* (UK) s 20.

[73] *Counter-Terrorism and Security Act 2015* (UK) s 45.

[74] *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) Sch 2.

[75] *Counter-Terrorism (Temporary Exclusion Orders) (Consequential Amendments) Act 2019* (Cth) Sch 1.

[76] *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) s 131A.

declared area procedure and offences in ss 119.2 and 119.3 of the *Criminal Code Act 1995* (Cth).[77] In 2016, review of the new Div 105A of the *Criminal Code Act 1995* (Cth), which established a regime for the post-sentence continuing detention of terrorist offenders in circumstances where they are deemed to "pose an unacceptable risk of committing serious Part 5.3 [terrorism] offences if released into the community",[78] was added to the functions of the Independent Monitor.[79] The INSLM must complete a review of Div 105A by 7 December 2021.[80] Two further sets of measures were added to the *Independent National Security Legislation Monitor Act 2010* (Cth) in 2018: Div 82 (sabotage), Pt 5.2 (espionage) and Pt 5.6 (secrecy of information) of the *Criminal Code Act 1995* (Cth);[81] and the amendments made to various laws by the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth).[82]

Both the IRTL and the INSLM have a much broader mandate to review and monitor counter-terrorism laws than they did when they were established. The implications of these changes will now be explored.

III. The Implications of the Changes on the IRTL and INSLM

These expansions to the mandates of the IRTL and INSLM appear to have had two seemingly significant consequences. The first is that the pattern of review has shifted, though in slightly different ways for each office. Since 2014, INSLMs have focused to a greater extent on the reviews that each has been required to conduct by statute, or referred by Government, than on self-initiated reviews. The effect of this is that the recommendations of these reports appear to be implemented to a significantly greater extent than recommendations in the annual reviews, even where the reports are critical of laws introduced by the government making the referral. In the United Kingdom, on the other hand, there has been a shift towards inclusion of all of the UK's counter-terrorism laws in the statutorily required annual report on the *Terrorism Act 2000* (UK). This followed a brief period in which the IRTL focused on reviews referred to it by the Government, which had the effect that some of the legislation that became discretionary, rather than mandatory to review after 2015 was not reviewed at all. A similar trend in relation to the implementation of INSLM recommendations by the Australian Parliament can also be observed with the implementation of IRTL recommendations by the UK Parliament, albeit to a lesser extent (though this might be because recommendations of the IRTL's annual reports are rarely implemented at all).

Prior to the enactment of the *Counter-Terrorism and Security Act 2015* (UK), the IRTL was required to produce an annual report on each of the terrorism laws that included a review clause. From 2011 to 2015, reports were produced on an annual basis for the *Terrorism Act 2000* (UK) and Pt 1 of the *Terrorism Act 2006* (UK), the *Terrorist Asset-Freezing etc Act 2010* (UK), and the *Terrorism Prevention and Investigation Measures Act 2011* (UK).[83] Since 2017, the norm has been for the IRTL to include reviews of all of the counter-terrorism laws that are within its mandate within the annual report on the *Terrorism Act 2000* (UK). After the change to the IRTL's reporting requirements in 2015, however, reviews of the *Terrorist Asset-Freezing etc Act 2010* (UK), and the *Terrorism Prevention and Investigation Measures Act 2011* (UK) became somewhat sporadic. A review of the former took place in 2017,[84] but there has been none since, perhaps because the terrorism-specific asset-freezing regime was supposed to be replaced by more generally applicable measures in the *Sanctions and Anti-Money Laundering Act 2018*

[77] *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1B).

[78] *Criminal Code Act 1995* (Cth) Div 105A.1.

[79] *Independent National Security Legislation Monitor Act 2010* (Cth) ss 6(1)(ia), 6(1C), inserted by the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Regime 2016* (Cth) Sch 2.

[80] *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1C).

[81] *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) Pt 3, amending *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1B).

[82] *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1D).

[83] Reports can be found on the website of the Independent Reviewer of Terrorism Legislation, *Reports of Former Reviewers* <https://terrorismlegislationreviewer.independent.gov.uk/category/reports/reports-former-reviewers/>.

[84] Max Hill QC, *The Terrorism Acts in 2017* (2018).

(UK), though these have yet to fully enter into force.[85] While there were no reports on Terrorism Prevention and Investigation Measures (TPIMs) in 2015 and 2016, since 2017, the IRTL has included review of this legislation in the annual report on the *Terrorism Act 2000* (UK).[86] In the brief hiatus in the annual reviews of the *Terrorist Asset-Freezing etc Act 2010* (UK), and the *Terrorism Prevention and Investigation Measures Act 2011* (UK), David Anderson QC, was referred three other reviews to conduct, including two on investigatory powers[87] and one on citizenship revocation.[88] At 373 pages, the first report on the UK's investigatory powers was nearly five times longer than the annual report on the *Terrorism Act 2000* (UK) in that year.[89] It contained 124 recommendations,[90] and significantly influenced the drafting of the *Investigatory Powers Act 2016* (UK), with Anderson stating that over 90% of his recommendations were "reflected in" the Act, a significant achievement for anyone proposing complex law reform.[91] In contrast, Anderson's annual report on the *Terrorism Act 2000* (UK) that year contained just three new recommendations,[92] though he also provided an update on the status of his previous recommendations.[93] The Home Secretary's response, though reasonably detailed, did not commit to implement any recommendations.[94]

A similar trend, yet even more pronounced is observable in respect to shifts in the pattern of review in respect of the INSLM in Australia. The inaugural INSLM, Bret Walker SC, conducted annual reviews of Australia's counter-terrorism laws from 2011 to 2014.[95] Each report covered several distinct areas of counter-terrorism law in significant depth,[96] and made a number of recommendations, but no government appeared to respond to them or implement them. In his fourth and final annual report, Walker noted: "Observations concerning governmental non-response to the INSLM's Second Annual Report, as well as to the COAG Review of Counter-Terrorism Legislation, were made in the INSLM's Third Annual Report delivered on 7th November 2013. They may be updated today by the statement that nothing has happened since then in public."[97] Subsequent INSLMs have, however, tended to use the annual report as a vehicle to set out the threat landscape and report on their activity during the reporting period, rather than to review aspects of the legislation.[98] Annual reports thus became significantly shorter than during Walker's tenure in office, with considerably fewer recommendations.[99] This is not because the INSLMs following

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[85] Jonathan Hall QC, *The Terrorism Acts in 2018* (2020) 29.

[86] Hill, n 84; Hall, n 85; Jonathan Hall QC, *The Terrorism Acts in 2019* (2021).

[87] David Anderson QC, *A Question of Trust: Report of the Investigatory Powers Review* (2015); David Anderson QC, *Report of the Bulk Powers Review*, Cm 9326 (Crown Copyright, 2016).

[88] David Anderson QC, *Citizenship Removal Resulting in Statelessness* (2016).

[89] Anderson, n 87; David Anderson QC, *The Terrorism Acts in 2014* (2015). The brevity of the report on the Terrorism Acts was noted in the government's response to that report as being partly a result of the other commitments the IRTL had undertaken on behalf of the government that year: HM Government, *The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2014 by the Independent Reviewer of Terrorism Legislation*, Cm 9357 (2016).

[90] Anderson, n 87, 285–306.

[91] David Anderson QC, *The Investigatory Powers Act 2016 – An Exercise in Democracy* <https://www.daqc.co.uk/2016/12/03/the-investigatory-powers-act-2016-an-exercise-in-democracy/>.

[92] Anderson, n 89, 83–86.

[93] Anderson, n 89, [10.1]–[10.2].

[94] HM Government, *The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2014 by the Independent Reviewer of Terrorism Legislation*, Cm 9357 (Crown Copyright, 2016) 1.

[95] INSLM reports are available on the website of the Independent National Security Legislation Monitor, *Reviews and Reports* <https://www.inslm.gov.au/reviews-reports>.

[96] The fact that Walker had reviewed all of Australia's counter-terrorism laws, at least once, across these four reports was used by then Prime Minister Tony Abbott as part of the reason that the office could be abolished: Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2014, 2355 (Tony Abbott).

[97] Bret Walker SC, *Independent National Security Legislation Monitor Annual Report 2014* (Commonwealth of Australia, 2014) 2.

[98] See, eg, James Renwick SC, *INSLM Annual Report 2016-2017* (Commonwealth of Australia, 2017).

[99] The first report of the Hon Roger Gyles AO QC was just 11 pages long and contained one recommendation, though he admittedly was appointed late in the reporting cycle: The Hon Roger Gyles AO QC, *INSLM Annual Report 2014-2015* (Commonwealth of Australia, 2015).

Walker were not conducting reviews of the national security and counter-terrorism laws, but because they were either required by amendments to the *Independent National Security Legislation Monitor Act 2010* (Cth) to conduct reviews of specific pieces of legislation, or had received a reference from either the Prime Minister, Attorney-General, or PJCIS to conduct a review of a particular matter. Thus, while the Hon Roger Gyles AO QC, for example, provided just two very short annual reports during his tenure in office, he also conducted detailed and in-depth reviews of the impact on journalists of s 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth),[100] control orders,[101] legislation in respect of foreign terrorist fighters,[102] and terrorism questioning and detention powers.[103] Similarly, during his time in office, Dr James Renwick CSC SC had to complete the statutory review of stop, search, and seizure powers,[104] declared area offences,[105] and control orders and preventive detention orders,[106] as well as a statutorily required review of the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth).[107] The last of these is unusual in that there was both a statutory requirement for review[108] and it was also referred to the INSLM by the PJCIS, an innovation Renwick and the PJCIS both welcomed.[109] He was also referred two other issues to review: the prosecution and sentencing of children[110] and terrorism-related citizenship loss provisions.[111] Renwick made a significant number of recommendations for changes to Australia's national security and counter-terrorism laws across these various reviews, many of which were implemented – if only in part – by the enactment of new legislation. For example, a number of Renwick's recommendations in respect of the terrorism-related citizenship loss provisions in the *Australian Citizenship Act 2007* (Cth) were implemented by the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth). Renwick recommended that what he termed the "operation of law" model of citizenship loss in ss 33AA and 35 of the *Australian Citizenship Act 2007* (Cth) should be replaced with a Ministerial decision model.[112] These provisions had been incorporated into the Act by virtue of the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth). They allowed for the automatic loss of a dual-national's Australian citizenship through particular types of conduct, such as by engaging in conduct inconsistent with their allegiance to Australia (by, eg, engaging in a terrorist act) or by serving in the forces of a country at war with Australia, or by fighting for, or being in the service of, a declared terrorist organisation. Renwick's recommendation was implemented in part by the repeal of ss 33AA and 35 of the *Australian Citizenship Act 2007* (Cth)

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[100] The Hon Roger Gyles AO QC, *Report on the Impact on Journalists of Section 35P of the ASIO Act* (Commonwealth of Australia, 2015).

[101] The Hon Roger Gyles AO QC, *Control Order Safeguards (INSLM Report) Special Advocates and the Counter-Terrorism Legislation Amendment Bill (No 1) 2015* (Commonwealth of Australia, 2016); The Hon Roger Gyles AO QC, *Control Safeguards Part 2* (Commonwealth of Australia, 2016).

[102] The Hon Roger Gyles AO QC, *Certain Matters Regarding the Impact of Amendments to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Commonwealth of Australia, 2016).

[103] The Hon Roger Gyles AO QC, *Certain Questioning and Detention Powers in Relation to Terrorism* (Commonwealth of Australia, 2016).

[104] James Renwick SC, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers* (Commonwealth of Australia, 2017).

[105] James Renwick SC, *Sections 119.2 and 119.3 of the Criminal Code: Declared Areas* (Commonwealth of Australia, 2017).

[106] James Renwick SC, *Review of Divisions 104 and 105 of the Criminal Code (Including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (Commonwealth of Australia, 2017).

[107] James Renwick SC, *Trust but Verify: A Report Concerning the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and Related Matters* (Commonwealth of Australia, 2020).

[108] *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1D).

[109] Renwick, n 107, 5.

[110] James Renwick SC, *Report to the Prime Minister: The Prosecution and Sentencing of Children for Terrorism* (Commonwealth of Australia, 2018).

[111] James Renwick SC, *Report to the Attorney-General: Review of the Operation, Effectiveness and Implications of Terrorism-related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007* (Commonwealth of Australia, 2019).

[112] Renwick, n 111, xv–xvi.

by the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth). A number of other recommendations were, however, not adopted.

In some respects, then, the reports required by statute and those referred by the Prime Minister, Attorney-General, or PJCIS, have had more of an impact in the sense that they have caused changes to the laws, than annual reports. However, it also means that the aspects of the national security and counter-terrorism laws that Parliament (by inserting a review into the *Independent National Security Legislation Monitor Act 2010* (Cth)) or the Prime Minister, Attorney-General, or PJCIS (by referring a matter to the INSLM) wish to see reviewed take precedence over other, perhaps equally important counter-terrorism measures. It would be cynical to suggest that the increase in reports on reference and the inclusion of statutory reviews into the *Independent National Security Legislation Monitor Act 2010* (Cth) was aimed to prevent the INSLM from carrying out such reviews. In fact, the current INSLM, Grant Donaldson SC, is currently conducting an own motion review into the "operation of section 22 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) as it applies in the 'Alan Johns' matter (a pseudonym)".[113] This important review concerns the apparently unique Australian case of a federal offender who was arraigned, pleaded guilty, and was sentenced to a term of imprisonment, none of which events occurred in open court, and all of which were otherwise secret. It was initiated by Renwick before he finished his tenure but could not be completed due to delays caused by the coronavirus pandemic.

It is worth considering the impact that the increased number of statutory reviews and reports on reference has had on the IRTL and INSLM's capabilities to conduct own-motion reviews and to identify for themselves (rather than being directed by Government or Parliament) the national security and counter-terrorism laws that are most in need of review, noting that each office is part time, the IRTL nominally four days a week, the INSLM nominally two days a week, although each in practice works full time for periods when required.

Conclusion

While the UK's IRTL has a much longer history than the Australian INSLM, both offices have faced a period of challenges and changes over the past decade. Despite attempts to abolish both offices in 2014, the functions and mandate of the IRTL and INSLM have instead expanded over the past seven years and they can be seen to be firmly established. This has meant that more of Australia and the UK's national security and counter-terrorism laws have been brought within the remit of review and monitoring. In both jurisdictions, the respective Governments have referred a number of matters to the IRTL and INSLM for review. The Australian Parliament has also required the INSLM to conduct a variety of reviews through the inclusion of reporting requirements into the *Independent National Security Legislation Monitor Act 2010* (Cth). In one sense then, both offices have more to review, and more reviews have been conducted. However, these changes have had three main consequences. First, in the United Kingdom, the expansion in the IRTL's mandate was linked to a more discretionary approach to review most of the laws; only the *Terrorism Act 2000* (UK) was subject to a statutory annual review. The effect of this was that immediately after the change was made, for a few years the laws that were no longer required to be reviewed on an annual basis by statute were not reviewed. This coincided with a particularly busy period for the IRTL, who had been referred a number of other matters to review. This is the second main consequence of the recent changes. The increase in reports on reference, and in Australia reports required in terms by the *Independent National Security Legislation Monitor Act 2010* (Cth), has meant that the focus of the IRTL and INSLM has been squarely on the laws that the Government (and in Australia's case, Parliament) considers important to review. Even though both the IRTL and INSLM have powers to conduct an own-motion review, and the discretion to choose which aspects of the counter-terrorism laws to review, this has been somewhat usurped by the requirements to meet deadlines for review set by the Government and Parliament. This has had an interesting knock-on effect however, which is the third main consequence of the amendments, and that is that recommendations of reviews referred to the IRTL and INSLM by the Government, or in Australia instigated by Parliament, are far more likely to receive a positive reception than those that emerge from annual reports conducted by the IRTL and INSLM. This should have a

[113] Independent National Security Legislation Monitor, *Current Reviews* <https://www.inslm.gov.au/current-review-work>.

positive impact on those laws which are amended following these types of reviews. It does, however, mean that these mechanisms for reviewing and monitoring the UK and Australia's national security laws work best when they make recommendations about laws in respect of which the Government is already willing to change. This might not bode particularly well for the most controversial counter-terrorism laws on the statute books. When the INSLM legislation was introduced the then Attorney-General said "We all remain hopeful that one day there will be a time when the threat of terrorism will diminish and make these laws no longer necessary",[114] but in an Annual Report Renwick wrote: "Although I also hope that the threat of terrorism will one day diminish, I cannot yet see when that day will come [as] … the risk of terrorist acts affecting Australia remains a matter of grave concern, and the threat to Australia caused by espionage and interference by foreign states has grown markedly."[115] It would appear then that the offices will be around for some time. That would also seem to be the position in the United Kingdom. And the models are now being emulated. As this article goes to print, the Republic of Ireland has introduced a Bill which would establish an Independent Examiner of Security Legislation which has the scope and purpose of the Australian model without its compulsory powers.[116]

[114] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 2010, 2846 (Robert McLelland).

[115] James Renwick SC, *Annual Report 2018-9* (Commonwealth of Australia, 2019) viii.

[116] *Policing, Security and Community Safety Bill 2021* (ROI) Pt 7.

The Conduct of Terrorism Trials in England and Wales

The Rt Hon Sir Charles Haddon-Cave*

The manner in which terrorism trials are conducted is a mark of how civilised a society we are, and a litmus test of our adherence to the Rule of Law. Terrorism trials present unique challenges because of their complexities and subject matter and the heightened public concern surrounding terrorist offences. The role of the courts is to ensure a fair trial within a reasonable timescale. This article seeks to explain the practices and procedures relating to the conduct of terrorism trials in England and Wales. We continue to learn from our colleagues in other jurisdictions in the Common Law world who face similar challenges.

> Injustice anywhere is a threat to justice everywhere.
>
> Martin Luther King, Jr (1929–1968)

The manner in which terrorist trials are conducted is a mark of how civilised a society we are, and a litmus test of our adherence to the Rule of Law. As Lord Bingham said:

> There are doubtless those who would wish to lock up all those who suspected of terrorist and other serious offences and, in the time-honoured phrase, throw away the key. But a suspect is by definition a person whom no offence has been proved. Suspicions, even if reasonably entertained, may prove to be misplaced, as a series of tragic miscarriages of justice has demonstrated. Police officers and security officials can be wrong. It is a gross injustice to deprive of his liberty for significant periods a person who has committed no crime and does not intend to do so. No civilized country should willingly tolerate such injustices.[1]

There is a heavy burden on the courts and the judiciary to conduct trials of those who are charged with terrorist offences in a manner which is both transparently and scrupulously fair, and ensures the process is completed within a reasonable timescale.

A fair trial in a constitutional democracy grants a terrorist of precisely that which they would deprive us of, namely a fair trial. As Lady Hale has observed "compromising the rule of law was not the way to defeat terrorism".[2]

Terrorism Acts

Terrorism is defined in United Kingdom law as the use or threat of action, both in and outside of the United Kingdom, designed to influence any international government organisation or to intimidate the public and for the purpose of advancing a political, religious, racial or ideological cause.[3] Under the *Terrorism Act 2000* (UK) (*2000 Act*) s 1 (4)(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom. The following elements need to be proved in a terrorism trial:

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* Lord Justice of Appeal of England and Wales and formerly Judge-in-charge of the Terrorism List (2017–2018).

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[1] Lord Bingham of Cornhill, *The Rule of Law*.

[2] Lady Hale, Supreme Court of the United Kingdom, *Terrorism and Global Security: Threats to the Independence of the Judiciary in a Changing World* <https://www.supremecourt.uk/docs/speech_100512.pdf>.

[3] *Terrorism Act 2000* (UK) s 1.

(1) an actual or contemplated use or threat of action involving serious violence against a person, endangering a person's life or creating a serious risk to the health or safety of the public or a section of the public;[4]
(2) the use or threat of action also involved the use of firearms or explosives; or
(3) if the use or threat of action did not involve the use of firearms or explosives then it is necessary to consider whether the use or threat of action was designed to influence any government or international governmental organisation or to intimidate the public or a section of the public; and that
(4) the use or threat of action is made for the purpose of advancing a political, religious, racial or ideological cause.

Parliament has legislated under the Terrorism Acts to create a broad range of terrorism offences, notably:

- Section 5 of the *Terrorism Act 2006* (UK) (the *2006 Act*) – preparation for acts of terrorism;
- Section 6 and 8 of the *2006 Act* – providing and receiving training;
- Section 11 of the *2000 Act* – membership of a proscribed organisation;
- Sections 15 to 18 of the *2000 Act* – fundraising offences;
- Section 54 of the *2000 Act* – providing and receiving weapons training;
- Section 56 of the *2000 Act* – directing a terrorist organisation;
- Section 57 of the *2000 Act* – possession of articles for terrorist purpose;
- Section 58 of the *2000 Act* – possession of information useful to a terrorist;
- Section 59 of the *2000 Act* – inciting terrorism overseas;
- Section 62 of the *2000 Act* – terrorist bombing overseas.

The two most common terrorism charges are s 5 of the *2006 Act* and s 11 of the *2000 Act*. These offences are clearly and simply drafted and juries have not had difficulties in understanding what elements are required to be proved to establish the offences in question. Section 5 makes it an offence for a person to engage in the preparation of acts of terrorism, or to assist others in the preparation of acts of terrorism. The offender must be shown to have the requisite intent, which involves an inquiry into the "mindset" of the defendant. Section 11 of the *2000 Act* creates the offence of membership of a proscribed organisation. The Home Secretary has the power to list proscribed organisations, which currently include the IRA, Islamic State[5] and National Action.[6]

Prosecution Guidance

Prosecutors are required to take the following factors into account when determining whether a prosecution is in the public interest:[7]

- How serious is the offence committed?
- What is the level of culpability of the suspect?
- What are the circumstances of and the harm caused to the victim?
- What was the suspect's age and maturity at the time of the offence?
- What is the impact on the community?
- Is prosecution a proportionate response?
- Do sources of information require protecting?

Terrorism naturally arouses heightened concern by the public and State entities. Terrorism trials are often the subject of particular public and press attention. This all brings its challenges. But the role of

[4] Relevant offences may include: (1) murder; (2) manslaughter; (3) an offence under *Offences against the Person Act 1861* (UK) s 18 (wounding with intent); (4) an offence under s 23 or 24 of that Act (administering poison etc); (5) an offence under s 28 or 29 of that Act (explosives); (6) an offence under s 2, 3 or 5 of the *Explosive Substances Act 1883* (UK) (causing explosions); (7) an offence under *Criminal Damage Act 1971* (UK) s 1(2) (endangering life by damaging property); (8) an offence under *Biological Weapons Act 1974* (UK) s 1 (biological weapons); (9) an offence under *Chemical Weapons Act 1996* (UK) s 2 (chemical weapons).

[5] "ISIS" was a popular epithet in 2014–2015 though the entity is now mainly referred to as "Islamic State".

[6] Home Office, *Proscribed Terrorist Organisations* (17 July 2020).

[7] Crown Prosecution Service, *Code for Crown Prosecutors*, [4.14] <https://www.cps.gov.uk/publication/code-crown-prosecutors>.

the courts remains a simple one – to ensure a fair trial for all defendants within a reasonable timescale. In this regard, terrorism trials are no different from other criminal trials. Indeed, while recognising the special features of terrorism trials, it is important that terrorism trials are not "special" in any sense but just seen and treated as any other criminal trial. Terrorist offences are criminal offences.

I set out below each stage of the terrorism trial process from the pre-trial investigation to verdict as operated in England and Wales.

INVESTIGATION

Terrorism trials are fortunate to benefit from the highest quality of investigation and investigators. The most advanced techniques of surveillance and forensics are engaged by highly trained individuals from specialist counter-terrorism units in the police force and intelligence services. A lot of resources are often required at the investigation stage because of the sheer volume of material that these cases involve. For every person arrested, often all of the data on their laptops, phones and other devices has to be carefully gathered, processed and catalogued. This is often key to establishing for example, contacts or "mindset" evidence (see below). This involves a substantial amount of time and a considerable expertise to identify what is truly relevant and therefore, potentially disclosable. The substantial volume of information to be sorted is the hallmark of a terrorist investigation. In the National Action membership trial of *Jones, Jack, Cutter and Scothern* (Birmingham Crown Court, 2020), West Midlands counter-terrorist officers interrogated 22 million data files.

Investigators commonly encounter encryption. The use of encrypted technology is standard in most terrorist organisations. Social media apps and specialist private encryption apps are popular. [8] Suspects are generally reluctant to volunteer their passwords.

A key question in this process for investigating officers is when to seek the advice of specialist counsel. It is well-recognised that there is a need to seek early involvement of counsel in terrorism cases. Prosecuting counsel provide essential guidance at an early stage as to for example, what information is needed for a lawful arrest and subsequently, what evidence will need to be disclosed. They are often required to advise at very short notice in fast-moving investigations.

Recent years have shown an increase in "lone-wolf" attacks by self-radicalised individuals acting outside conventional organisations and a growing number of younger terrorist offenders. A 13-year-old boy from Cornwall became the UK's youngest terrorist offender in February 2021. He was convicted of disseminating terrorist documents and possession of terrorist material.[9]

A key challenge for the authorities and investigating officers is timing: whether and, if so, when to make the call to intervene and arrest someone identified as a potential terrorist offender. Intervening too *soon* may result in a lack of evidence as to for example, acts preparatory to an act of terrorism. Intervening too *late* may result in a terrorist attack taking place and innocent lives imperilled. Sometimes suspects are charged with lower-level crimes to disrupt them in their radical path. Fortunately, most terrorist acts are foiled by the authorities during the planning stage before an actual attack has taken place.

PRE-TRIAL DISCLOSURE

The pre-trial disclosure regime is an important safeguard which entitles the defence to be provided with material which could assist in the preparation of their case.[10] In terrorist cases the Crown will often, in addition, provide a "Disclosure Management Document" to serve as an open and transparent basis for disclosure decisions and encourage early-stage defence participation in the disclosure process. The prosecution is entitled to refuse to disclose material for national security reasons. The prosecution may apply for Public Interest Immunity, which allows the court to withhold disclosable

[8] Telegram, Encrochat *etc*.

[9] "Teenage Neo-Nazi from Cornwall is UK's Youngest Terror Offender", *BBC News* <https://www.bbc.co.uk/news/uk-england-cornwall-55891140>.

[10] Crown Prosecution Service, *Disclosure* <https://www.cps.gov.uk/about-cps/disclosure>.

material from the defence if it is in the public interest to do so. In circumstances where the judge is minded to order disclosure, there are several possible solutions aimed at protecting the interests of the defence, including summaries of the intelligence, edited or anonymised documents and the appointment of a Special Advocate. However, if the limited disclosure will render the trial process unfair, greater disclosure will be ordered. The prosecution may choose to discontinue proceedings so as to avoid having to make particularly sensitive disclosure.[11]

Specialist Bar and Judges

Terrorist trials in England and Wales have the advantage of highly specialist practitioners. The Terrorism Bar is small, comprising some 20 practitioners. Their lack in numbers is made up by their matchless experience and skill, both forensic and advocacy, and a willingness to burn the midnight oil to master the details of their brief. Barristers in this recondite field usually have to elect between acting as a prosecutor or defence counsel because of the danger of inadvertent disclosure if one has a mixed practice. Prosecutors are security vetted to the highest levels so they can be given access to, and advise on, the disclosure of intelligence. They are closely supported by teams within specialist police force units or the intelligence agencies, including MI5, MI6 and GCHQ. They are better resourced than some other elements of the legal system.

Defence barristers were, regrettably, marginalised to some extent during the 1970s, 1980s and early 1990s. It was said to be harder for defence counsel who had represented IRA terrorists to rise from the Bar to the Bench. It took considerable professional courage to accept defence briefs at that time and the role came at some personal cost. However, a cultural change has now taken place and defence counsel in terrorism cases have for some time been recognised and valued as a key cog in the justice machine. The defence brief nevertheless often remains a difficult brief. Defence counsel sometimes represent dangerous and troubled clients in unpopular causes. They encounter practical difficulties, for instance, in accessing their clients in the high security units of prisons and secure hospitals. The work is invariably publicly funded.

Terrorism trials are entrusted to a cohort of highly experienced Circuit and High Court judges who are familiar with this field and the Chief Magistrate. The reason for the involvement of such senior judges was helpfully summarised by Dr James Renwick SC in his highly impressive 5th Report as INSLM[12] as follows. First, there is a public interest in terrorism cases being case managed by the most experienced judges: (1) to encourage expedition in hearing the cases; (2) to avoid error leading to mistrial or retrial; and (3) so that the public have extra confidence in the conduct of the trial and the appropriateness of any sentences passed. Second, terrorism cases stand apart from "normal" crime because of their exceptional seriousness to society as a whole. Third, very often these cases will involve national security material or security service personnel and may require exceptional orders to close the court for a period of the trial and orders ensuring that national security material or information is not inadvertently released. Fourth, it is quite often the case that there is a vast amount of material discovered by the prosecution which, as one judge put it to me, is beyond the capacity of a single human brain to analyse and therefore requires search by computer (often complicated because the material may be encrypted or in a foreign language) but which therefore also requires at an early stage the active involvement of the case-managing judge to ensure the search terms used by the Crown at the request of the defence are apt.

Case Management Regime

A Criminal Practice Direction[13] issued by the Lord Chief Justice requires terrorism cases to be rigorously and timeously case-managed from the outset. All terrorism cases are originally first case-managed by a

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[11] *R v H and C* [2004] 2 AC 134, 36.

[12] Independent National Security Legislation Monitor, *Report to the Prime Minister: The Prosecution and Sentencing of Children for Terrorism* <inslm.gov.au>.

[13] *Criminal Practice Direction* [2015] EWCA Crim 430 (New annex on the management of terrorism cases: CPD XIII Annex 4: Case management of terrorism cases).

High Court Judge nominated by the President of the Queen's Bench Division to be the Judge-in-charge of the Terrorism List.

Immediately after a person has been charged in a terrorism case anywhere in England and Wales, a representative of the Crown Prosecution Service will notify the person on the 24-hour rota for special jurisdiction matters at Westminster Magistrates' Court of the following information: (1) the full name of each defendant and the name of his solicitor or other legal representative, if known; (2) the charges laid; (3) the name and contact details of the Crown prosecutor with responsibility for the case, if known; and (4) confirmation that the case is a terrorism case.

All terrorism cases are first listed before the Chief Magistrate of England and Wales and the first appearance is normally at Westminster Magistrates' Court.[14] A preliminary hearing is normally be ordered in a terrorism case to take place about 14 days after charge.

In cases sent to the Crown Court under s 51 of the *Crime and Disorder Act 1998* (UK), the magistrates' court is required to make directions to facilitate the preliminary hearing at the Crown Court.[15] These directions normally comprise two main elements.

First, three days prior to the preliminary hearing in the terrorism cases list, the prosecution must serve upon each defendant and the Regional Listing co-ordinator: (1) a preliminary summary of the case; (2) the names of those who are to represent the prosecution, if known; (3) an estimate of the length of the trial; (4) a suggested provisional timetable which should generally include: the general nature of further inquiries being made by the prosecution, the time needed for the completion of such inquiries, the time required by the prosecution to review the case, a timetable for the phased service of the evidence, the time for the provision by the Attorney-General for his consent if necessary, the time for service of the detailed defence case statement, the date for the case management hearing, and the estimated trial date; (5) a preliminary statement of the possible disclosure issues setting out the nature and scale of the problem, including the amount of unused material, the manner in which the prosecution seeks to deal with these matters and a suggested timetable for discharging their statutory duty; and (6) any information relating to bail and custody time limits.

Second, one day prior to the preliminary hearing in cases in the Terrorism List, each defendant must serve in writing on the Regional Listing Co-ordinator and the prosecution: (1) the proposed representation; (2) observations on the timetable; and (3) an indication of plea and the general nature of the defence.

Preliminary Hearing

The Legal Aid Agency are required to attend a preliminary hearing at a Crown Court to assist the court. Unless a judge otherwise directs, all Crown Court hearings prior to the trial are conducted by video link for all defendants in custody. The police service and the prison service are required to provide an initial joint assessment of the security risks associated with any court appearance by the defendants within 14 days of charge.

At the preliminary hearing at the Crown Court, the judge will determine whether the case is one to remain in the Terrorism List and if so, give detailed directions setting the provisional timetable for all relevant procedural matters up to trial, including staged disclosure, service of defence statements etc. It is common also for the prosecution to raise the question of press restrictions if investigations or linked cases are ongoing. At this hearing, the Judge-in-charge of the Terrorism List importantly sets the date and location of the trial. Thus, within 14 days of charge, all relevant parties and agencies know when the trial will take place and have a complete timetable to work to.

All adult offenders make their first appearance in a magistrates' court to take their plea and decide whether they will be tried summarily or on indictment before a jury. Westminster Magistrates' Court, the court of the Chief Magistrate of England and Wales, is the designated court for all serious terrorism-related

[14] In order to comply with *Police and Criminal Evidence Act 1984* (UK) s 46, a defendant must be brought before a magistrate as soon as is practicable and in any event not later than the first sitting after he is charged with the offence.

[15] And see *Criminal Justice Act 1987* (UK) s 4(1).

offences. The majority of terrorism cases are sent to be tried on indictment, that is by a jury, at the Central Criminal Court of England and Wales, also known as the Old Bailey.

Terrorism cases are carefully case managed from the outset with a view to laying out a clear timetable for preparation by the parties and ensuring the matter comes to trial within a reasonably swift timeframe. The Judge-in-charge of the Terrorism List conducts case management hearings every fortnight. This Judge will hear each new case and give directions laying down a detailed timetable to trial. The average number of cases received fortnightly and put into the List varies, but is normally around half-a-dozen. Prosecuting and Defence Counsel in each case will be present and make submissions regarding the directions. The standard directions made by the Judge will include, for example, deadlines for service by the prosecution of its initial disclosure (usually in tranches) and deadlines for service by the defence of the defence statement *etc*. A further "preparatory hearing" is normally also directed to take place within 28 days after the defence statement is filed.

At this early preliminary hearing, as explained, the Judge will also direct where the case is to be tried and decide which judge will be allocated the case. There are a number of Crown Court centres in England and Wales which are certified to hear terrorism cases. Generally, the policy is to try to ensure that the case is tried in the locale where the offence(s) took place. This is for a number of obvious reasons, including public reassurance and the convenience of witnesses and those affected by the incident. Thus, if the suspect's offending actions took place for example, in Manchester, Birmingham or London, we will generally try to arrange for the case to be heard in Manchester, Birmingham or London. However, some of the most serious cases are tried at the Old Bailey or Woolwich Crown Court which have particularly high security facilities, the latter being linked to Belmarsh Prison.

Reporting Restrictions

Careful consideration is also given at preliminary hearings to the question of the need to impose reporting restrictions. Section 4(2) of the *Contempt of Court Act 1981* (UK) gives the court power, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, to order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose. This provision is aimed at the postponement of publication rather than a permanent ban.[16]

Reporting restrictions are regularly ordered in two circumstances. First, where publication of proceedings might prejudice ongoing investigations. Since preliminary hearing takes place at an early stage – normally within two weeks of the arrest of an actor – there may be other actors who are also being investigated by the authorities in relation to the same or connected matters. Second, where other trials are due to take place for the same or linked offences (so that the outcome of the first trial might prejudice the outcome in the later ones for example, in the Victoria Station murder trials). The Judge will normally invite representations from all sides and any press present on the question of reporting restrictions.

Where reporting restrictions are imposed under s 4(2), they will normally prevent the reporting of the instant proceedings except for certain very basic facts such as the names of the accused and the offences with which they have been charged. These restrictions continue until the conclusion of the trial when they automatically cease to apply. The trial Judge may lift the restrictions on application by the media if satisfied that it is in the interests of justice to do so.[17] Dialogue between judges trying linked cases may be sensible.

The Jury

Jury selection at the trial will normally involve a questionnaire to elicit whether jurors can hear the case objectively. Questions range from asking whether the juror or anyone known to them has been involved

[16] *R (Press Association) v Cambridge Crown Court* [2012] EWCA Crim 2434.

[17] Judicial College, *Reporting Restrictions in the Criminal Courts, April 2015* (Revised May 2016). *Criminal Procedure and Investigations Act 1996* (UK) s 37; *Criminal Justice Act 1987* (UK) s 11.

in a terrorist incident to asking whether the juror has beliefs which make them unable to fulfil their oath. In particular cases, the questions may need to be more specific and related to the incident itself. In significant trials, the jury of 12 will be selected from a large pool and sworn together with several "alternates" who will remain until the end of the prosecution opening, in case a substitution is needed. In very rare cases involving national security, there is a procedure to ballot potential jurors by number and not by name.[18]

The jury will be reminded by the judge of their oath and the need to approach their task objectively and dispassionately solely by reference to the evidence which they hear and see in court, putting out of their minds anything they see or hear outside the courtroom, including any reports in the press. They will also be reminded of the absolute prohibition against carrying out their own research, whether on the internet or in any other way, and the serious consequences of doing so, including potentially imprisonment. The judge will seek to ensure that the jury feels safe and comfortable throughout the trial in order to be able to concentrate on their task with no distractions. It is common for arrangements to be put in place for jurors to enter and leave the court building using separate entrances to the public.

Hearings in Camera

The courts strive for open justice whenever possible. It is rare for hearings to be heard in camera.[19] This will only take place in exceptional circumstances, that is, where very sensitive material is involved and it is necessary in the interests of national security for the hearing to be held in camera. It is sometimes sensible to hold *part* of the proceedings in camera. In *Guardian News and Media Ltd v Incedal*,[20] the Court of Appeal rejected an argument that a whole trial should be held in camera but allowed the "core of the trial" to be heard in camera due to national security, but other elements of the trial – including the swearing in of the jury, reading of the charges, part of the judge's introductory remarks, the verdicts and the sentencing – were heard in open court.

The Trial and Evidence

Terrorism trials vary greatly in length, from a few days to many weeks depending on the charges involved, the number of defendants and the complexity of the issues. Evidence is presented in a variety of forms – documentary, live factual and expert witnesses, exhibits and agreed facts. Photographs and videos feature increasingly in terrorism trials. Tech teams excel at condensing a mass of data (for instance cell-site evidence or ANPR evidence[21]) into easy-to-follow timelines and chronologies. The full range of "special measures" is available to enable some witnesses to give evidence behind screens or by video link where appropriate. Expert evidence, for example, explosives experts, medical experts, IT experts, experts in the different ideologies, *etc*, often play a significant part in terrorism trials.

There is an increased use of undercover officers in the investigation of terrorist plots and suspects. An undercover officer recently assisted in uncovering a plot to bomb St Paul's Cathedral. The undercover officer communicated with the offender online, gained her trust and eventually the offender revealed her plans to the officer.[22] All the officers involved in this type of operation are required to provide witness statements and appear to give evidence in court but with appropriate special measures to protect their identity. Witness anonymity orders protect the identity of the officer. The officer may be concealed with a screen and sometimes their voice altered so the witness will only be seen by the judge and the jury. Before an undercover officer is sworn, his warrant card is passed to the judge in a sealed envelope. That way the judge can be satisfied that the undercover officer sworn under a pseudonym is a serving police officer.

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[18] See "authorised jury checks" in terrorist cases: Crown Prosecution Service, *Jury Vetting* <https://www.cps.gov.uk/legal-guidance/jury-vetting>.

[19] In private.

[20] *Guardian News and Media Ltd v Incedal* [2014] EWCA Crim 1861.

[21] Automatic Number Plate Recognition.

[22] "Woman Jailed for Life Following Triple-bomb Plot Conviction", *Counter Terrorism Policing News* <https://www.counterterrorism.police.uk/woman-jailed-for-life-following-triple-bomb-plot-conviction/>.

Jury bundles of the key evidence are very carefully prepared. Jury bundles in terrorism cases often contain material that is referred to as "mindset evidence". Mindset evidence is a shorthand expression for describing evidence which might assist the jury to come to a conclusion, or draw an inference, about a defendant's state of mind at the relevant time. It normally comprises extremist material or *memes* held on phones, hard drives, *etc* and links to online extremist websites. Care is taken in relation to the presentation of particularly graphic or explicit material to the jury with the material being appropriately edited, for example, the screen going blank at the moment of violence or the video displaying a description in words of the incident at that moment. The jury are carefully directed in relation to all such materials, and its relevance to the case.

External events and press reports can sometimes potentially affect terrorism trials. In 2015, the tragic Charlie Hebdo shooting in Paris occurred right in the middle of a terrorism trial taking place in London. Defence counsel requested that the trial be immediately adjourned because of the prejudicial impact that the ongoing events might have on the jury. The judge declined the defence application and simply reminded the jury of the importance of objectivity and fairness in our justice system and the trial proceeded uneventfully. In the "Three Musketeers" case of *Ali* and others in 2017, there were three separate terrorist attacks during the trial itself (some within hearing distance of the Old Bailey). Mr Justice Globe rejected each successive defence submission to adjourn.[23]

Defence applications to exclude evidence are common. An area of contention in terrorism trials has been the admission of "safety interviews". A safety interview is an urgent interview conducted by the police or security services with a suspect to elicit whether there are any immediate risks to person or property. Their urgency means that safety interviews are conducted without the ordinary pre-interview procedures, for example, ensuring the suspect has access to legal advice or allowing him to inform a third party of his arrest.[24] The admissibility of these interviews was tested in *R v Ibrahim*.[25] Ibrahim was one of several involved in an attempted terrorist attack on 21 July 2005. The investigators conducted safety interviews with three of the principal suspects. The Court of Appeal held that safety interviews were properly admissible at the trial judge's discretion. The Grand Chamber of the European Court of Human Rights (ECtHR)[26] found no violation of Art 6 (the right to a fair trial) in relation to three of the four applicants holding that the safety interviews were properly admitted in circumstances where there was a need to avoid a serious danger to life and liberty. However, regarding one applicant, the ECtHR was not satisfied that there had been compelling reasons to deny the applicant legal assistance. Inevitably, the admissibility of evidence in any individual case will turn on its facts.

The trial judge's overarching role in a terrorism trial is no different from any other criminal trial, namely, to "hold the ring" and ensure a fair trial. This has three key elements. First, to ensure that the atmosphere throughout the trial, remains calm, dispassionate and objective and focused on the evidence. Second, to ensure that applications and issues arising are dealt with fairly and expeditiously so as not to disrupt the flow of the trial. Third, to fairly sum up the law and the facts to the jury before sending them out to retire to consider their verdict(s). Judges invariably provide the jury with written directions of law and a "route to verdict" which will assist them when considering their verdict(s). When summing up to the jury, judges will often repeat the earlier warning against allowing emotion to cloud their judgment and explain the difference between the right to hold unpopular beliefs or extremist views and acting on those beliefs or views so as to commit criminal offences.

SENTENCING

The Sentencing Council of England and Wales has issued sentencing guidelines for terrorism which has greatly simplified and clarified the sentencing of terrorist offenders.[27]

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[23] The remarks on sentence in these matters by Globe J are at Judiciary of England and Wales, *Sentencing Remarks of Mr Justice Globe* (3 August 2017) <https://www.judiciary.uk/wp-content/uploads/2017/08/sentencing-remarks-mr-justice-globe-ali-others-20170803.pdf>.

[24] The safety interview has a different caution to a normal PACE (Police and Criminal Act) interview: "You do not have to say anything but anything you do say may be taken down and used in evidence etc."

[25] *R v Ibrahim* [2008] EWCA Crim 880.

[26] *Ibrahim v United Kingdom* [GC], App nos 50541/08, 50571/08, 50573/08 and 40351/09.

[27] Sentencing Council, *Terrorism Offences* <sentencingcouncil.org.uk>.

What Makes Terrorism Trials Different?

The Hon Anthony Whealy QC*

Terrorism trials in Australia have demonstrated, and continue to demonstrate, features which make them markedly different from the general run of criminal trials. This article focuses on the personal experience of a retired Supreme Court judge in relation to several such trials. It highlights the following differences: criminal behaviour based on a religious or ideological persuasion; inherent bias; the impact of national security protection laws and public interest immunity; the complexity of our terrorism legislation and the sentencing principles relevant to persons convicted of a serious terrorist offence. Against this background, the article addresses, from a practical perspective, the sometimes complex nature of the steps necessary to ensure a fair trial in an Australian terrorism trial.

INTRODUCTION

It is now more than 12 years since I was the presiding judge in a major terrorism trial. Indeed, it is some nine years since I retired as a judge of the New South Wales Supreme Court and Court of Appeal. However, while the law in this field has become increasingly complex, my research has revealed that the passage of time has not altered in any significant manner the difficulties I encountered as a trial judge in the two major terrorism trials in which I was involved. Those difficulties, peculiar to a terrorism trial, are the very matters that encompass the differences between such a trial and other criminal trials.

At the same time, these differences provide a substantial challenge to the trial judge whose fundamental task is to provide a fair trial for the accused.

What then are these differences? Why are they correctly regarded as difficulties? And, if they are, how may we as judges, true to our judicial oaths, overcome them?

To my mind there are at least five distinct areas of difference, sometimes overlapping, but always present in one form or another. I shall list these:

(1) The difference between a crime based on a religious or other ideological conviction and "ordinary" criminality.
(2) The presence of inherent bias.
(3) The stifling effect of National Security Information Legislation and Public Interest claims.
(4) The complexity of terrorism legislation and the necessary directions to the jury.
(5) The principles and practice of sentencing a person convicted of a terrorism offence.

RELIGIOUSLY MOTIVATED CRIME

This is really a preliminary point. Most "ordinary" crime is motivated by base intentions. At least they would be so regarded by most members of the community – greed, momentary anger, revenge, extortion, lust and all the other deadly sins.

However, with a terrorist related offence, we are confronted with an action accompanied by an intention to advance "a political, religious or ideological cause".[1] Indeed, with Islamist terrorism the concepts of religious, ideological and political intentions are, many believe, quite deeply intermixed. Indeed, these are often very deeply established religious convictions supported by subjective interpretations of the Qur'an and other religious texts.

There is a well-known paradoxical slogan – "one man's terrorist is another man's freedom-fighter".

* Formerly a Judge of Appeal, NSW Supreme Court.

[1] *Criminal Code Act 1995* (Cth) s 100.1(1).

This slogan is probably inaccurate but it often appears to be the case, depending on your point of view, in a terrorism trial. In my experience, the motivating ideology behind the offence charged has often been a form of revulsion against the West's treatment of Islamic countries and their communities, accompanied by a religious conviction that intimidatory conduct is warranted in Australia as a consequence.

Arguments against these notions, both for and against, are plentiful on a left/right worldwide divide. However, what sets these ideological concepts apart from simple advocacy and genuine debate is a further necessary element in the definition of a terrorist act.

The intention of advancing a political, religious or ideological cause must be accompanied by an act or acts that, for example, cause serious harm to a person, or cause death or damage to property.[2] Thus it will be seen that this element of the offence moves it out of the arena of mere advocacy and debate and into the field of serious criminality.

In the trials in which I have been involved, the acts in preparation for a terrorist act involved, in one form or another, the stockpiling of potentially dangerous materials which could be, and were intended to be used to coerce and influence by intimidation the Australian Government and/or the public.[3]

It is not difficult to describe the notions I have outlined as perhaps a perversion of orthodox Islamic teaching. This is another area where debate has raged. However, the fact remains that the individuals involved in these two criminal trials were driven by a certainty that they were entirely justified by the teachings of Islam.

In my sentencing remarks in the second trial, I stated:

> Consistently with the jury's verdict, I find that each offender was completely committed to the outcomes of the enterprise to do acts in preparation for a terrorist act or acts. I find that the notions willingly and fully embraced by each individual offender, and share jointly between them, including the following:
>
> (a) First, each was driven by the concept that the world was, in essence, divided between those who adhered strictly and fundamentally to a rigid concept of the Muslim faith, indeed, a medieval view of it, and those who did not.
>
> (b) Secondly, each was driven by the conviction that Islam throughout the world was under attack, particularly at the hands of the United States and its allies. In this context, Australia was plainly included.
>
> (c) Thirdly, each offender was convinced that his obligation as a devout Muslim was to come to the defence of Islam and other Muslims overseas.
>
> (d) Fourthly, it was the duty of each individual offender, indeed a religious obligation, to respond to the worldwide situation by preparing for violent jihad in this country, here in Australia.
>
> The task required by the criminal enterprise was to equip the conspirators individually and jointly, with the knowledge, the ability and the means to prepare for, or to enable, a terrorist act or those acts would be to instil terror and panic in the Australian community, and thereby to force the Australian government to change its alliances and policies overseas. The terrorist act or acts contemplated involved the detonation of one or more explosive devices, or the use of firearms, or both. It was plainly intended that this act or those actions would be of a major kind and that they would be effective to secure the objects of the enterprise.[4]

These remarks spell out forcefully the religious content of the convictions held by the defendants.

In an important sense, this notion of men possessed of a deep-seated religious conviction, assumed the greatest significance – and hence difference from "ordinary" crime – in the sentencing process.

However, its presence permeated every aspect of the trial – pre-sentence rulings, selection of jury, arrangement of court furniture and fittings, the giving of directions, court sitting times and security arrangements. Of course, in every criminal trial, one or other of these functions would require special handling but, in a terrorism trial, the presence of a deep-seated religious or ideological belief is a constant element influencing the proceedings.

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[2] *Criminal Code Act 1995* (Cth) s 100.1(2).

[3] In *R v Elomar* (2010) 264 ALR 759, the defendants stockpiled ammunition, laboratory equipment, and chemicals. In *R v Sharrouf* [2009] NSWSC 1002, the defendants stockpiled instructional videos, clocks and batteries. In *R v Mulahalilovic* [2009] NSWSC 1010, the defendants stockpiled ammunition. In *R v Touma* [2008] NSWSC 1475, the defendants stockpiled improvised explosive devices, gun powder, denotators and ammunition). In *R v Lodhi* (2006) 199 FLR 364 the defendants stockpiled maps and lists of chemicals.

[4] *R v Elomar* (2010) 264 ALR 759, [56]–[57].

The Two Trials – R v Lodhi and R v Elomar

Before examining the major differences between a terrorism trial and an "ordinary" trial, it may be helpful to provide context by describing briefly the two major trials that dominated my experience in the period between 2005 and 2010.

My experience began in 2005. I was asked to preside over the first major terrorism trial in New South Wales, that of Faheem Lodhi.[5] I came to the trial with some trepidation. After all, this was new legislation, and it had not really been explored, in an effective way, by any of our courts nationwide.

Faheem *Lodhi* was a well-educated Australian citizen who practiced as an architect.[6] His background in Pakistan was that of a well-respected family with legal connections.[7] He was married to a doctor in Australia.[8] He was charged with four offences, all of which focussed on his doing of actions that were alleged to be connected with preparation for a terrorist act.[9] For example, he had made enquiries of a chemical company for the availability and pricing of a range of chemicals, a number of which could be used in the manufacture of a bomb.[10] He had collected and kept in his office material available on the internet which dealt with the method of constructing a bomb.[11] He had obtained documents which showed some broad details of the electricity grid systems in New South Wales.[12] One of the problems he faced was that, in some of these areas, he had used a false name or given false details.[13] Moreover, he had a connection with one Willie Brigitte.[14] This man was a suspected French terrorist and he was, amidst some considerable publicity, deported from Australia and held by the French authorities for a number of years before he too was charged and convicted of terrorism offences.[15]

There was an air of secrecy in the dealings between *Lodhi* and Willie Brigitte, although it must be said that none of the surveillance of Brigitte in Australia showed him involved in the actual offences for which *Lodhi* was ultimately to be charged. This raised issues of prejudice for the accused, since there was always the danger of guilt by association.

Lodhi's defence was that, although there might appear to be something sinister about his activities in the relevant period, they could each be explained perfectly innocently. For example, in his evidence, he said that he was interested in chemicals because he was considering starting a business which would require the use of chemicals to clean animal hides and the like.[16] *Lodhi* was cross-examined extensively and, it must be the case that the jury formed a poor opinion of him as a witness and had serious doubts about his credibility. He was convicted of three of the four charges and later sentenced to 20 years in prison, with a non-parole period of 15 years.[17]

The *R v Elomar*[18] trial, extraordinarily enough, took nearly two years to complete. That is an unusual fact in itself. There were, however, nine accused, although four of them, in one fashion or another, pleaded guilty, leaving five facing trial.[19] It is common in the Australian system of criminal justice to allow the

[5] *R v Lodhi* (2006) 199 FLR 364.

[6] *R v Lodhi* (2006) 199 FLR 364, [58].

[7] *R v Lodhi* (2006) 199 FLR 364, [56].

[8] *R v Lodhi* (2006) 199 FLR 364, [60].

[9] *R v Lodhi* (2006) 199 FLR 364, [1]–[6].

[10] *R v Lodhi* (2006) 199 FLR 364, [27]–[33].

[11] *R v Lodhi* (2006) 199 FLR 364, [34]–[35].

[12] *R v Lodhi* (2006) 199 FLR 364, [14]–[15].

[13] *R v Lodhi* (2006) 199 FLR 364, [9], [11], [15]–[16], [27].

[14] *R v Lodhi* (2006) 199 FLR 364, [9]–[13].

[15] *R v Lodhi* (2006) 199 FLR 364, [8].

[16] *R v Lodhi* (2006) 199 FLR 364, [30].

[17] *R v Lodhi* (2006) 199 FLR 364, [101]–[112].

[18] *R v Elomar* (2010) 264 ALR 759.

[19] *R v Elomar* (2010) 264 ALR 759, [7]–[8].

parties to raise pre-trial matters before the jury is empanelled.[20] The idea is to clear the landscape of unnecessary matters requiring prolonged argument so that the jury will not be inconvenienced once they have been empanelled and set out their task of listening to the evidence and determining the issues.

Not surprisingly, since there were some 18 barrister and a dozen or so solicitors involved (not to mention the barristers and solicitors for the Commonwealth and State governments, the police and ASIO) pre-trial procedures in *Elomar* took some eight months between February and October 2008. The jury was not empanelled until early November 2008 and verdicts finding each of the men guilty were not handed down until the end of 2009.[21] They were sentenced in February 2010.[22]

The first task was to assemble a jury panel. In a normal trial, it is common for the sheriff to summon some 70 or 80 people to be on the jury panel, from which a jury will be selected. The reason for the number being of that order is that many people, for quite legitimate reasons, inform the sheriff or perhaps the court that they are simply unable to be involved. It may be ill health, the need to care for sick children or a problem with the workplace. People running their own business often find it impossible to give the time necessary to be involved in a jury trial. Judges try to be as sympathetic as possible to this situation, while insisting that jury service is a duty and privilege that should not be avoided, save for proper reasons.

It was obvious to me that, because we were contemplating a trial of perhaps 12 months in length, that we would need a very large jury panel. So it proved. The Sheriff summoned over 3,500 people. This, in itself, created logistical problems. We could hardly assemble them in a football stadium or a public park. Happily, the NSW government had recently opened a brand new court complex in Parramatta in Western Sydney. This was chosen as the venue for the trial. It had a jury panel room which was able to hold up to 400 people at any one time. So what we did was to stagger the jury selection process over five days. At the end of it, we had, out of the original 3,000 or so, about 300 people who were willing to give up a year of their life to take part in this important trial. Out of those 300, 15 were ultimately selected.

On each of the days when the jury panel was culled, I made it quite clear that anyone who had a closed mind about terrorism, about Islam, about Muslims, or who had been affected in any way by the terrorist activities in Europe or in Bali, should ask to be excused from the trial.

It was also necessary for me to tell the jury panel that part of the evidence they would see, if selected for jury duty, contained confronting images of a graphic and disturbing kind. These included dead bodies, deceased children, badly injured persons and images of warfare and the like. I told the jury panel that anyone who was particularly sensitive to images of that kind should ask to be excused from jury service.

Our jury system in New South Wales operates on the basis that the jury panel members are not identified, either by name or occupation.[23] This is to protect trials from jury tampering. In criminal proceedings, the defendant has available three peremptory challenges without restriction.[24] The Crown has three peremptory challenges without restriction for each person prosecuted.[25] However, any number of peremptory challenges may be made if the Crown and all the persons prosecuted agree to the challenges.[26] A peremptory challenge is one where a challenge is made after the juror has called to be sworn and before he is sworn.[27] Neither the Crown nor the defendant is required to have a sound reason before exercising the challenge and, more often than not, the challenge is based upon an immediate perception as to whether the potential juror is likely to be helpful or otherwise, to the case sought to be made on either side.

[20] *Criminal Procedure Act 1986* (NSW) s 130.

[21] *R v Elomar (No 29)* [2009] NSWSC 1102.

[22] *R v Elomar* (2010) 264 ALR 759.

[23] *Jury Act 1977* (NSW) s 37.

[24] *Jury Act 1977* (NSW) s 42(1)(a).

[25] *Jury Act 1977* (NSW) s 42(1)(b).

[26] *Jury Act 1977* (NSW) s 42(2).

[27] *Jury Act 1977* (NSW) s 45.

It may be of interest to note that in this trial, there were some five or six Muslim women prepared to be accepted for jury duty. Each was dressed in traditional Muslim garb and presented, in every respect, in a responsible and proper fashion. Notwithstanding, each of these five potential jurors was challenged off the jury panel. What is interesting is that the challenges were made by counsel on behalf of the accused, not by the Crown.

Once the jury were empanelled, our 15 community representatives were told, once again, to keep an open mind, to be impartial and to constantly check their own consciences to make sure that bias and prejudgment did not enter into the arena.

I also told the jury members that they had to be very careful about everything that they read in the newspapers. In particular, there was a need to be careful about media material reporting terrorist acts elsewhere in the world. Indeed, as the trial progressed, there were atrocities of one kind or another reported as either having occurred or being threatened in many places around the world. Each time, it became necessary for me to refresh the jury's recollection as to the directions they had been given in this regard. I was perfectly satisfied throughout the trial that the jury understood this and that they heeded the directions I gave.

The trial itself was lengthy and, in evidentiary terms, extremely complex. There were hundreds of witnesses called and an enormous amount of surveillance evidence was placed before the jury. Many of the witnesses were ASIO personnel. This did not prove as much a problem as it had in the first trial. By now, the ground rules about national security information and its protection appeared to be accepted all round. But, a considerable number of witnesses gave their evidence from remote locations and pseudonyms were used where the real identity of witnesses could not, for security reasons, be revealed.

I propose to deal with only a few matters arising from the trial.

The first is the essential issue the jury had to determine. There were really two questions. Was there a conspiracy to do acts in preparation for a terrorist act?[28] If so, was each or any of the five accused a participant in that conspiracy?[29] One of the accused gave evidence. His name was Abdul Rakib Hasan. His evidence was very important, not only to his case, but to that of the other men as well. Hasan gave an explanation for his actions in being involved with a radical Melbourne cleric and to his reasons for making inquiries about the purchase of battery acid and acetone.[30] He told the jury he had not entered into any plan with anyone to commit acts in preparation for a terrorist act.[31] He believed that, in Islam, it was forbidden to kill innocent women and children and civilians. He said he had never had any intention to make explosive that could kill people in Australia or blow up any buildings. Hasan explained that, although he had a lot of books, CDs and DVDs at his home that had radical material on them, he had never read them and he was not interested in the material.[32]

In sentencing Mr Hasan, following upon his conviction, I held that I could not and did not accept his evidence and it was apparent that the jury did not accept Mr Hasan's either.[33]

I will mention only three further aspects of the trial. The men (who were sentenced to varying terms of imprisonment of between 21 and 28 years) all had in their possession, to one degree or another, shared material.[34] This commonality material deserves some mention in detail. It may be described as falling into three categories, each of which was plainly capable of impinging on the mind of a committed extremist in an ascending scale of dangerous intent.

[28] *R v Elomar* (2010) 264 ALR 759, [12].

[29] *R v Elomar* (2010) 264 ALR 759.

[30] *R v Elomar (No 27)* [2009] NSWSC 985, [33].

[31] *R v Elomar (No 27)* [2009] NSWSC 985.

[32] *R v Elomar* (2010) 264 ALR 759, [43].

[33] *R v Elomar* (2010) 264 ALR 759, [107]–[130].

[34] *R v Elomar* (2010) 264 ALR 759, [43]–[55].

First, there were images of Muslim people, often women and children, terribly wounded or shockingly killed by the actions of the United States soldiers and their allies.[35] Images of this kind, of course, would readily inflame the committed Muslim viewer and ignite his or her anger at the actions of the enemy. The second category of images showed military type explosions and the like.[36] These were in circumstances demonstrating that the Americans and their allies were sustaining significant casualties at the hands of the insurgents. They were often accompanied by cheering and chanting in jubilation at the defeat of the enemy. Images of this kind were calculated to promote an extremist pleasure in the victory of the insurgents over the invading enemy.

The third and final category was the most disturbing of all. This was the gruesome and atrocious imagery of hostages being executed by the Islamists in the most terrible and brutal fashion.[37] They included images of the actual beheadings of captives in sickening detail.

I should add that I did not allow the jury to see the execution videos. They were shown part of one, but it was stopped prior to commencement of the execution itself. There were a considerable number of other execution videos. These were in evidence but they were not seen by the jury. The jury was given a written document which described in non-graphic terms what happened on the videos.

This brief description of the trial will demonstrate some of its unique features: its length, its complexity and the potential for prejudice arising during the proceedings.

Bias

One of the most striking images of the present century must be the television images of planes crashing into the Twin Towers in September 2001. These are images indelibly imprinted in our minds, such was the horror of the events we were witnessing. The death and destruction of some 3,000 people as two enormous structures, symbols themselves of the enormous success of capitalism, exploded and collapsed as a result of the co-ordinated plan, carefully prepared by fanatical religious idealists. It was, I suggest, a sight never to be forgotten.

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. There was an enormous debate about the nature of terrorism, about the need for "a war on terrorism" and an urgent need to introduce legislation of a completely new kind. It had always been an offence to cause the death of a fellow human being. It was motivated by a religious and ideological need to terrify the western world, so that it would change its ways in relation to its treatment of Muslims and its activities in Muslim lands.

The public perception of a serious terrorist act as being a crime worse than ordinary crime, which gave rise to horror and revulsion, was recognised as an attack on society as a whole.[38] So it was in 2002 that the Australian government rushed to action to produce a series of new laws.[39] That process has been a continuing one and, between 2001 and the time of trial, there had been well over 20 separate pieces of legislation brought into existence. As I shall point out, a particular matter of stimulus was the atrocious terrorist attacks in London when the Underground was bombed in July 2005. This was a particularly chilling reminder for Australians of what might occur should a terrorist attack occur in this country. Fifty-two people had been killed including a Melbourne man. A number of Australians were seriously injured. The terrorists were completely indiscriminate in their killing. The 52 victims came from many different countries and religions. It would not have mattered to the terrorists whether the

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[35] *R v Elomar* (2010) 264 ALR 759, [46].

[36] *R v Elomar* (2010) 264 ALR 759, [50].

[37] *R v Elomar* (2010) 264 ALR 759, [48].

[38] See Rt Hon Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism*, Cmd 3420 (October 1996) xi.

[39] See *Suppression of the Financing of Terrorism Bill 2002* (Cth); *Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002* (Cth); *Border Security Legislation Amendment Bill 2002* (Cth); *Telecommunications Interception Legislation Amendment Bill 2002* (Cth); *Security Legislation Amendment (Terrorism) Bill (No 2) 2002* (Cth).

victims included followers of their own faith. It was clear that terrorists made no allowance for race, religion or nationality.

It was in this context that many Australians became deeply concerned about Muslim extremism. The media bore some degree of responsibility for what may properly be described as an overheated response. A number of our more outspoken politicians also bore some of the blame. The outcome, as might be expected, was that many decent citizens in the Muslim community felt discriminated against, marginalised and outcast.

A number of Muslim religious teachers exacerbated this problem. Anger flared and there was actual violence in our local communities. It was against the background of this hostile atmosphere that the trials over which I presided took place.

It is not unusual for prejudice to intrude into a criminal trial. Many murders, for example, are shocking in their nature. The media are adept at inflaming passions by emphasising the atrocities often perpetrated by human wrongdoing. However, in the decade after 9/11, prejudice against the Muslim community was noticeably prevalent.

From the very outset of the *Lodhi* trial until its conclusion some months later, I was particularly concerned about this aspect of prejudice and bias. I was extremely conscious of the continuing publicity in the media concerning terrorist acts in other countries. I was also conscious of popular radio personalities speaking out frequently about attitudes held by certain radical Muslims living in Australia.

As I have intimated, there were a number of ways in which the features of a terrorism trial, far more than in an ordinary trial, prompted an incessant need to ensure that the threat of bias was kept to an absolute minimum. Let me give two examples: each of these arose in the *Elomar* proceedings. The first related to the layout of the courtroom itself. The second related to an unusual event which occurred one month after the trial proper had commenced.

The Court Layout

This was the first trial held in a new court complex in Western Sydney. There were two custom-built courts on the top floor of the building especially designed to cater for long complex criminal trials. One notable feature is that the accused were confined behind a fixed glass compartment, physically separated from the lawyers, the public and the jury. During the first few months of the pre-trial sessions, I became increasingly aware of the likely unfavourable impression that might be given to the jury in this regard. Quite apart from the possibility of a prejudicial impression, the architecture made it difficult for the lawyers to communicate privately with their clients, and almost impossible to show them documents, if that became necessary.

The presence of the "wall" separating the accused from the rest of the court ultimately became a critical issue. Before the jury was empanelled, an application was made by the accused to have the glass panel removed.[40] The Crown opposed the removal and the State Government, which had designed the court, supported this opposition.[41]

After much consideration, I ordered that the glass panel should be removed. My principal reason related to the dangerous impression it gave: the jury were likely to see the accused as unfit to be in the same room with them; that they were physically separated and contained because they were dangerous, and that they, the jury and the public needed to be protected from these men.[42] Once the partition came down, the jury were empanelled and the trial began. The layout of the court no longer presented a dangerous impression and the perception of bias was eliminated in that regard.

[40] *R v Baladjam (No 41)* [2008] NSWSC 1462.

[41] *R v Baladjam (No 41)* [2008] NSWSC 1462, [44], [38].

[42] *R v Baladjam (No 41)* [2008] NSWSC 1462, [74]–[80].

The Incident with the Muslim Woman

About a month into the trial, I received a note from the jury.[43] The jury were concerned about two incidents that had taken place during the previous week. The first involved four jurors who said they had been followed to their car. The second involved one juror who believed she had been observed in her car by a woman who made notes in a notepad and made a telephone call. The inference was clear that the jurors suspected the woman was making a note of their car registrations or other details. The jury note identified a woman who wore Muslim dress and whom they had seen in the public gallery of the court on a number of occasions.

Clearly, this incident had the capacity to bring about a discharge of the jury. However I determined, not without some hesitation, to persist. The issue was – could the jury, despite the incidents and the concern they caused, continue to act impartially and dispassionately in the trial? The accused sought a discharge and ultimately the Crown supported their application. The course I took was to address the jury and to provide them with a note. My address was in the following terms:

> In reference to the events mentioned in your note … you will recall that I gave you a direction before you left court yesterday morning. It was a direction expressed in firm terms. But now I want to ask you, all of you, through your foreman, if I may, are you able to assure the court that, notwithstanding the events mentioned in your note, each of you is able to discharge his or her task as a juror in this trial impartially?

The note I gave to the jury read as follows:

> I want to ask all of you, through your foreman, are you able to assure the court that, notwithstanding the events mentioned in your note, each of you is able to discharge his or her task as a juror in this trial impartially.

The jury retired as requested and provided a note in the following terms:

> Your Honour, the jury has had a discussion regarding your note, the response is unanimous. Every juror remains able to discharge his or her task as a juror in this trial impartially. For the record, this is yes.

I then gave a decision which was challenged unsuccessfully on appeal.[44] The gravamen of the decision was as follows:

> In the light of the directions I have given the jury and the jury's reaction to it, I cannot and do not conclude that the parties or the public might entertain any reasonable apprehension that the jury might not bring an impartial and unprejudiced mind to the resolution of the issues involved in the trial.[45]

These two instances were not the only matters where bias raised its threatening head. Other issues were present. The accuseds' Muslim dress, their beards, their sometimes threatening appearance, their desire to adjourn for prayer; their observance of religious days. All required careful directions to the jury. Sometimes there was a need not to give directions (eg their refusal to stand for the judge and jury) so as not to over-emphasise the situation.

Finally there was one intrusion, particularly noticeable in *Lodhi* but somewhat muted throughout the *Elomar* trial: the persistent presence of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). This complex and troublesome piece of legislation was, once again, a by-product of the attack on the Twin Towers in New York. It has continued to bedevil criminal trials, and especially trials involving allegations of terrorist activities, or those alleging the unwarranted disclosure of classified information.

National Security Information Legislation/Public Immunity

I shall first give a brief summary of this legislation as it existed at the time of the two trials. Second, I shall make a brief commentary about its practical effects during a terrorism trial. Finally, I shall point out its potential difficulties in the trial context, noting its capacity to exacerbate the bias problem.

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[43] *R v Elomar (No 4)* [2008] NSWSC 1444.

[44] *Elomar v The Queen* (2014) 300 FLR 323, [317]–[324].

[45] *R v Elomar (No 4)* [2008] NSWSC 1444, [37].

The legislation was passed, in part, to protect information whose disclosure in federal criminal proceedings would be likely to prejudice national security.[46] 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.[47] 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.[48] These expressions are given very broad meanings in the definition ss 9, 10 and 11 of the Act. For example, "international relations" means "political, military and economic relations with foreign governments and international organisations".[49]

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.[50]

The operation of the Act, will ordinarily be "triggered" when the prosecutor contemplates the brief of evidence necessary for the trial.[51] The prosecutor may notify the Court and the parties that a particular case falls within the provisions of the legislation.[52] In fact, however, such notice can be given at any time during the proceedings.[53]

At the commencement of Pt 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 affect national security.[54] 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.[55] 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 affect national security.[56] The Court may make such order (if any) as it considers appropriate to give effect to the arrangement.[57]

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.[58] This information includes

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[46] Commonwealth, *Parliamentary Debates*, Senate, 30 November 2004, [3]–[8].

[47] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) Pt 3.

[48] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 8.

[49] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 10.

[50] Explanatory Memorandum, *National Security Information (Criminal Proceedings) Bill 2004* (Cth) 1.

[51] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 6.

[52] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 24.

[53] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 21(1).

[54] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 21.

[55] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 21(1)(a)–(b).

[56] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 22(1).

[57] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 22(2).

[58] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) Div 2.

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.[59]

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.[60]

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 or the calling of the witness.[61]

After holding a hearing required under s 27(3) in relation to the disclosure of information in a federal criminal proceeding, the court must make an order under one of s 31(2), (4) and (5). 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.[62]

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.[63]

In deciding what order to make under s 31, the Court must consider the following matters:[64]

> 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-ss 26(2) or (3) – the information were disclosed in contravention of the certificate, or
> (ii) where the certificate was given under sub-ss 28(2) – the witness were called.
>
> 7(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.
>
> 7(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). Clearly, the greater weight is to be given to the risk of prejudice to national security.

The legislation provides for a potential series of appeals.[65] 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.[66]

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.

[59] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 24(1)–(3).

[60] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 26(1).

[61] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 27(3a).

[62] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(1), (2), (4), (5).

[63] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(6).

[64] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(7), (8).

[65] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) Div 4.

[66] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 34.

> 19(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 effect on a defendant's right to receive a fair hearing.

Quite apart from practical issues such as delay and inconvenience, it can be readily appreciated that decisions made under the NSI Act carry awkward consequences in terms of potential prejudice and bias.

By this, I refer to the protective orders that would necessarily be made following a decision to uphold the Attorney-General's certificate either in whole or in part. Protective orders may involve closing the court to the media and the public; may involve taking evidence from remote locations by audio visual links; may involve the use of pseudonyms and screening orders. The protection of classified surveillance techniques also requires the utmost secrecy.

Each of these orders has the capacity to increase the risk of bias and prejudice. What are jury members to think of the accused when the court orders that it is necessary to close the court to the public and take evidence remotely? What is it to make of an order that may keep material secret even from the accused? Is there not a real possibility that the jury may think that the accused are bad or dangerous persons in the light of these extraordinary procedures?

Of course, in an ordinary criminal trial, some of these procedures may be adopted following a public interest immunity decision. However, in a terrorism trial, they are almost a daily occurrence or experience. One of the reasons for this is that ASIO officers are often involved in the collection of evidence and that foreign informants (sometimes themselves a convicted terrorist) may be called upon to give testimony. Protection of identity and protection of foreign associations and dealings are paramount consequences of the need to protect national security.

It is fair to say that, in the *Lodhi* trial, the interpretation and application of this legislation played a significant role. There were appeals to the NSW Court of Criminal Appeal challenging the protective orders made and even the constitutional validity of the legislation.[67] These appeals were unsuccessful.

By contrast, during the *Elomar* trial, the presence of the legislation remained apparent but in a more muted fashion. As I understand the situation, this has remained the case in more recent terrorism trials. This is principally because co-operation between the parties has led to agreement being reached as to the nature and extent of protective orders. However, the legislation remains a troubling feature of terrorism trials and requires careful handling to avoid both prejudice and unnecessary delay in the trial process.

Directions to the Jury

Directions to a jury, including the final charge to the jury, occur in every criminal trial. Moreover, it has become the norm to provide the jury with a written direction setting out the essential elements of the offence with which an accused person is charged.

However, in a terrorism trial, this is a critical and difficult feature because of the complicated definition of a terrorist act and the wide variety of actions that are criminally associated with the concept of a terrorist act. Without being exhaustive, let me list some of these offences:

- commit a terrorist act;[68]
- plan or prepare for a terrorist act;[69]
- finance terrorism or a terrorist;[70]
- provide or receive training connected with terrorist acts;[71]
- possess things connected with terrorist acts;[72]

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[67] *Lodhi v The Queen* (2007) 179 A Crim R 470; *Lodhi v The Queen* (2006) 199 FLR 303; *Lodhi v The Queen* 65 NSWLR 573.

[68] *Criminal Code Act 1995* (Cth) s 101.1.

[69] *Criminal Code Act 1995* (Cth) s 101.6.

[70] *Criminal Code Act 1995* (Cth) s 103.

[71] *Criminal Code Act 1995* (Cth) s 102.5.

[72] *Criminal Code Act 1995* (Cth) s 101.4.

- collect or make documents likely to facilitate terrorist acts.[73]

The complexity of the written elements of a terrorist offence can be gleaned from an examination of the directions I gave in *Lodhi*. The example I have chosen relates to the allegation that *Lodhi* collected maps of the electricity grid in preparation for a terrorist act. It states, in part:

> The elements of the offences, which the Crown must prove beyond reasonable doubt, are as follows:–
>
> Count 1
>
> (a) On or about 3 October 2003 at Sydney in the State of New South Wales the accused collected two maps of the Australian electricity supply system
>
> and
>
> (b) He intended to collect those maps
>
> and
>
> (c) The maps were connected with preparation for an action or threat of action involving the causing of serious damage to the Australian electricity supply system, or part thereof, by the detonation of an explosive or incendiary device or devices
>
> and
>
> (d) The action or threat of action referred to in (c) was a terrorist act (see Note 1)
>
> and
>
> (e) The accused knew (that is, he was aware), of the connection between the maps and the preparation for the action, or threat of action, referred to in (c), that is, at the time that he collected the maps:-
>
> (i) he was aware of the action, or threat of action, referred to in (c); and
>
> (ii) he was aware of the intention by that action, or threat of action, to advance a political, religious or ideological cause; and
>
> (ii) he was aware, by that action or threat of action, it was intended to coerce or influence by intimidation at least one of the following, the Government of the Commonwealth, the Government of the State, Territory or foreign country, or to intimidate the public or a section of the public.

Two particular complexities, among others, may be noted. First, the act said to be a terrorist act must be such that it possesses a certain "purpose or motivation", for example, the intention of advancing a political, religious or ideological cause.[74] It is critical to note that this is the "intention" of the act, not necessarily that of the actor, although a defendant in a particular case may be motivated by the stipulated intention. An example of this distinction may be seen in the situation where an otherwise innocent person has been coerced into carrying an explosive vest, or where such a person is not aware that he or she is carrying explosives. The critical element is the intention characterising the proposed explosion of gelignite, not that of the person carrying the explosive in the example I have given.

Second, the act said to be a terrorist act must possess certain characteristics but, it will not be a terrorist act if there is a reasonable possibility that it has other characteristics, for example, advocacy or protest without an intention to cause harm or danger to a person.[75] It is not easy to explain these concepts to a lay jury.

Because of the complexities I have mentioned, the written direction, difficult though it be, will need to be accompanied by detailed oral directions to the jury in an endeavour to make the elements of the offence, and the precise issues at trial, easier for the jury to comprehend. In a particular case, this oral aspect of the charge to the jury can itself be quite complicated and lengthy.

There is a further area in which the directions to the jury in a terrorism trial assume complexity, not generally encountered in most criminal trials.

I have earlier referred to the "state of mind" evidence reflected in the extremist material possessed by the accused in the *Elomar* trial. It will be recalled that I described the evidence as falling into three categories. Obviously, there is a real danger that where such material is admitted into evidence, the jury may be persuaded by the nature of the evidence that those in possession of it are likely to be guilty of

[73] *Criminal Code Act 1995* (Cth) s 101.5.

[74] *Criminal Code Act 1995* (Cth) s 101.1.

[75] *Criminal Code Act 1995* (Cth) s 100.1(3).

the serious charges brought against them. They may reason, illegitimately, that because a person has a particular state of mind, there is a tendency that he will have that state of mind on a later occasion.

The first direction given in this situation is to forbid the jury from seeing the evidence in this way. They must be told in the clearest terms that the evidence is confined to telling them the state of mind of the accused and that it may be relevant to their intentions in connection with the actions they have carried out. However, the direction continues, it cannot follow that because of their possession of the material, they are therefore guilty of the offence charged.

Second and more importantly, the jury must be warned against using the evidence as tendency evidence. This is reasoning that people who possess this material are therefore likely to have a tendency to commit serious crimes or to have a tendency to have the same state of mind at a later date. This distinction between evidence that bears upon a person's intention and evidence that shows a tendency to possess a certain state of mind is a very fine one. Accordingly, the crafting of careful directions is absolutely essential to avoid prejudice, or, in the worst case, a miscarriage of justice.

Sentencing

Sentencing for all criminal offences is often complex and far from easy. However, there are a number of sentencing principles that have special primacy in relation to a person who has been convicted of a terrorist offence. I have had the benefit of reading Mark Weinberg's article on sentencing in this edition and would only add the following.

As I indicated at the outset, the fact that the motivation for the offence is religious or ideological is an unusual but necessary feature of the offence. In my experience, fully radicalised extremists are unlikely to alter their views. This remains the case even following many years in prison. Such men, it has been said, "wear their imprisonment like a badge of honour".

One further feature of the Australian incarceration of prisoners for terrorism offences is this: what is to happen when a radicalised extremist reaches the end of the term of his sentence?

Such a person may remain committed, upon release, to carry out the very terrorist act his lengthy term of imprisonment has prevented. The solution to this terrible dilemma, by no means a popular one in terms of human rights or civil liberties, is a new statutory provision enabling a person to be held in detention for up to three years after their sentence is finished.[76] The orders can be extended at the end of the three-year period if a court is satisfied that a further extension is necessary.[77]

Detention at the end of a term of imprisonment is not confined in Australia to terrorism offences. Orders of this kind can be made in the case of serious sexual offenders.[78] Nevertheless, this extraordinary feature of the treatment of terrorist offenders may legitimately be seen as a characteristic that is generally absent in the case of ordinary criminal behaviour.

[76] *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth) Sch 1 Div 105A.

[77] *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth) Sch 1 Div 105A.12.

[78] See, eg, *Crimes (High Risk Offenders) Act 2006* (NSW) s 5C; *Serious Offenders Act 2018* (Vic) Pt 5.

National Security and the Law – What Lies Ahead?

Lord Carlile of Berriew CBE QC*

Assessing what lies ahead for national security and the connected law is a complex, multifaceted process. As the world comes to terms with the scale of the impact of the COVID-19 pandemic and grapples with the profound social, economic and political shifts it has inflicted, the most pertinent issues that will affect the relationships between national security and the law are still forming. With the publication of its "Integrated Review", the United Kingdom has reassessed its place in the world, made choices with serious strategic consequences, and presented a series of plans to deal with the changing situation. An example from the legal context is extensive sentencing reforms, which have created an upward trajectory of imprisonment. By examining how the United Kingdom now perceives its own national security in a global context and has adapted its approach, with particular reference to trends in international terrorism, we can draw some initial conclusions about what lies ahead.

I. INTRODUCTION

Since 9/11, centralised government thinking about what issues are key to national security has developed. Some prefer the term "evolved", but that posits a natural, scientific progress. In reality, changes in approach have been driven more by a series of political developments, punctuated by changes of government and unpredictable geopolitical events.

Terrorism, one of the driving national security themes of the past two decades, remains a vital issue for the public,[1] but at a policy level is gradually being subsumed into the recognition that post-Cold War assumptions of conflict against non-state actors are being incremented by state-on-state competition. Potentially even more important is to recognise the tip-of-the-iceberg issues that are developing from a growing global competitive environment, marked by high-technology superpowers, regional middle powers vying for influence, and globally organised crime in the cybersphere. These changes are fuelled by rapidly growing geopolitical inequality that creates a few winners and many losers, leaves those in between at risk of an invisible structure, hopelessness and lack of opportunity, leading to social conflict and instability from grassroots to high government. Extremism – the adoption of extremist views for the purposes of political action – is an identifiable consequence of pessimism of that kind for some activists.

Setting national security strategy is at the heart of addressing these issues. Sir Michael Quinlan, former Permanent Secretary at the Ministry of Defence once said:[2] "[national] security provision is in the insurance business – it has to be, in a sense, pessimistic, calibrated to what we fear might happen, not to what we would like to happen or even what we think most likely to happen." This is a realistic pessimism, unwelcome but necessarily to be planned for. Governments must prepare for the worst and

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Lord Carlile wishes to acknowledge the considerable research and other contributions to this article of his colleague Alex King.

[1] The perceived threat from terrorism is a constant theme in UK public discourse. A noteworthy element is the consistent public perception of *increasing* risk of terrorist attack for example YouGov, *Has the Threat of Terrorism Increased in the Last 5 Years?* <https://yougov.co.uk/topics/politics/trackers/has-the-threat-of-terrorism-increased-in-the-last-5-years>.

[2] From Peter Hennessy, *The Secret State: Preparing for the Worst 1945-2010* (Penguin, 2010).

hope for the best, strategising against threats so catastrophic that they may affect *national*, rather than individual, security.

The scale of the threat of terrorism, serious crime, cyberattacks, energy insecurity, and increasingly, state-backed competition, have not altered out of all proportion in the past year of pandemic. And those wishing the United Kingdom harm – whether state or non-state actor – have not particularly changed after Brexit. What has changed, what the Integrated Review addresses,[3] and what we must recognise going forward, is that the way in which in 2021 the government and wider society perceives threats and chooses to manage them is significantly different from the perceptions of 2001 or 2011.

II. The World in Early 2021

A lesson from the COVID-19 pandemic has been the folly of ignoring warnings about high-impact risks that are highly likely to happen as a matter of when – not if.

By November 2020, the rise of nationalism around the world had led to competitive management of the pandemic, with international co-operation marred by competition for protective equipment, treatments and vaccines. Growing political confrontation between major powers against a background of pandemic management reinforced disagreements. Asia's remarkable response and resilience suggested a shifting economic centre of gravity in the world, and the success of new communication technologies under lockdown highlighted new ways of working which will shape the economy of tomorrow. Developing countries suffered the most, and with global poverty already worsening at the beginning of 2020, access to health care for COVID-19 remains unequal, creating new winners and losers and putting the basic livelihoods of millions at great risk.[4] If such a situation were to remain unaddressed, it is likely to promote further inequality and greater migratory movements all over the world. The latter is a huge issue, as for reasons of human security, migrants and the residents of transit and host countries are put at much greater risk of exploitation, radicalisation and extremism. This is a global issue, evidencing the failure of international comity and diplomacy to make the Earth a safer planet.

In parallel with the health crisis, 2020 has witnessed other demanding challenges – a global energy crisis; unprecedented GDP fluctuations; simmering tensions over territorial ambitions transforming into use of hard power to achieve ends;[5] increasing competition in the "grey zone" at the margins of acceptable state behaviour; and trumpeted but fragile rapprochements between Arab nations and Israel.

Specific issues that have fallen off the agenda will be revisited this year as some positivity takes hold after a gruelling 2020. These include ambitions for multilateralism, relations with the new United States administration (particularly China's), the exit from the health crisis and economic recovery while avoiding social crises, avoiding new regional conflicts, increased poverty, the further failure of developing countries or further compromises to global development goals.

China has emerged from 2020 in better economic shape than most of the West; with a centralised, autocratic system of government, China was able to implement draconian regulations, and mount a strong economic recovery. One of the better understood certainties of the past year is greater Chinese confidence and assertiveness. China may have concluded that its own system functions better than any in the Western system: and if the conviction grows that Western democracies – and in particular the United States – are in decline, this may make China even more confusing for the West to deal with in future.

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[3] HM Government, *Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy* (March 2021).

[4] OECD, *Risks That Matter 2020: The Long Reach of Covid-19* (28 April 2021) <https://www.oecd.org/coronavirus/policy-responses/risks-that-matter-2020-the-long-reach-of-covid-19-44932654/>.

[5] For example, the Armenia-Azerbaijan conflict that lasted 44 days between September and November 2020. Over 5,000 were killed, thousands of refugees displaced OECD, *OECD Policy Responses to Coronavirus (COVID-19): Risks That Matter 2020: The Long Reach of COVID-19* (28 April 2021) <https://www.crisisgroup.org/europe-central-asia/caucasus/nagorno-karabakh-conflict/b91-improving-prospects-peace-after-nagorno-karabakh-war>.

A Note on COVID-19

There is circumstantial evidence that terrorist and extremist groups around the world have made efforts to use the global COVID-19 crisis to their advantage,[6] determined to try to capitalise on new geographical geopolitical realities. They perhaps believe that key national and international institutions are distracted by domestic crises, and that counterterrorism security and military budgets will be reduced as a result of the economic consequences of the pandemic; that instability and conflict zones will continue with increasing numbers of refugees; and that unemployment, and economic hardship will impact increasing numbers of potentially vulnerable people across the world.

Throughout the pandemic, unprecedented numbers of young people have been driven to spend vast amounts of their time on the internet, communicating with one another in the many ways that are now available including by impenetrable, encrypted social networking and on the dark web. The lockdowns in many countries may well have helped terrorist groups recruit and radicalise.

III. The Consequences for Terrorism and the Rule of Law

The global situation is a matter for continuing concern, not least because of growing uncertainty due to economic and social changes linked to the pandemic and other significant global shifts. Notable is the changing nature of terrorist and insurgency threats in many areas, with associated serious implications for the rule of law and international security. Some examples of deterioration are clear.

In Afghanistan, a campaign of assassinations has targeted female judges, leaders of civil society and journalists. These go to the roots of national and international accountability. There is a clear coincidence with the announced US withdrawal of troops. President Biden's big decision has been made – the US will withdraw by 11 September 2021. One can understand his position from a US domestic politics standpoint, and nobody should be surprised given pre-election comments of the situation. But the impact is wide ranging and has provoked deep concerns.[7] 2020 was a deadly year in Afghanistan, with devastating attacks on universities and a maternity hospital, and over 8,000 civilian deaths. There were also 82 attacks claimed by ISIS-K,[8] and in May 2021, a further attack specifically targeted a girls' school in Kabul. While this attack is, at time of writing, unclaimed,[9] such incidents can only increase, as ISIS-K intend to disrupt Afghan government-Taliban talks and as the Taliban feel they are winning on the ground. The Taliban leadership also continue to manifest limited interest in reforming their fundamentalist approaches to governance.[10] Afghanistan promises to become a base for Daesh proxies and franchises, a haven for deadly preparation, and thereby for international terrorist attacks directed unpredictably, all over the world.

In Iraq, embedded sectarian tensions continue to stoke Jihadist terrorist activity and the availability and marketing of terrorism materiel. The United Nation estimates there are 10,000 Daesh fighters remaining in Iraq and Syria, but this estimate may be low. We can expect Daesh and affiliates to continue to attempt to build local support – if necessary through the intimidation and extortion of locals, and by exploiting

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[6] Institute for Economics & Peace (IEP), *Global Terrorism Index 2020: How Have Terrorist Organisations Responded to COVID-19?* <https://www.visionofhumanity.org/wp-content/uploads/2020/11/GTI-2020-web-1.pdf>.

[7] For example, Michael McCaul and Ryan Crocker, *Here's What Biden Must Do Before We Leave Afghanistan* (4 May 2021) <https://www.nytimes.com/2021/05/04/opinion/biden-afghanistan-withdrawal.html> and Ashraf Ghani, *Afghanistan's Moment of Risk and Opportunity: A Path to Peace for the Country and the Region* (4 May 2021) <https://www.foreignaffairs.com/articles/afghanistan/2021-05-04/ashraf-ghani-afghanistan-moment-risk-and-opportunity>.

[8] ISIS-K (*Khorasan*) is ISIS' Central Asian affiliate. It has shown specific interest and capability in directed sectarian violence targeting Afghan and Pakistani Shiite minorities, particularly women and girls. Center for Strategic and International Studies, *Islamic State Khorasan (IS-K)* <https://www.csis.org/programs/transnational-threats-project/terrorism-backgrounders/islamic-state-khorasan-k>.

[9] "Kabul Attack: Families Bury Schoolchildren of Blast That Killed Dozens", *BBC*, 9 May 2021 <https://www.bbc.co.uk/news/world-asia-57046527>.

[10] Indeed, there is "legitimate concern that if political pressure diminished after an eventual peace agreement and a troop withdrawal, they might revert to pre-fall 2001 practices." Thomas Ruttig, *Have the Taliban Changed?* (2021) <https://ctc.usma.edu/have-the-taliban-changed/>.

societal tensions. Their interest in sponsoring low-cost, high-impact attacks continues. Layered above these issues lies Iran's malign influence, sponsoring the formation of non-state proxy organisations in other countries to execute Iran's vision of political and regional hegemony.

After a decade of conflict in Syria, a 2020 *Hurras Al-Din*[11] video called on individuals to carry out lone actor attacks globally. This indicates resilience, and a capability to retain communications abilities. There has been no progress on the dispersal or repatriation of camps full of international foreign fighters and their families. That terrible situation runs the grave risk of creating a generation whose only life is terrorism, and who see the international community as the diabolical cause of their statelessness and miserable existence. This is a huge and now no longer latent problem without any sign of a collective solution; immediately identifiable evidence of shameful neglect by the international community, including the allied democracies of the West and their partners.

There are many other concerning examples, including Libya, Somalia and across Africa, with shocking death tolls in Nigeria and the Sahel, including Mali, Chad and Niger. More recently, in Mozambique there is some evidence of co-ordination between local insurgents and international networks. A recent attack claimed by a Daesh affiliate on a Total oil installation led to the deaths of expatriate staff. Mozambique cannot control these events on its own, and fresh thinking and co-operation are needed to staunch the spread of such events.

IV. The Terrorism Threat in Europe and the United Kingdom

Terrorists continue to threaten Europe. Whereas the complexity of attacks has become less sophisticated, the use of vehicles to mow down innocent bystanders and the use of legally available weapons such as knives has made it more difficult to anticipate, disrupt and prosecute terrorist attackers.

A re-emergent concern in Europe is the evidence of State-sponsored terrorism.[12] In February 2021 an Iranian diplomat was convicted of a plot to bomb a large Paris rally held by an exiled opposition group. Assadollah Assadi, 49, a diplomat at the Iranian embassy in Vienna, was given a 20-year jail term by a court in Antwerp in Belgium. Three others were also convicted. They were arrested during a joint operation by German, French and Belgian police. This is most unlikely to be the only such plot. Although the Iranian Government denied state involvement, it is noteworthy that Assadi made the decision not to appeal against his conviction, which was explicitly for a State-sponsored plot.

Meanwhile, there is a clear spread and increasing risk of extremism across Europe. This creates huge challenges for Rule of Law legal systems, for which due process and proportionality are all too easily trumped by disproportionate political reactions to issues such as pre-trial disclosure, the lengthening of sentences and ever more arduous release conditions.

At the forefront of these concerns lies the rise of Right-Wing Extremism (RWE). There is no doubt that RWE is on the increase, and there have been several serious examples in the United Kingdom. Three British right-wing groups have been statutorily proscribed as terrorist organisations, including National Action (2016), Sonnenkrieg Division (2020)[13] and Feuerkrieg Division (2020): none have challenged the designation. Thus it is incontestable that RWE includes terrorists. Even up to 2017 in the United Kingdom there was still no recognised problem with conspiratorially organised RWE terrorism (though events such as the murder of Jo Cox MP did suggest the possible direction of events). Now, RWE is a snowballing challenge. The Government has told us that the raw percentage of RWE investigations and arrests by the British authorities is becoming comparable to those targeting Islamist violent extremist

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[11] Hurras Al-Din is an al-Qa'ida-affiliated jihadist group that emerged in Syria in early 2018 after several factions broke away from Hayat Tahrir al-Sham (HTS), which itself splintered from Al-Qaeda in Syria in 2017. The group is suspected of attack-planning against Western targets. US Department of State, *Country Reports on Terrorism 2019* (2019) <https://www.state.gov/reports/country-reports-on-terrorism-2019/>.

[12] "France Bomb Plot: Iran Diplomat Assadollah Assadi Sentenced to 20 years", *BBC*, 2021 <https://www.bbc.co.uk/news/world-europe-55931633>.

[13] In March 2021, acting on an ASIO recommendation, Sonnenkrieg Division became the first RWE organisation to be listed as a terrorist group in Australia: Anthony Galloway, "'Abhorrent, Violent Ideology': Australia Lists Extreme Right-wing Group as Terrorist Organisation for First Time", *The Age*, 22 March 2021 <https://amp.theage.com.au/politics/federal/abhorrent-violent-ideology-australia-lists-extreme-right-wing-group-as-terrorist-organisation-for-first-time-20210322-p57cys.html>.

groups. Of those referred to the Prevent policy-based Channel program of the United Kingdom counterterrorism process in 2020–2021, the largest group of those judged at-risk are now RWE far-right extremists (making up 43% of referrals, compared to Islamist extremists at 30%). In the previous year ending 31 March 2020, there were 6,287 referrals to Prevent, an annual increase of 10%.[14] *Prevent*[15] is one part of the UK government's four-part CONTEST CT strategy.[16]

There are multiple examples of RWE elsewhere in Europe, including France and Germany. Although Germany carries heavy baggage from the 1930s and their consequences, France presents a worrying immediate problem due to fragile community relations structures and the unintended consequences of constitutionally-reinforced secularism. Schengen border arrangements make it easier for extremists and their weapons to travel within the European Union (EU).

Overall, what this represents is an alarmingly rapid increase in political movements across Europe for whom violence is acceptable. There are also unclear mutually reinforcing relationships between radicalisation and foreign state information warfare. This is part of the rationale for the UK's recalibration of its defence policy to include cyber capability and counterterrorism and national security activity in the asymmetric (non-State funded) threat picture.

The boundary between territorial groups with belief systems and small political terrorist groups has narrowed, blurring the line between non-state actors and terrorist groups.

The rise of RWE as well as that of a territorial Caliphate have made the definition and legal terminology of terrorism deeply problematic around the world. This challenge is recognised in Australia, as the Director-General of ASIO announced in March 2021 during an annual threat assessment that he would stop referring to "Islamic extremism" and "right-wing extremism", instead using the broad terms "religiously motivated violent extremism" and "ideologically motivated extremism" – while recognising that "so-called right-wing extremism" had grown from about one-third of ASIO's priority CT caseload to about 40% over the past year.[17]

An additional, and controversial question is whether the authorities in some countries (including the United Kingdom), deploy statistics in a disingenuous way, to soften the public assessment of the dangers presented by violent and heretical Islamism.[18] Although some RWE activity is dangerous and increasingly so, it remains a reality that the greater operational challenges are presented by violent Islamism, the proponents of which often are more complex, with international connections and inspiration, and less well-known to the police as generic criminals. Statistics do not tell the whole story.

COVID-19, Radicalisation and Recruitment

On 22 April 2020, UK counterterrorism police warned that the impact of COVID-19 and social isolation would make some vulnerable people more susceptible to radicalisation, and other forms of grooming. Chief Superintendent Adams, the National Coordinator for Prevent, said: "Isolation may exacerbate grievances that make people more vulnerable to radicalization, such as financial insecurity or social alienation." This view is shared by the General Director of the French General Directorate for Internal Security, Nicolas Lerner, who argued that confinement can accelerate extremist behaviours when aggravated by other emotional factors.[19]

[14] Of those referred to Prevent in 2019 to 2020, 1,487 (24%) were referred for concerns related to Islamist radicalisation and 1,387 (22%) were referred for concerns related to far-right radicalisation.

[15] Gov.UK, *News Story: William Shawcross to Lead Independent Review of Prevent* (26 January 2021) <https://www.gov.uk/government/news/william-shawcross-to-lead-independent-review-of-prevent>.

[16] HM Government, n 3.

[17] Anthony Galloway "'Words Matter': ASIO to Stop Referring to 'Right-wing' and 'Islamic' Extremism", *The Age*, 17 March 2021 <https://www.theage.com.au/politics/federal/words-matter-asio-to-stop-referring-to-right-wing-and-islamic-extremism-20210317-p57bme.html>.

[18] For example, Globalriskinsights.com, *Future Trends: Far-Right Terrorism in the UK – A Major Threat?* (April 2021) <https://globalriskinsights.com/2021/04/future-trends-far-right-terrorism-in-the-uk-a-major-threat/>.

[19] Décugis, Jean-Michel and Jérémie Pham-Le, "Terrorisme: le risque d'un « effet accélérateur » du confinement", *Le Parisien*, 18 April 2020.

Research conducted by Pool Re and Cranfield University suggests that during the COVID-19 lockdown the number of actual attacks has been reduced because of legal difficulties for terrorists to move about in public and mount preparations.[20] However, for the reasons given above the ideation and planning of future events certainly has burgeoned. There is every reason for continued vigilance. Terrorist propaganda, especially connected to the far right, has increased during this time. Research by Moonshot CVE (a respected and specialist countering violent extremism technology adviser) found that online engagement with extremist right-wing content increased by an average of 13% immediately following the introduction of social distancing and other lockdown measures in the United States.[21] After 10 days of lockdown, engagement rose to a 21% increase on pre-lockdown levels.

It is a truism that the internet is at the core of today's serious problems in the planning and deployment of terrorist events. Although the authorities, certainly in Five Eyes countries, have achieved notable success in removing from the Web a great number of terrorist-related material, the sitting of online organisations and propaganda is a slippery customer – the electronic equivalent of flags of convenience. The appetite for international co-operation to deal with the evils freely available on the internet is beset by reluctance among governments to tackle problems for which blame all too easily is attributable to others, and also by the sluggish recalcitrance of those who provide the electronic space for such activity.

V. Brexit and UK Security

Historically the United Kingdom has been one of the main driving forces behind the development of common EU policy for security and defence (CSDP). During its membership the United Kingdom had the largest defence budget among EU Member States. Without the UK's support, the strategic ambition of a "common European defence" could ultimately falter and the EU's strategic autonomy will remain at the "soft power" end of the military spectrum. These comments can be transposed to national security and counterterrorism issues.

Already information systems which before Brexit were used regularly are not available in real time. This includes the Schengen Information System (SIS2), certain aspects of intelligence sharing, and rapid availability of non-UK criminal records. While efforts are being made to close the gaps, these unwanted consequences, surprisingly not fully negotiated before Brexit, are a serious inhibition operationally for the UK authorities.[22]

In order to shape the agenda, or influence policy, and ensure there is no duplication with NATO, the United Kingdom will now have to rely heavily on its diplomatic networks and other bilateral and multilateral channels of diplomacy going forward.[23]

VI. Looking Ahead

Among the essential features of any democracy is a basic requirement to submit public policy decision-making to democratic accountability. The dangers of arbitrariness and disproportionality are at greatest risk when a government exercises its primary duty to keep the public safe from attacks on their daily lives and on the polity of their country. Further, the public call for "something to be done" is never shriller than when, for example, people have died because of an unanticipated terrorist attack at an iconic location.

[20] Andrew Silke (Pool Re and Professor of Terrorism, Risk and Resilience, Cranfield University), "COVID-19 and Terrorism: Assessing the Short and Long-term Impacts of Terrorism" (Press Release, No PR-CDS-20-061, 07 May 2020) <https://www.cranfield.ac.uk/press/news-2020/covid19-and-terrorism-assessing-the-short-and-longterm-impacts>.

[21] Moonshot CVE research, quoted in "Immediate Impact", Andrew Silke (Pool Re and Cranfield University's Professor of Terrorism, Risk & Resilience), "COVID-19 and Terrorism: Assessing the Short-and Long-term Impacts" (May 2020) <https://www.poolre.co.uk/wp-content/uploads/2020/05/COVID-19-and-Terrorsim-report-V1.pdf>.

[22] This situation was referred to as "a pretty effective compromise … but a damage limitation exercise" by Julian King, former European Commissioner for the Security Union 2016–2019, "Does the Brexit Deal Keep Us Safe?", *Prospect Magazine*, 5 January 2021 <https://www.prospectmagazine.co.uk/world/julian-king-brexit-deal-security-intelligence>.

[23] A particularly useful summary quoted here is Claire Mills and Ben Smith, "End of Brexit Transition: Implications for Defence and Foreign Policy Cooperation" (House of Commons Library Briefing Paper No 9117, 19 January 2021) <www.parliament.uk>.

Societies like the United Kingdom, governed under Rule of Law principles, rightly are wary of acting against individuals based upon what may be termed the “precautionary principle”. Aversion to pre-emption in Common Law has long been addressed by the creation of inchoate offences including conspiracy and incitement to specific criminal actions. Such inchoate offences require identifiable, usually evidential criminal ambition and intent. More recently, these principles have been extended to apply to statements and actions well prior to (or unconnected with) a specific terrorism offence, and to proscribing membership of terrorist organisations. This continues to trouble some lawyers and Parliamentarians, a concern that needs to be faced in designing law fit for the future.

Until relatively recently the very existence of certain parts of the UK security apparatus could not be referred to in the UK Parliament. Even today, it is unlawful to utilise as part of prosecution evidence in a criminal trial the use of intercepts by the UK authorities (although the use of intercepts by the security services of other countries is admissible – a strange anomaly). Despite the creation of respected and very effective accountability mechanisms, for example the Intelligence and Security Committee of Parliament, and the Investigatory Powers Commissioner’s Office, there remains tension between public opinion (generally in favour of strict powers to catch and punish terrorists) and civil liberties focused NGOs (generally opposed to any powers not used for crime as a whole).

Recently two statutes have been passed in the United Kingdom to strengthen powers against terrorism. Further legislation was announced in the Queen’s Speech at the opening of the 2021–2022 Session of Parliament on 11 May 2021. An Oxford University researcher and lawyer Umar Azmeh accurately described this recent legislation as “root and branch, striking reform, with an upward trajectory and public support”.[24]

The *Terrorist Offenders (Restriction of Early Release) Act 2020* (UK) had the effect of lengthening prison terms, by increasing the time served from at least one-half to at least two-thirds of the term passed by the Court. This impacted on prisoners imprisoned before the Act was passed. Unsurprisingly, that effect was challenged in the courts: the challenge failed.

The *Counter Terrorism and Sentencing Act 2021* (UK) ended the prospect of early release for anyone convicted of a serious terror offence and forces them to spend their whole term in jail.

The most dangerous offenders – such as those found guilty of preparing or carrying out acts of terrorism where lives were lost or at risk – now face a minimum of 14 years in prison and up to 25 years on licence, with stricter supervision. Justice Secretary & Lord Chancellor, Rt Hon Robert Buckland QC MP, said:

> Those who seek to kill and maim innocent people in the name of some warped ideology have no place in our society. … This legislation will put terrorists behind bars for longer – protecting the public and helping to keep our streets safe.

The 2021 Act also allows courts to consider whether a much wider range of offences have a terror connection – for example an offence involving the supply or possession of firearms with a proven link to terrorist activity – and hand down tougher punishments.

Additionally, the Act increases the tools available to counterterrorism police and the security services to manage the risk posed by terrorist offenders and individuals of concern outside of custody.

This includes the overdue provision of stronger *Terrorism Prevention and Investigation Measures*, which restrict the movements and connections of individuals concerned; and make it easier for the police to apply for a *Serious Crime Prevention Order* in terrorism cases. Additionally, it widens the list of those offences that can be classed as terror-connected and thus trigger *Registered Terrorist Offender Notification* requirements – meaning more offenders will be required to provide the police with regular updates on changes to their circumstances, such as a new address or when they plan to travel abroad.

In addition, the Government is planning to amend the UK’s Treason laws to prosecute citizens who travel abroad to join terrorist groups. These laws, which have been in place since 1351 and were last used to prosecute Nazi sympathiser William Joyce in 1946, have been described by the Government and MPs as currently unworkable with regard to jihadists returning to the United Kingdom from Iraq and Syria.

[24] During a Zoom conference organised by the Bishop of Gloucester, 12 May 2021, podcast still awaiting release.

Proposals to reform the law include the widening of the definitions of what constitutes an "enemy" and "acts of betrayal" to apply to non-state actors, including terrorist organisations. Additionally, there are proposals to compel people travelling to areas known to host hostile groups to provide legitimate reasons for doing so in order to avoid prosecution.

Many regard the offence of Treason as an anachronism into which juries might be unwilling to be co-opted in cases involving young terrorist fighters – however heinous their individual behaviour. It is difficult to determine any offence described as Treason which is not already another serious offence, punishable by imprisonment which in the worst cases would involve the whole of life. One is left with the conclusion that a broadened definition of Treason would render it unnecessary to prove specific criminal acts. One can assume that, notwithstanding the current Conservative Government's large Parliamentary majority, there will be significant opposition to the Treason proposal, especially among lawyers in the House of Lords, the primary responsibility of which is to use its collective capability to scrutinise new laws so that they meet proportionate requirements.

Other jurisdictions face similar challenges for the future of their security and defence laws. Changes are expected to laws authorising "endless wars"[25] in the United States – reflecting President Biden's wish to work with Congress to repeal 2001 and 2002 legal Authorizations for Use of Military Force (AUMF) and replace them with a "narrow and specific framework that will ensure we can protect Americans from terrorist threats while ending the forever wars".[26] Such authorisations have been used broadly[27] to fight the 20-year "Global War on Terrorism" (GWOT). Nobody doubts that these conflicts are necessary, against a constantly evolving global network of foes ranged against the West – but the democratic and legal basis for such conflict has now come up against a President who has committed to changing America's approach. Given the sheer size of US global security and defence commitments, this will have varying impacts everywhere.

China's "National Security Law"[28] in Hong Kong is seen differently elsewhere, as an example of an authoritarian state using national security legislation to redefine terrorism as a means of control. Another example is Russia, attempting to use global fora to gain influence over the fundamental basis of the internet, to promote its own view of global affairs.

Further challenges will have to be met, and legislation worldwide adapted, as the response to technological change, including changes in the technology of communications interception; in the infrastructure of the internet; in cyber espionage; and in the potential for artificial intelligence and bulk data analytic techniques to be used in conducting intelligence activities. Issues such as the transparency of secret intelligence and security organisations, and wariness of creating a *semblance* of democratic supervision but a *reality* of political untouchability, will rightly cause robust argument.

The challenges to individual states, and the need for international dialogue, have never been clearer. For example:

(1) How will rights be upheld proportionately under these changing conditions?
(2) What norms will govern these rights and obligations, and who will uphold them?
(3) Whose standards will apply?
(4) How will the need for cultural translation between different political and religious systems be met?
(5) What expectations do the responsible majority hold for the law in future?

[25] For lobbying commentary on this issue, see Responsible Statecraft, *Biden and Congress Must Repeal Law Authorising Endless Wars* (2021) <https://responsiblestatecraft.org/2021/01/07/joe-biden-and-congress-must-repeal-the-law-authorizing-endless-wars/>.

[26] Foreign Policy, *How Biden Benefits from Limiting His Own War Powers* (2021) <https://foreignpolicy.com/2021/03/11/biden-aumf-limit-war-powers/>.

[27] Examples include Niger and Iraq: Andrew Rudalevige, "When Did Congress Authorize Fighting in Niger? That's an Excellent Question", *Washington Post*, 11 November 2017 <https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/11/when-did-congress-authorize-fighting-in-niger-thats-an-excellent-question/> and Heather Brandon-Smith, *The 2002 Iraq AUMF: What It Is and Why Congress Should Repeal It* (7 April 2021)<https://www.fcnl.org/updates/2021-04/2002-iraq-aumf-what-it-and-why-congress-should-repeal-it>.

[28] G7 urges China to reconsider national security law (Gov.UK).

We must face the implications of a rapidly-shifting threat environment, recognising attempts at subversion and resurgent competition between states and organisations using both physical and virtual tools of influence and coercion, as well as challenges to the global rules-based order, and the implications – legal and otherwise – for national security.

National Security and the Law

Reflections of a Former Australian Attorney-General

Hon George Brandis QC*

Until 2017, the Attorney-General of Australia was also the Minister responsible for domestic security. The Abbott and Turnbull governments implemented the most extensive reforms to Australia's national security laws in a generation. The peculiar nature of the Attorney's office – both within politics, and apart from it – encouraged an approach to these reforms, which reflected the importance of seeking bipartisanship in national security policy. This article reflects on that approach and sets out the broad outlines of the several tranches of legislation – including reforms to the Australian intelligence community, counter-terrorism laws, critical infrastructure and foreign interference.

INTRODUCTION

Throughout the Abbott Government, and for all but the last eight months of the Turnbull Government, it was my privilege to hold the office of Attorney-General. The Attorney-General's office is primarily a political one.[1] But the Attorney-General is not only a politician; he is also the first Law Officer. There are therefore large areas of the role in which the Attorney must act in a manner which is essentially apolitical. Reconciling those two roles – as political protagonist and as protector, within the executive branch of government, of the rule of law – is by no means easy. It does, however, mean that a conscientious Attorney-General becomes accustomed, on an almost daily basis, to drawing the line between where political partisanship ends and broader considerations of good governance begin. This becomes a habit of mind – almost an instinct – although, in the rowdy theatre of Parliament and among political journalists oblivious to constitutional niceties, it is often overlooked that the Attorney-General is not moved by political considerations alone.

As well during my tenure as Attorney-General, I was also the Minister with immediate responsibility for domestic national security. In that capacity, I had primary responsibility for domestic national security policy and legislation, and was one of the seven permanent members of the National Security Committee of Cabinet. The two largest agencies within the portfolio were the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP). Following my departure at the end of 2017, and in consequence of an important reconstruction of the administrative arrangements announced by Prime Minister Turnbull earlier that year,[2] national security responsibilities were absorbed into a newly-created Department of Home Affairs, and the role of Attorney-General was scaled back to its more traditional functions.

The period of the Abbott and Turnbull Governments saw the most extensive reforms to Australia's national security laws in a generation. It was my responsibility to oversee the preparation and drafting of that legislation and to secure its passage through the Parliament.[3] The double character of the office during the time I held it informed the way in which I undertook national security law reform. In particular,

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[1] For most of the time I was Attorney-General, I was also Leader of the Government in the Senate and, as such, the principal parliamentary advocate for the Government in the upper house across the entire range of political issues and controversies.

[2] Department of Prime Minister and Cabinet (Cth), "A Strong and Secure Australia" (Media Release, 18 July 2017).

[3] The last two tranches of legislation for whose preparation I was responsible, the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) and the *Foreign Interference Transparency Scheme Act 2018* (Cth), were introduced into the Parliament on 7 December 2017 – my last parliamentary sitting day as Attorney-General – and enacted the following year.

for the reasons I will explain, the peculiar nature of the Attorney's office – both within politics, and apart from it – encouraged me to take an approach to national security law and policy which was serviceable to achieving the bipartisan consensus upon which the reforms depended, and to maintaining public confidence that national security policy was not being dictated by political motives. This article gives me the opportunity to reflect upon that approach, and also to set out the broad outlines of the several tranches of legislation which were developed at my direction and with my close involvement.

The Attorney-General as Minister for National Security: 1949–2017

Lawyers are, naturally, accustomed to thinking of the Attorney-General primarily as the first Law Officer: the principal legal adviser to Government (although in a practical sense, that role is mostly – although not always – fulfilled by the Solicitor General, the second Law Officer); the Minister who administers the Attorney-General's Department and the many agencies within the portfolio most directly related to the legal system; by courtesy, the leader of the legal profession and, by custom, the defender of the judiciary from political attack.[4] As the Minister who brings to Cabinet recommendations for appointments to the Federal judiciary, the Attorney-General is also, in effect, the gatekeeper to the third branch of Government.

The Australian arrangements which existed during my tenure, which also made the Attorney-General, in the words of Prime Minister Abbott, "the Minister for National Security", were longstanding but unusual. In most comparable countries, those functions are performed by another Minister – in the United Kingdom (UK), by the Home Secretary; in the United States, by the Secretary for Homeland Security.[5] Aligning Australian practice with that of other likeminded nations was the rationale offered by Prime Minister Turnbull for his 2017 changes.[6] The reasons why, for some 70 years since the time HV Evatt held the office, the Attorney-General of Australia had responsibility for national security – and, most importantly, oversight of the national security agencies – are both historical and functional.

There is some obscurity about when the Attorney-General first came to be regarded as the Minister responsible for domestic national security. The role evolved over time. It was accelerated by the fact that, during the Second World War, the power of internment of persons considered to pose a risk to national security was exercised by the Attorney-General.[7] Perhaps the date on which the role may best be thought to have crystallized is 16 March 1949: the day on which ASIO came into being. ASIO, which was, in its conception and design, closely modelled on the British agency MI5, was initially established by administrative fiat by Prime Minister Chifley.[8] It was not put onto a statutory basis until the passage of the *Australian Security Intelligence Organisation Act 1956* (Cth) (*ASIO Act*) in 1956. ASIO's foundational instrument was not even an Order in Council, but a document over Chifley's signature entitled "Prime Minister's Memorandum to the Director-General of Security, being a Directive for the establishment and maintenance of a Security Service".[9] Paragraph 2 of the Memorandum provides:

> The Security Service forms part of the Attorney General's Department, and the Attorney General will be responsible for it to Parliament.

[4] The custom that the Attorney-General should defend the judicial branch of government from political attack was disputed by one of my predecessors, Attorney-General Williams, in his speech to the Australian Legal Convention in 1997, and not observed by another, Attorney-General McClelland, when the High Court was attacked by Prime Minister Gillard following its decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144. For reasons which I set out in the MinterEllison Sir Harry Gibbs Lecture at The University of Queensland Law School on 26 September 2013, "The Role of the Attorney-General", I believed that the custom should be observed, and I sought to restore it.

[5] However, it is not unusual – for instance in New Zealand – for the Attorney-General to also be sworn in as the Minister for the intelligence services.

[6] Prime Minister Malcolm Turnbull, "National Security Reform Announcement" (Press Conference, 18 July 2017).

[7] *National Security Act 1939* (Cth).

[8] Prime Minister Ben Chifley, *Prime Minister's Memorandum to the Director-General of Security, Being a Directive for the Establishment and Maintenance of a Security Service* (16 March 1949).

[9] David Horner, *The Spy Catchers: The Official History of ASIO Volume I: 1949–1963* (Allen & Unwin, 2014) Ch 4.

Yet the Memorandum also provides, by para 5:

> The Security Service is part of the Defence Forces of the Commonwealth. … Its task is the defence of the Commonwealth from external and internal dangers arising from attempts at espionage and sabotage, and from actions of persons and organizations, whether directed from within or without the country, which may be judged to be subversive to the security of the Commonwealth.

Also relevant in para 3, which provides:

> As Director General you will have direct access to the Prime Minister at all times.

Paragraph 6 of the Prime Minister's Memorandum was plainly drafted to reinforce the apolitical nature of ASIO:

> It is essential that the Security Service should be kept absolutely free of any political bias or influence, and nothing should be done that might lend colour to any suggestion that it is concerned with the interests of any particular section of the community. … You will impress on your staff that they have no connection whatever with any matters of a party political character and that they must be scrupulous to avoid any action which could be so construed.

When ASIO was subsequently placed on a statutory basis, the freedom of the Director-General from political interference was guaranteed.[10]

Protecting ASIO from any suggestion of political interference was good policy. It was also politically necessary. It is apparent that the Chifley Government felt a degree of political tenderness about the creation of a domestic "spy agency" – in particular, from civil libertarians and left-wing opinion. Although the initial absence of an Act of Parliament for ASIO meant there was no formal parliamentary debate about its establishment, both Chifley and Evatt were closely questioned, most notably by JT Lang, the former Premier of New South Wales, now the Member for Reid and leader of a splinter Labor Party in the House of Representatives. In answer to a question from Lang about ministerial control of ASIO, Chifley said:

> The Director-General of Security will be under the administrative control of the Attorney-General's Department. As Prime Minister, I issued a special directive to the Director-General giving the general outline of the work he is to perform and intimating that he is to have direct access to me at all times. … As I have said, the Director-General has been given complete authority on security matters and I do not propose to interfere with him in the discharge of his functions.[11]

Evatt was particularly concerned to emphasise the importance the Government placed on ensuring the complete political impartiality of ASIO, and its strict obedience to the rule of law, by pointing out that the person chosen as the first Director-General was a Supreme Court judge:

> We so designed it as to put it beyond the scope of political party approach. The Government decided to appoint a Supreme Court judge from South Australia, Mr Justice Reed, to administer the service. … The Government has every confidence in the ability and independence of that gentleman. The Government does not concern itself with the precise methods that he uses.[12]

That sensitivity – to avoid any reasonable ground of concern that ASIO could be politically influenced – was also apparent in the parliamentary debate on the 1956 legislation as well, when the political roles had changed and it was now Evatt, as Leader of the Opposition, who argued that the protections of ASIO's independence in the Act were not strong enough.[13]

A statutory guarantee of freedom from ministerial direction, and the appointment, as its first Director-General, of a senior judge, were two of the ways that those who created ASIO sought to send a public

[10] *Australian Security Intelligence Organisation Act 1956* (Cth) s 5; *Australian Security Intelligence Organisation Act 1979* (Cth) s 8.

[11] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1949, 775 (Prime Minister Chifley).

[12] Commonwealth, *Parliamentary Debates,* House of Representatives, 6 October 1949, 1088–1089 (HV Evatt, Attorney-General).

[13] The Opposition voted against the Bill on its second reading.

signal of its political independence.[14] Another was the decision to make the first Law Officer its Minister – notwithstanding that its direct line of reporting was to the Prime Minister, and that it was (at least in its original conception) described as "part of the Defence Forces". No doubt it also reflected the political influence of Evatt. It also owed something to the views of the then Commonwealth Crown solicitor, HFE Whitlam, who was one of the five officials who wrote the original charter.[15]

Between 1949 and 2017, ASIO was overseen by 26 Attorneys-General, every one of them lawyers, and in all but a few cases, barristers who had seen long years of legal practice. It would be fair to say that a large majority of them were first and foremost lawyers, not politicians. The skills that are acquired from years of practice as a barrister are generally quite different from those needed for the vocation of politics. Many a successful barrister has failed to make the transition from the courtroom to the very different arena of the Parliament – or the television studio. Nevertheless, there are undoubtedly some aspects of a politician's work to which the experience of the Bar is adaptable, and an asset. For obvious reasons, the role of Attorney-General is one of them. That applies, in particular, to certain of the national security functions.

Under the *ASIO Act*, there are some important types of operation – including telephone interception, computer access and certain defined "special operations" – which can only be conducted by warrant issued by the Attorney-General. The issue of such warrants is an administrative, not a quasi-judicial act. Nevertheless in my experience, the consideration of warrant requests demands a very similar process of reasoning as the issuance of warrants by a judicial officer. In both cases, it depends upon reaching an evidence-based conclusion based on the proper application of statutory criteria. Usually, the evidence is direct; not uncommonly, it depends upon drawing an inference from primary facts. Studying the "intelligence case" in warrant requests was an important part of the Attorney-General's job. It should never be regarded as a "rubber stamp" and must never be delegated. In interrogating requests, the Attorney-General is no more second-guessing the judgment of intelligence professionals than a magistrate, before whom a warrant request comes, is second-guessing the judgment of police officers: he is merely ensuring that the recommendation for the issuance of the warrant is a conclusion which follows from the evidence presented, and that the statutory criteria are satisfied. This is pre-eminently a lawyer's skill.

In nearly four and a half years, I very seldom had occasion to refuse warrant requests. Whenever I was not satisfied that the recommendation was sufficiently supported by the evidence, I would invite the officers to review and augment the intelligence case. Almost invariably, the revised intelligence case was satisfactory and the warrant was issued. In a tiny number of cases, the request was withdrawn. Both of the Directors-General with whom I worked told me at various times that the knowledge that the Attorney-General would carefully scrutinise all warrant requests was greatly valued by ASIO, and ensured that it always adhered to the highest standards of practice – which, in my view, it did. When Prime Minister Turnbull decided in 2017 to place ASIO under the jurisdiction of the newly-created Minister for Home Affairs, I argued that the warrant-issuing power should remain with the Attorney-General. Mr Turnbull accepted my argument.

There is little doubt that having the Attorney-General as its Minister influenced the culture of ASIO – a point which at least one of my Directors-General made to me strenuously, and approvingly. Certainly, during my time as Attorney-General, I found the Organisation to have a very conscientious fidelity to the rule of law, as well as a pragmatic awareness that absolute freedom from political partiality was central to its reputation and its effectiveness.

[14] It should be said that while only one subsequent Director-General has been recruited from the judiciary (Sir Edward Woodward), there has never been an allegation of political partiality against any of them which has withstood scrutiny.

[15] Horner, n 10, 96. This is particularly ironic since it was Whitlam's son, EG Whitlam, who was the first Prime Minister to seek to remove ASIO from the Attorney-General's oversight: see the account in John Blaxland, *The Protest Years: The Official History of ASIO Volume II: 1963 – 1975* (Allen & Unwin, 2015) 445. But that was in October 1975, and more famous events supervened before the enabling legislation was introduced in the Parliament. The idea was abandoned by Prime Minister Fraser, and not revived until the time of Prime Minister Abbott (who considered it but decided against it), then re-prosecuted with success under Prime Minister Turnbull.

The Politics of National Security Law Reform

I considered it to be the obligation for the Attorney-General as national security minister to lead the debate on national security policy – and, most importantly, on national security legislation – in a manner which, so far as was possible in an intensely contested political environment, placed the national interest above everyday political point-scoring. It is particularly important – as those who founded ASIO in 1949 recognised, and has been accepted by all responsible observers since – to protect the public reputation of ASIO: an agency which, because of the very nature of its work, cannot be subject to the same kind of public scrutiny as other agencies of government. So, just as the Attorney-General, while a politician, must on occasions subordinate political partisanship to more important considerations – respect for the rule of law, the independence of the judiciary and the separation of powers – I took the view that national security policy and the national security agencies should also be kept as free as possible from everyday politics. That is even more important at a time when the nation faces a real risk of lethal terrorist attack. That is not to say that there is not a legitimate role for the airing of political differences about particular measures or events – that, after all, is what parliamentary debate is for. Nevertheless, I regarded national security as one of the few areas of public policy where it was better that the warmth of party politics should yield to cooler, non-partisan, analytical judgment. Such a spirit was also apparent in the approach taken by the members of the parliamentary committee with oversight of the security agencies, the Parliamentary Committee on Intelligence and Security (PJCIS), which has traditionally worked across party lines, and usually behind closed doors, to achieve the best legislative outcomes.

The view I held that the Government should try, so far as possible, to avoid politicising national security policy, was not a view which all of my political colleagues shared. Yet it is one of the key tests – perhaps *the* key test – of an Attorney-General to be prepared to stand up to political colleagues in defence of certain fundamental principles and values. There is an analogy here between the role of the Finance Minister and that of the Attorney-General: they are the two members of the Cabinet who must be prepared to defy the ardour of colleagues and say "no": in the case of the former, to protect the Budget; in the case of the latter, to defend the rule of law and the independence of the judiciary. I reflected on this in my valedictory speech to the Senate on 7 February 2018:

> I have not disguised my concern at attacks upon the institutions of the law: the courts and those who practice in them. To attack those institutions is to attack the rule of law itself. It is for the Attorney-General always to defend the rule of law, sometimes from political colleagues who fail to understand it or are impatient of the limitations it may impose upon executive power. Although the Attorney is a political official, as the first law officer he has a higher duty: a duty to the law itself. It is a duty which, as my cabinet colleagues know, on several robust occasions I have always placed above political advantage.[16]

Similar considerations should apply to national security policy. Perhaps the most important single reason that so much national security law reform was achieved by the Abbott and Turnbull Governments was because all of the measures commanded bipartisan support. That bipartisanship was achieved by ensuring that the Opposition, in particular the Shadow Attorney-General, was consulted at critical stages, and by using the processes of the PJCIS to iron out differences. It was also achieved by taking care, in the use of political rhetoric, to adopt the right tone when it came to national security debate: not goading the Opposition in a provocative way, while maintaining a good-humoured patience in the face of occasional barbs which were merely part of the political theatre.

Achieving bipartisan consensus on national security law reform meant declining to open a political front against one's opponents: an approach which tried the patience of some of my more belligerent colleagues. Yet the same stubbornness which an Attorney-General must bring to the defence of the rule of law applied, in my view, to the design and passage of national security legislation. I also reflected on that in my final speech to the Parliament:

> I have heard some powerful voices argue that the Coalition should open a political front against the Labor Party on the issue of domestic national security. I could not disagree more strongly. One of the reasons why the government has earned the confidence of the public on national security policy is that there has never been a credible suggestion that political motives have intruded. Were they to do so, confidence not

[16] Commonwealth, *Parliamentary Debates*, Senate, 7 February 2018, 493 (Senator the Hon George Brandis, QC).

> just in the Government's handling of national security but in the agencies themselves would be damaged and their capacity to do their work compromised. Nothing could be more irresponsible than to hazard the safety of the public by creating a confected dispute for political advantage.[17]

I know the then Director-General of ASIO shared that view – as, I have no doubt, would all chiefs of the national security agencies, before and since.

National Security Law Reforms 2013–2017

Shortly after the Abbott Government was elected, the Prime Minister asked me to undertake a comprehensive, "blue sky" review of Australia's national security laws. After Mr Turnbull became Prime Minister in September 2015, he took a keen interest in the area and asked me to lead further reforms, in particular in the area of foreign interference and reform of espionage laws. This work was undertaken in close collaboration with the Attorney-General's Department, the national security agencies, the Prime Minister's Office and, in some cases, in consultation with the national security ministers and national security agencies of the other "Five Eyes" nations (the United States, the United Kingdom, Canada and New Zealand).

In approaching the law reform task, I and those who worked with me consciously strove to serve two imperatives: to give the national security agencies the powers they needed to protect Australians, in particular from the rapidly-escalating threat of domestic terrorism, while at the same time crafting the laws in a manner which best protected the rights of the citizen. It would be an error to regard those objectives as inconsistent (although, on occasions, compromises had to be found). The effectiveness of the intelligence agencies depends, to a high degree, upon public trust. The perception that a government was engaged in overreach – in a gratuitous expansion of the policing powers of the state – would be corrosive of that trust, and thus inimical to the effectiveness of the intelligence and policing agencies themselves. Both of the Directors-General and both of the AFP Commissioners with whom I worked understood that. As both a lawyer and a practising politician, I always tried to exercise both a lawyer's respect for the rule of law and – reflecting my own political values – a suspicion of over-mighty government and an awareness of the need to limit and constrain State power.

I approached every decision with a presumption against further enlarging the power of the intelligence agencies unless there was a demonstrable, evidence-based and rational case for such enlargement. Where there was, I was concerned to ensure that the increase in powers was sufficient to address the need, but not more; that such powers were subject to appropriate ministerial, parliamentary and external[18] scrutiny; and that, in appropriate cases, the powers were sunsetted or otherwise time-limited. In some instances, where enlarging the scope of operational activities was concerned, the exercise of the powers was made conditional upon the issue by the Attorney-General of a warrant. As well, as I have said, I tried to ensure that public debate on national security policy and law reform was conducted, so far as possible, in a politically non-partisan manner. My Director-Generals and Commissioners not only supported that approach; they were very satisfied that they were not being used by me for political ends.

That being said, however, there is no question that the change in the domestic security environment from about 2013, evident from the increasing belligerence and ambition of Islamist terrorism (and, in fewer cases, from extreme right-wing terrorism), justified reforms which gave the agencies greater powers. On 12 September 2014, Prime Minister Abbott announced that, acting on the advice of ASIO, the Terror Alert Level was being raised to "High", a classification indicating that a terrorist event on Australian soil was assessed to be likely.[19] As well, towards the latter part of my term as Attorney-General, ASIO reported a significant elevation of foreign interference with Australia's domestic affairs by foreign States and their surrogates, which required significant legislative attention.

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[17] Commonwealth, *Parliamentary Debates*, Senate, 7 February 2018, 494 (Senator the Hon George Brandis, QC).

[18] In particular by the INSLM and the Inspector-General of Intelligence and Security.

[19] Prime Minister Tony Abbott and Attorney-General George Brandis QC, "National Terrorism Public Alert Level Raised to High" (Joint Press Conference, 12 September 2014).

Summary of Principal Reforms

The reforms for which I was responsible fell into four broad categories:

(1) legislation which reformed, and in some cases expanded, the powers of the national security agencies, and which facilitated better co-operation between them;
(2) counter-terrorism legislation which created new terrorism-related offences;
(3) legislation which protected critical infrastructure; and
(4) legislation to reform the laws relating to espionage and to create a new framework of protections against hostile foreign interference in Australia's domestic affairs.

Much of the legislation was of an omnibus character, which covered more than one of those categories, although the espionage and foreign interference laws were confined to those topics.

Into the first category fell the *National Security Legislation Amendment Act (No 1) 2014* (Cth) which gave effect to recommendations made by the PJCIS[20] for the introduction of a new warrant category, the "identified person" warrant, and established a regime for "special intelligence operations", which required the Attorney-General's warrant; the *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (Cth), which expanded certain powers of agencies governed by the *Intelligence Services Act 2001* (Cth) and enhanced agency interoperability; the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), which gave effect to recommendations made by the Independent National Security Legislation Monitor (INSLM)[21] to expand the grounds upon which control orders could be made and introduced a regime of delayed notification search warrants, while also extending the sunsetting dates of certain ASIO powers provided for by pre-existing legislation; and the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth), which gave effect to the report of the PJCIS recommending that national security agencies be given powers to access and retain metadata.[22]

Legislation falling into the second category – new counter-terrorism offences – included the provisions in the *Foreign Fighters Act* which made it an offence, subject to exceptions such as humanitarian work and journalism, for an Australian to be present at a place declared by the Minister for Foreign Affairs to be a proscribed area. This legislation, introduced at a time when the Islamist terrorist group ISIL[23] had occupied large areas of Iraq and Syria with the avowed intention of establishing a "caliphate", facilitated the prosecution of Australian terrorist recruits located within such areas. That Act also introduced new offences for the domestic advocacy of terrorism.

Legislation in the third and fourth categories was designed to enhance the protection of Australian assets and institutions from foreign sources which were considered inimical to the national interest.

It became increasingly apparent during the Turnbull and Abbott Governments that there were insufficient statutory powers for the protection of Australia's critical infrastructure from potentially hostile foreign actors. The sabotage provisions in the *Crimes Act 1914* (Cth), which had in an earlier age been the principal means of such protection, were woefully obsolete in the age of networked computer systems and cyber attack. Two bills – one dealing specifically with telecommunications, the other with electricity, gas, water and ports – dealt with the issue.[24] Just as the criminal law of sabotage was obsolete in dealing with threats to critical infrastructure, so was the old law of espionage entirely inadequate to deal with the growing concern, to ASIO and the Government, of methodical and extensive interference in government and political processes, and other important institutions such as universities, from potentially hostile foreign actors. Those warnings came at a time of increasing public discussion and concern about the activities within Australia of the People's Republic of China, following the alarms raised by reputable

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[20] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* (May 2013).

[21] Independent National Security Legislation Monitor, *Annual Report* (Report No 2, 2012); Independent National Security Legislation Monitor, *Annual Report* (Report No 4, 2014).

[22] Commonwealth, *Parliamentary Debates*, Senate, 7 February 2018, 494 (Senator the Hon George Brandis, QC).

[23] The English language acronym of Islamic State of Iraq and The Levant.

[24] *Telecommunications and Other Legislation Amendment Act 2017* (Cth); *Security of Critical Infrastructure Act 2018* (Cth).

scholars and commentators such as Professor Clive Hamilton, Professor Rory Medcalfe and John Garnaut, among others. Nevertheless, the legislation was deliberately designed to be country-agnostic; China was by no means the only country which was believed to be engaged in hostile interference.

In March 2017, Prime Minister Turnbull wrote to ask me to undertake a major piece of law reform to address the problem of foreign interference. Much of my time in 2017 was spent on the preparation of this legislation. It was consciously undertaken as a "Five Eyes" project, upon which other likeminded democracies could draw.[25] The result was two statutes, the *National Security Legislation (Espionage and Foreign Interference) Bill 2017* (Cth) and the *Foreign Influence Transparency Scheme Bill 2017* (Cth), both of which were introduced into the Parliament on 7 December 2017 and enacted the following year.

The *Espionage and Foreign Interference* legislation contemporised the traditional offences of espionage and treason. More importantly, the new laws recognised that there was a wide range of activities which, if engaged in by hostile foreign actors, might be inimical to Australia's national interest, but for which there was no adequate legal coverage. These related to, among other things, covert attempts to influence political and government decision-making, interference with important civil society institutions such as universities, and certain kinds of interference in commercial activity. The common elements were that the interference was directed by or on behalf of a foreign government or political entity, and that it was engaged in covertly. The policy justification for the legislation was that conduct of that kind – and, most importantly, conduct which sought to shape the direction of political or governmental decisions in furtherance of a foreign interest – was conduct within the legitimate sphere of regulation. Such conduct fell into two broad categories: conduct which was per se inimical, although beyond the reach of the existing laws against espionage, which ought to be made unlawful; and conduct which, while not per se harmful to the national interest, should not lawfully be engaged in without disclosure. Conduct falling within the second category was subject to the *Foreign Influence Transparency Scheme* legislation, the earliest inspiration of which was the *Foreign Agents Registration Act 1938* (US).[26] A Foreign Agents Register was established, analogous in some respects to the lobbyists' register established by several State Parliaments, which required disclosure of the foreign interest on whose behalf the registrant acted. It was made an offence to engage, on behalf of a foreign principal, in certain types of conduct, designed to exert influence on government, the political process and certain other important public institutions, without public disclosure.

In its first Annual Report after the operation of the scheme had commenced, ASIO said:

> We assess that passage of the espionage and foreign interference legislation has had an impact on espionage and foreign interference in Australia, and caused some foreign intelligence services to re-assess the risks associated with clandestine foreign intelligence operations conducted in or against Australia.[27]

Envoi

By that time, I had become Australia's High Commissioner to the United Kingdom; the foreign interference legislation, introduced on the last parliamentary sitting day of 2017, was my final contribution to national security law reform in Australia. However, once in London, I was frequently asked by British politicians, senior officials and leaders of the UK national security agencies – several of whom I had consulted in drafting the Australian foreign interference legislation – about its operation. Certainly, there was a strong view within the UK intelligence community that similar law reform was needed, and the Australian legislation was seen as a recent and readily adaptable model.

On 11 May 2021, in The Queen's Speech opening the current session of Parliament, the Government announced that it would introduce a *Counter-States Threats Bill* designed to counter hostile activity by

[25] Including long consultations with lawyers at the Department of Justice in Washington and at the Home Office and MI5 in London in July 2017.

[26] *Foreign Agents Registration Act 1938*, 22 USC §§ 611–621.

[27] Australian Security Intelligence Organisation, *Annual Report 2018-19* (2019) 45.

foreign States and establish a Foreign Influence Registration Scheme.[28] The Home Office then published a Consultation Paper on 13 May which proposes legislation closely resembling the Australian laws.[29] The wheel has come full circle. Australia's domestic security framework, created by Attorney-General Evatt in the late 1940s, was guided almost entirely by the British model.[30] Seventy years later, it is from the Australian security intelligence model that the United Kingdom is eager to learn.

[28] United Kingdom, *Parliamentary Debates: Official Report* (United Kingdom) 11 May 2021; Sixth Series, Vol. 695, 4.

[29] HM Government: The Home Office, *Legislation to Counter State Threats (Hostile State Activity): Government Consultation* (13 May 2021).

[30] Horner, n 10, s71ff, especially 91–95.

NAA: A6122, 1756
Surveillance photograph of Lidia Janovska at Mascot Airport, Sydney, 1960

NAA: A432, 1963/2272
Surveillance photograph showing Ivan Skripov, First Secretary of the Soviet Embassy in Canberra and a KGB officer, meeting double agent Kay Marshall, 1962

NAA: A6285, 10
Vladimir Petrov reading a newspaper in an ASIO safe house, 1954

Images of archived ASIO security surveillance photographs kindly supplied by National Archives of Australia.

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