

Preventative Detention of Terrorist Suspects

A Review of the Law in Australia, Canada and the United Kingdom

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Introduction

The detention in custody of a person without a criminal charge has been regarded as fundamentally contrary to British system common law rights as they have developed over four centuries. By the 20th Century this principle was seen as a corner-stone of personal liberty, but despite this, the freedom from arbitrary arrest and detention has been significantly infringed upon in emergency situations and war-time.

However, arguably there has been a significant and perhaps permanent shift away from the principle of freedom from arrest without charge under anti-terrorist legislation passed in a number of countries since 2001. In his judgement in the House of Lords case of *A v Secretary of State for the Home Department* [2004] UKHL 56, Lord Hoffman expressed his concerns:

*“This is one of the most important cases which the House has had to decide in recent years. It calls into question the very existence of an ancient liberty of which the country has until now been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom.”*²

The traditional recourse available to a person detained without charge was the writ of habeas corpus by which the court would order that the state release the person or prefer a criminal charge against them, a procedure which would then bring them into the court’s jurisdiction to grant or refuse bail.

In Australia for the first time legislation has been passed at Commonwealth and State and Territory level which allows the executive government to arrest people and hold them in custody without any evidence sufficient to charge the person with any offence and in fact without any necessity for a belief that there will ever be any evidence to ever charge them with any offence.

Legislation of a similar type has existed in the United Kingdom since the 1970’s, but in 2006 the period of time during which suspects can be held in custody was significantly increased to 28 days.

Between 2001 and early 2007, the Canadian *Criminal Code* also had provisions allowing for persons to be arrested and detained, although the detention was for quite short periods and was only for the purpose of bringing the person before the courts to seek orders controlling a person’s activities rather than imprisoning them directly. The five year sunset clause for this legislation expired in February 2007 and a motion to extend the operation of the legislation was defeated in the House of Commons despite Government backing for its extension. As a consequence Canada does not presently have legislation similar to the Australian or English preventative detention of terrorism suspects.

² *A v Secretary of State for the Home Department* [2004] UKHL 56, page 50, paragraph 86

In each jurisdiction, the perceived need for legislation allowing for 'preventative detention' was to deal with the threat of terrorism which was thought to be different from other forms of crime. It was claimed that the existing legislation was inadequate to ensure that society was safe from the threat of domestic terrorist attacks.

The aim of this paper is to compare the legislation and some significant cases in three jurisdictions: Australia, the United Kingdom and Canada, and to consider whether the legislation is necessary and whether it in fact achieves its stated aims.

The thesis of the paper is that the legislation allowing for the detention without charge of terrorism suspects for significant periods (such as 14 or 28 days) is not necessary and may be counter-productive to convicting and punishing terrorists and preventing terrorist attacks. Canada's recent decision not to extend the legislation is recognition of this. If a large multi-ethnic country such as Canada is able to deal with the issue of terrorism without detention without charge, then it suggests that the need for such legislation is not as great as its proponents suggest.

The common law defence of necessity would make lawful an action by a police officer to detain a suspected terrorist without evidence to substantiate a charge if it appeared to the officer that a terrorist attack was imminent. There may well be benefit in legislative recognition and extension of the lawfulness of such actions done in an extraordinary emergency. If that were done, the model of the now expired Canadian legislation or the current Australian Commonwealth legislation which allows for up to 48 hours detention should be followed, rather than the legislation existing in the Australian states and the United Kingdom which respectively allow for 14 and 28 days detention without charge.

Australia's legal response to international terrorism since 2001

Under the Australian constitution, the states are responsible for criminal law and as a result criminal offences differ to some extent from State to State. The Federal Parliament (the 'Commonwealth') does not have a specific power to enact criminal laws, and it is able to enact criminal laws for the whole country only to the extent that they are incidentally authorised by their relevance to another Constitutional head of power.

The Commonwealth must also ensure that any Federal criminal offences and procedures comply with the Constitution, particularly 'Part III' of the Constitution and the rights that have been found to be necessarily implied into the Constitution.³

The Commonwealth and each State and Territory of Australia have enacted anti-terrorism legislation allowing for the detention without charge of terrorism suspects. Due to the perceived Constitutional limitations, the Commonwealth legislation is more restricted than the States' legislation.

³*Terrorism legislation and the Constitution*, (2006) 28 Australian Bar Review at page 117, McHugh, Michael (retired High Court judge)

The Commonwealth Government enacted legislation called the *Anti-Terrorism Bill (Number 2) 2005 (Cth)* which amended the *Commonwealth Criminal Code* to allow for the preventative detention of terrorism suspects without charge. It also allows for this to be combined with control orders which would restrict the freedom of movement and activities of persons suspected of plotting terrorist acts. The control orders are for up to 12 months duration, but successive control orders can be imposed on a person. Any breach of the control order (which does not have to be agreed to by the person subject to the order) is punishable as a criminal offence.

The provisions allowing for 'control orders' are found from s104.1 to 104.29 of the *Criminal Code (Cth)*. The extent of the obligations, prohibitions and restrictions that may be placed on a person subject to a control order is found in section 104.5(3) of the *Criminal Code* which states:

“(3) The obligations, prohibitions and restrictions that the court may impose on the person by the order are the following:

- (a) a prohibition or restriction on the person being at specified areas or places;*
- (b) a prohibition or restriction on the person leaving Australia;*
- (c) a requirement that the person remain at specified premises between specified times each day, or on specified days;*
- (d) a requirement that the person wear a tracking device;*
- (e) a prohibition or restriction on the person communicating or associating with specified individuals;*
- (f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the Internet);*
- (g) a prohibition or restriction on the person possessing or using specified articles or substances;*
- (h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);*
- (i) a requirement that the person report to specified persons at specified times and places;*
- (j) a requirement that the person allow himself or herself to be photographed;*
- (k) a requirement that the person allow impressions of his or her fingerprints to be taken;*
- (l) a requirement that the person participate in specified counselling or education.”*

As can be seen from the above, a control order under Division 104 of the *Criminal Code* could be extremely onerous and in fact not far removed from house arrest. Any

breach of the control order can be punished by imprisonment. Most of this paper will focus on the preventative detention legislation; however it should be noted the control orders also establish new and unusual powers significantly limiting the freedoms of persons not convicted of any criminal offence.

The objective of the new preventative detention sections of the Commonwealth *Criminal Code* was to prevent any terrorist attack and/or to protect evidence relating to a terrorist attack. The preventative detention provisions seek to achieve this by detaining the suspected terrorist for up to 48 hours and by significantly limiting the persons who the detained person can contact during the period of detention.

The Commonwealth *Criminal Code* allows any Australian Federal Police (AFP) officer to apply to a senior AFP officer ('the issuing authority') for a preventative detention order if they suspect on reasonable grounds that a person will engage in a terrorist act, possesses evidence of a prospective terrorist act and the preventative detention will substantially assist in preventing any terrorist act, or where they suspect that a person has evidence of a terrorist attack committed in the previous 28 days and the preventative detention of the person is necessary to preserve that evidence. The initial preventative detention order made by a senior AFP officer operates like an arrest warrant (though only valid for a 48 hour period) and authorises the arrest of the person and their detention for up to 24 hours.

An application for a further 24 hour period of preventive detention (called a "continued preventative detention order") can be made to certain judges, federal magistrates, administrative appeals tribunal presidents or deputy presidents or retired judges who have been appointed by the Commonwealth government. The period of time that a person can be detained without charge under the Commonwealth legislation is 48 hours. After that time, the person must either be charged or released. However an application can be made for a control order over the person's activities after their release. During the period of detention under this power the person must not be questioned. However, a person may be 'released' from the preventative detention and then immediately arrested on suspicion of a substantive offence or 'released' and then immediately detained and questioned under the Part III of the *Australian Security Intelligence Organisation Act (1979)* which is discussed below.

The Australian Security Intelligence Organisation (ASIO) has the power under Division 3 of the *Australian Security Intelligence Organisation Act (1979)* to detain people for up to 7 days⁴ where the Director General of ASIO satisfies the Minister and designated Federal Magistrate or Judge that "there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence."⁵ These powers were created in 2003 and substantially amended in 2004 and 2006.

The person detained under an ASIO "questioning and detention warrant" is able to be questioned in a closed hearing before a "prescribed authority". Under s34B of the Act, a "prescribed authority" is a person who is a retired judge, a current State or

⁴ *Australian Security Intelligence Organisation Act (1979)*, s34S and s34(4)(c) – the limit on detention is expressed in the legislation as 168 hours (7 days)

⁵ *Australian Security Intelligence Organisation Act (1979)*, s34G

Territory judge or an Administrative Appeals Tribunal President or Deputy-President who has consented to taking on the role.

Division 3 of the *Australian Security Intelligence Organisation Act (1979)* contains potentially much more draconian provisions than the amendments to the Commonwealth Criminal Code. The basis for this significantly longer detention and questioning is that it will “*substantially assist the collection of intelligence that is important in relation to a terrorism offence*”.

The Commonwealth powers under Division 3 of the *Australian Security Intelligence Organisation Act (1979)*, have substantial layers of protection in the way in which they have to be approved and the manner the hearings will operate, but they do potentially allow for detention without charge of a person for 7 days without any belief that the person should or could be charged with any offence.

The appropriateness of the 7 days of detention and questioning under the *Australian Security Intelligence Organisation Act (1979)* for national security purposes and not the investigation and prosecution of criminal offending is open to question, but it purports to have a separate rationale from the provisions under the Commonwealth *Criminal Code*.

Division 105 of the Commonwealth *Criminal Code* allows for preventative detention with significantly fewer procedural safeguards than the ASIO legislation. The first 24 hours of detention can be authorised simply by a senior AFP officer. However, the person is not able to be questioned during this detention, and can only be questioned in detention if the detention under those provisions is brought to an end (although it actually can be continued under the normal criminal procedures).

The Australian States and Territories were requested by the Commonwealth Government to enact their own preventative detention statutes for terrorism suspects. The form of the statutes they enacted differ somewhat from State to State, but are to a greater or lesser extent modelled on the Commonwealth Criminal Code provisions, but with all statutes authorising periods of preventative detention of 14 days.

Queensland enacted the *Terrorism (Preventative Detention) Act 2005*. The Act allows a person to be detained in custody to “prevent a terrorist act occurring in the near future; or preserve evidence of, or relating to, a recent terrorist act.”⁶

The Queensland legislation is very similar to the Commonwealth legislation except for the duration of the detention that is allowed. The initial order for preventative detention is for 24 hours and can be authorised by a senior police officer. However, the “final order” (similar to the Commonwealth “continued preventative detention order”) can be for 14 days.

The “final order” under the Queensland legislation must be authorised by a serving or retired judge who is personally appointed to the role by the Minister and has consented in writing to exercising the power.

⁶ *Terrorism (Preventative Detention) Act 2005 (Q)*, section 3

The Victorian legislation is entitled the *Terrorism (Community Protection) Act 2003*. The Act allows for the detention of terrorism suspects without charge for up to 14 days. It differs from the Commonwealth and Queensland legislation in that there is no power for a senior police officer to authorise an initial short period of detention. Any application for preventative detention whether an interim order for 48 hours or a final order for up to 14 days must be made to the Victorian Supreme Court.⁷

The New South Wales legislation is the *Terrorism (Police Powers) Act 2002*. The provisions relating to preventative detention are in Part 2A of the Act and are very similar to the Victorian Act. It also requires that the application for a preventative detention order be made to the Supreme Court and that the Supreme Court can grant an interim order for up to 48 hours and then after a hearing can grant an order for detention of up to 14 days.⁸

The Western Australian legislation is *Terrorism (Preventative Detention) Act 2006*. The Act allows a person to be detained in custody for up to 14 days to prevent a terrorist attack or to preserve evidence. The Western Australian Act makes the “issuing authority” of the preventative detention order a serving or retired judge who has been personally appointed to the role by the State Governor and who has given their written consent to performing the task. Western Australia also does not allow for any interim order to be authorised by a senior police officer and all applications for preventative detention must be made to the a serving or retired judge who has been appointed as “the issuing authority” under the Act.⁹

The Tasmanian legislation is entitled the *Terrorism (Preventative Detention) Act 2005*. It allows for an authorised police officer to apply to the Supreme Court of Tasmania for a preventative detention order, or if the order is needed urgently, to make the application to a senior police officer.¹⁰ However, a person can only be detained for 24 hours where the initial order is made by a senior police officer and there is an obligation to put the application before the Supreme Court as soon as possible after the person’s detention in custody. The Supreme Court may make an interim order authorising 48 hours detention and a final order of up to 14 days preventative detention.

The South Australian legislation is also entitled the *Terrorism (Preventative Detention) Act 2005* and is similar to the Tasmanian legislation in its operation. It allows for any police officer to make an application for the preventative detention of a person to a Judge who has been appointed an “issuing authority” under the Act and has consented to that appointment. The Act also allows an application to be made to a senior police officer if the application is urgent and the application cannot be made to a judge in sufficient time. The period of preventative detention where a senior police officer makes the order is 24 hours and where a judge has made the order it is up to 14 days.¹¹

⁷ *Terrorism (Community Protection) Act 2003* (Vic) section 13C and 13G

⁸ *Terrorism (Police Powers) Act 2002* (NSW), sections 26K, 26L and 26H

⁹ *Terrorism (Preventative Detention) Act 2006* (WA), section 7 and 13

¹⁰ *Terrorism (Preventative Detention) Act 2005* (Tas), section 5

¹¹ *Terrorism (Preventative Detention) Act 2005* (South Australia), sections 4 and 10

The Australian Capital Territory's legislation is called the *Terrorism (Extraordinary Temporary Powers) Act 2006*. The Australian Capital Territory's legislation has much the same effect as the legislation in the States, but is framed in more cautious terms. For instance in section 8 of the *Terrorism (Extraordinary Temporary Powers) Act 2006* which is otherwise identical to other State's provisions stating the basis of preventative detention orders, that preventative detention is a "measure of last resort".

The ACT's legislation requires that a Senior Police Officer apply to the Supreme Court for a preventative detention order. Only the Supreme Court can grant a detention order and interim orders are only for 24 hours. The ACT allows only 7 days of detention, but this can be added to other periods of preventative detention from other jurisdictions to extend to a maximum of 14 days for any single alleged terrorist act.

The Northern Territory's legislation is called the *Terrorism (Emergency Powers) Act 2006*. Part 2B deals with preventative detention of terrorism suspects. Section 21E allows an authorised police officer to apply to an eligible Judge (one who has been appointed to the role and accepted that appointment) for the preventative detention of a terrorism suspect for up to 14 days. Under s21P of the Act, the preventative detention of person by an eligible judge must be reviewed by the Supreme Court of the NT "as soon as practicable" after the person is first taken into custody.

It can be seen that the legislation of the States and Territories varies to some extent, but in general terms, they all authorise the detention of terrorism suspects for up to 14 days without charge in order to prevent an anticipated act of terrorism.

The State and Commonwealth powers of preventative detention have not been challenged before any Australian court. It does not appear that they have yet been used. Arrests in New South Wales of persons alleged to have been plotting a major terrorist attack were done under the ordinary arrest provisions of the Crimes Act, rather than the State or Commonwealth preventative detention provisions.

The related Commonwealth power of imposing 'control orders' has been used against a man named Joseph 'Jack' Thomas who was convicted of a Commonwealth charge of having received assistance and training from a terrorist organisation (Al-Qa'ida), but had his conviction overturned on appeal. The Commonwealth applied for and was granted a control order restricting Mr Thomas's freedom under Division 104 of the *Criminal Code*. The control order against Mr Thomas is the only control order referred to on the Australian Commonwealth Department of the Attorney-General's web-site. The legality of the control order has been appealed to the High Court as *Thomas v Mowbray & Ors*.¹² The matter was heard from December 2006 to February 2007 over four separate sitting days and the Court's decision is still reserved.

The applicant in *Thomas v Mowbray & Ors* has claimed that the removal of significant personal liberties without criminal charge under the control order provisions of the Commonwealth *Criminal Code* is antithetical to Part III of the Australian Constitution, particularly where the judicial arm of the executive is used to

¹² *Thomas v Mowbray & Ors* [2006-2007] HCA transcripts 2, 19 & 31/10/06; 5&6/12/06; and 20 & 21/2/07

authorise the control orders. The earlier High Court cases of *Lim*¹³ and *Al-Kateb*¹⁴ which dealt with the lengthy detention of unauthorised immigrants held that this type of detention was Constitutional. The High Court case of *Fardon*¹⁵ held that state legislation could authorise the detention of allegedly dangerous sexual offenders after the conclusion of their fully served sentences. *Fardon* did not directly deal with the question of whether the Commonwealth Government could do likewise. Both *Lim* and *Fardon* were discussed in the Thomas appeal and the decision in Thomas is likely to resolve some of the issues on the extent of Commonwealth and state powers of detention without charge that were not ruled upon in the previous cases.

The United Kingdom's legal response to terrorism before and after 2001

The current law in the United Kingdom allows for persons suspected of being involved in terrorism activities to be held in custody without charge for up to 28 days. However, this detention without charge can only be ordered where a designated District Judge (Magistrates Court) is satisfied that the detention is necessary to obtain evidence by questioning the prisoner or to preserve relevant evidence. There has been a history of legislation allowing for detention without charge in the mainland United Kingdom since the 1970s and for a considerably longer period in British-ruled Ireland and elsewhere in the colonial empire.¹⁶

By virtue of its empire and its position as the first modern global “superpower”, the United Kingdom has confronted what we would now classify as terrorism for well over 100 years. In the 1860's through to the 1880's there were over fifty Fenian (Irish nationalist) and Anarchist bombings in London. The Fenian bombings included the massively destructive Clerkenwell Prison bombing of 1867 (in which twelve people were killed and over 100 were seriously injured) and the bombing of Scotland Yard Police Headquarters in 1884. In light of current world politics, it is an interesting feature of the Fenian bombings that at least some of the organisers of the bombings were US citizens. The Clerkenwell Prison bombing was partly organised by a former US army officer Richard Burke who was a Fenian prisoner in the jail.

To a greater or lesser extent, there has been some risk of terrorist attack within the United Kingdom ever since the 1860's. However, until the 1970's, specific anti-terrorist legislation existed only in Ireland, not the rest of the United Kingdom. The *Civil Authorities (Special Powers) Act (Northern Ireland) 1922* contained powers of “internment” without trial for suspicion of involvement with terrorist groups. By 1972, The Secretary of State for Northern Ireland had the power to order detention for 28 days of any person who was “*suspected of having been concerned in the commission or attempted commission of any act of terrorism, or in the direction, organisation or training of persons for the purpose of terrorism.*”¹⁷

¹³ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1

¹⁴ *Al-Kateb v Godwin* (2004) 219 CLR 562

¹⁵ *Fardon* (2004) 78 ALJR 1519, HCA 46

¹⁶ “Round up the usual suspects, a Legacy of British Colonialism and the European Convention on Human Rights” 41 *Loyola Law Review* 629, Simpson, A.W.B.

¹⁷ Detention of Terrorists (Northern Ireland) Order 1972 (SI 1972/1632 (N.I. 15))

Under this power an average of 500-1000 people were detained at any given time in Northern Ireland until the Wilson Labour government came to power in 1974 and ceased relying upon the provision in December 1975.¹⁸

The first major new provision dealing with terrorism in mainland United Kingdom was the *Prevention of Terrorism (Temporary Provisions) Act 1975*. This Act was in fact temporary in name only and was renewed annually. Further Acts of a similar nature (not requiring annual renewal) were put into place in 1984 and 1989.

The *Prevention of Terrorism (Temporary Provisions) Act 1989* allowed for the detention without charge of any person suspected of being involved in terrorist activities or subject to exclusion from the United Kingdom for an initial period of 48 hours and allowed the Secretary of State to extend that detention without charge for a further 5 days (a total of 7 days).¹⁹

The *Terrorism Act 2000* re-enacted the power to detain a terrorism suspect without charge for up to 7 days. However, it authorised the Lord Chancellor to designate District Judges (Magistrates Court) as “judicial authorities” who were empowered to authorise the detention of a person for up to 7 days.²⁰

The *Terrorism Act 2000* continued to focus on the perceived terrorist threat emanating from Ireland and up until February 2001, the prescribed organisations declared by the Act to be unlawful were exclusively Irish. It was only in March 2001 that non-Irish organisations were added to the prescribed organisation list. These were mostly Islamic extremist organisations, although the International Sikh Youth Federation, the Tamil Tigers and ETA were also listed.

The *Terrorism Act 2000* has very wide ranging effect; for example it contains provisions that make it unlawful to wear clothing or display any article that would create a reasonable suspicion that the person is a supporter of a prescribed organisation. It is therefore an offence punishable by imprisonment for six months to wear T-shirt professing allegiance to the International Sikh Youth Federation.²¹

The United Kingdom parliament passed the *Anti-Terrorism, Crime and Security Act 2001* which allowed foreign terrorism suspects who were not able to be deported to their home countries to be held indefinitely without charge. This aspect of the legislation was held to be contrary to the European Human Rights Convention in *A v Secretary of State for the Home Department* [2004] UKHL 56 which is discussed further below.

The *Prevention of Terrorism Act 2005* repealed the provisions of the 2001 Act which were held to be incompatible with the European Human Rights Convention in *A v Secretary of State for the Home Department*. The *Prevention of Terrorism Act 2005* created “control orders” to limit the freedom of persons suspected of being involved in terrorism. There are two levels of orders (“derogating” and “non-derogating”).

¹⁸ Brandon, B, “Terrorism, Human Rights and the Rule of Law: 120 years of the UK’s legal response to Terrorism”; [2004] Criminal Law Review 981

¹⁹ Prevention of Terrorism (Temporary Provisions) Act 1989, section 14

²⁰ Terrorism Act 2000, Schedule 8, Part III, clause 29

²¹ Terrorism Act 2000, section 11

The lower level orders can be ordered by the British Home Secretary, whereas the higher level of orders must be imposed by a court. However a person could be detained for 48 hours in order to be brought before a court for such an order to be made.

In 2006, the UK parliament passed the *Terrorism Act 2006*, which, inter alia, amended the *Terrorism Act 2000* so that persons suspected of terrorism offences could be detained for up to 28 days. That was done by changing the time period of 7 days in schedule 8 of the *Terrorism Act 2000* to 28 days.

Detention of a person for four weeks without having charged them with any criminal offence and without having to hold any belief that evidence exists to charge them with any criminal offence is a power that would appear to have to require substantial justification.

As is set out above, the power to hold a person for 28 days is a power that had not previously been lawful in mainland Britain, but it had been extensively used in Northern Ireland in the 1970s.

The case of *A v Secretary of State for the Home Department* [2005] 2 AC 68; [2004] UKHL 56 was a case in which the House of Lords held that the indefinite detention of foreign nationals without permanent residency status who were thought to be involved in terrorism (but without sufficient evidence for any charge) was incompatible with the European Convention on Human Rights. The Lords ruled that persons could not be held in immigration custody until a country would accept them where there was no immediate prospect of that occurring.

The Act which was being considered was the *Anti-terrorism, Crime and Security Act 2001* (UK). The majority of the House of Lords held that the provisions of the Act allowing for the indefinite detention of foreign nationals because they had no other country ready to accept them was disproportionate and discriminated on the grounds of nationality and immigration status. The majority held that the provisions were disproportionate and discriminatory because a UK national or a foreigner with a permanent residency visa who posed precisely the same risk as the foreigner without permanent residency status could not be detained in the same way. As a matter of logic, it was held that the Act could not be necessary if that was the case.

Lord Hoffman wrote a judgement in which he agreed with the outcome arrived at by the majority, but strongly disagreed that it was only the lack of proportionality given its discriminatory application that made the provisions incompatible with European human rights legislation. The third paragraph of Lord Hoffman's judgement stated:

“The technical issue in this appeal is whether such a power can be justified on the ground that there exists a ‘war or other public emergency threatening the life of the nation’ within the meaning of article 15 of the European Convention on Human Rights. But I would not like anyone to think that we are concerned with some special doctrine of European law. Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty

in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out the rights which British subjects enjoyed under the common law.”

Lord Hoffman acknowledged that habeas corpus had been suspended during times of great national emergency. However, he stated that the threat posed by Muslim extremist terrorists did not threaten the life of the British nation. He held that the level of threat did not justify the wholesale withdrawal for an indefinite period of the freedom from arbitrary arrest and confinement.

The majority judgements did hold that there was a “war or other public emergency threatening the life of the nation” within the meaning of article 15 of the European Convention on Human Rights, but that the way in which the detention was limited to a specified class of persons made it discriminatory and disproportionate. This potentially left open the possibility of re-casting the law so that any person could be subject to indefinite detention. The British parliament has not done this, and as stated above, the present British law allows for detention for up to 28 days of a person suspected of terrorism when there is not sufficient evidence to charge them with any offence.

The Canadian legal response to international terrorism since 2001

After the 11 September 2001 terrorist attacks in the United States, the Canadian Parliament amended the *Criminal Code* by inserting Part II.1 headed “Terrorism”.

This new Part of the *Criminal Code* created new offences relating to the funding and participation in terrorism within Canada or by Canadian citizens outside of Canada.

The new part also includes a remarkable offence provision which makes having certain knowledge that is not disclosed to the authorities a criminal offence, even by an otherwise innocent person. Section 83.1 of the *Criminal Code* creates an proactive obligation on “every person in Canada and every Canadian outside Canada” to “disclose forthwith” the existence of any property in their possession or control that is owned or controlled by a terrorist group or any information about a “transaction or proposed transaction in respect of any property owned or controlled by a terrorist group”.. Having knowledge of such matters and failing to disclose it “forthwith” is an offence which is punishable by up to 10 years imprisonment.²²

This is a remarkable offence provision because it makes failure to disclose knowledge of even a financial transaction with a terrorist entity by a third party a criminal offence on the part of any person who fails to notify the authorities. An example might be a next-door neighbour or a brother of some-one who has sent money to a prescribed organisation and where the next-door neighbour or brother becomes aware that this has occurred. Section 83.1 makes having that knowledge and not immediately disclosing it to the police a serious criminal offence.

²² Criminal Code of Canada, s83.12

In addition to creating these offences, Part II.1 established procedures for “Investigative Hearings” and “Recognizances with Conditions”. When the Part was enacted, it included a “sunset clause” which provided that sections 83.28 (Investigative Hearing), 83.29 (Arrest Warrant for Investigative Hearing) and 83.3 (Recognizance with Conditions) ceased to apply at the end of the fifteenth sitting day after 31 December 2006.

The Canadian Parliament vigorously debated whether the sunset clause should be extended or not on 9, 12 and 26 February 2007. The Government was in favour of the extended operation of these provisions; however, a vote in the House of Commons to extend the operation of these it was defeated on 27 February 2007.²³

The provisions relating to judicial investigative hearings and detention of persons in order to place them under recognizances with conditions under the Criminal Code no longer have the force of law. It is not clear whether the Government will present an alternative regime to Parliament to replace the previous law or not.

The regime that existed between 2001 and early 2007 was as follows:

The Investigative Hearings provisions allowed for the establishment of a Commission of Enquiry before which witnesses could be compelled to answer questions and produce documents without any right to rely upon the privilege of self-incrimination. However, limited protection was granted by protecting the witness against the prosecution using the answers directly or indirectly against the witness in any subsequent criminal prosecution other than a prosecution for perjury or giving misleading evidence.²⁴

The final part of the new provisions provided for a power for courts to compel a person to agree to enter into a “recognizance with conditions” which controlled the person’s personal freedom if they wished to be released from custody. This was similar to the Control Orders under the Australian legislation. A refusal to enter into such a recognisance was punishable by up to 12 months imprisonment.²⁵ Technically, the Criminal Code did not state that a person refusing to sign a recognisance committed an offence, but the practical outcome was the same, as the provision stated that the Judge “may commit the person to prison for a term not exceeding twelve months”. Interestingly, no provision was made for a person who changed their mind about signing the recognisance order after having been committed to jail to serve that period of imprisonment.

The Canadian law did not provide for preventative detention of terrorist suspects per se, but it did allow for suspects to be arrested without warrant in order to prevent a suspected terrorism offence and held for up to 24 hours²⁶ so that they could be

²³ 124 votes for extending the operation of these provisions and 159 votes against.

²⁴ Criminal Code of Canada, s83.28(10) and sections 132 and 136

²⁵ Criminal Code of Canada, s83.3(9)

²⁶ Section 83.3(6)(a) &(b) in fact required that the person be brought before the judge “without unreasonable delay and in any event within that period” (24 hours), however if a provincial judge was not available within 24 hours, then it was to be done “as soon as possible”. In practical terms, this would appear to mean 24-48 hours if no judges were available on a weekend or public holiday, but otherwise the period should be less than 24 hours.

brought before a court which could then decide upon the need for a recognizance order.

The court before which the terrorism suspect is brought was empowered to release the person or remand them in custody for up to 48 hours pending a hearing on whether a recognizance control order should be made.

The *Criminal Code* allowed for a longer remand time than 48 hours for recognizance control order hearings, but only where the person had been released from custody pending the hearing. This would appear to make the hearing of a person who has been remanded in custody a rather summary hearing of the merits of the case, at least from the prisoner's perspective.

Section 83.3, subsections (7) and (8) of the *Criminal Code* did not allow for a person to be remanded in custody any longer than the 48 hours until the hearing. The legislation then required that the person be released, provided that they agreed to enter into a "*recognizance to keep the peace and be of good behaviour for any period that does not exceed twelve months and to comply with any other reasonable conditions prescribed by the recognizance, including the conditions set out in subsection (10), that the provincial court judge considered desirable for preventing the carrying out of a terrorist activity.*" Subsection (10) related to the surrender of firearms held by the person.

The *Criminal Code* did not specify in any greater detail what would be "reasonable conditions". For example it did not provide guidance on whether the following would be "reasonable conditions" or not: curfews, home detention, twice daily reporting to police, non-association with listed persons, prohibition on the use of computers or telephones, prohibition working in a current job, or submitting to the use of electronic monitoring devices.

It may have been considered that the limits set by the current practices for the conditions set on bail undertakings for criminal charges might be seen as the limit of "reasonable conditions", but of course in those cases, the defendant is able to be remanded in custody outright if the risk of flight or re-offending is thought to be unacceptable by the court, whereas here the person has not been charged with any offence but will be sentenced to a term of imprisonment if they decline to sign the undertaking. It does seem that the extent of "reasonable conditions" under such orders is something that the legislation should deal with more specifically if it is re-enacted in any form.

In summary, between 2001 and early 2007, the Canadian *Criminal Code* allowed the police to arrest a person who they suspected may commit a terrorism offence, but where they did not have evidence to charge them with any offence. The power of detention on that basis was limited in that the police were required to bring the person before a provincial judge as soon as was reasonably possible. The provincial judge then had the power to remand the person in custody for up to 48 hours before deciding in court on whether a recognizance order was required. The person was not able to be held in custody longer than that unless they refused to agree to the conditions of the recognizance order deemed necessary by the judge. If the person refused to sign the order, they were able to be "committed to prison" for up to 12 months.

Prior to the Canadian parliament deciding not to extend the operation of parts of the *Criminal Code* relating to investigative hearings and recognizance orders, the Canadian Supreme Court had upheld the validity of the investigative hearings under the new *Criminal Code* provisions in two cases in 2004.²⁷ Both cases held that while the legislative provisions establishing investigative hearings under s83.28 of the *Criminal Code* did not necessarily offend the Canadian *Charter*, the judge controlling such a hearing would need to ensure that liberties and protections under the Canadian *Charter* were in fact protected by making necessary orders to ensure that the procedure was not allowed to be used as a mid-trial discovery procedure as was alleged to have been done in the *Air India* case which led to the *Re Application under s83.28 of the Criminal Code* case in the Supreme Court.

The right of law enforcement agencies to rely upon the common law defence of necessity

If a law enforcement officer is following a person who they strongly suspect is about to commit a terrorism act, but where the officer does not have any admissible evidence of this, what are his or her common law rights to detain the suspected terrorist in order to prevent the offence being committed?

This is effectively the issue to which the preventative detention legislation is directed. However, the common law itself would allow for the person to be detained under the common law defence of necessity.²⁸

If a person, whether a police officer or not, can only prevent a terrible crime from being committed by physically detaining a person then that is not unlawful. It would offer a complete defence to a charge of assault and unlawful deprivation of liberty. However, it is accepted that it would be desirable to have a specific legislative framework to authorize such actions. The existence of the common law defence is relevant however to show that legislation authorizing limited detention of persons in such a circumstance is at least to some extent reflective of the common law.

The Australian Commonwealth legislation²⁹ allowing for short periods of preventative detention and the now defunct Canadian *Criminal Code* provisions for preventative detention³⁰ were in theory only relatively limited extensions of the common law defence of necessity. In practice it may be that the existence of such provisions encourages their use in situations that do not reflect a true emergency. Given the short duration of the detention (effectively 24-48 hours at the most) under these provisions, the potential conflict between necessary action in a true emergency and their potential for misuse may be regarded as having been fairly balanced.

²⁷ *Re Application under s83.28 of the Criminal Code* [2004] 2SCR 248 & *Re Vancouver Sun* [2004] 2 SCR 332

²⁸ Or the statutory equivalent, see for example s25 of the *Queensland Criminal Code*

²⁹ Division 105 of the Australian Commonwealth *Criminal Code*

³⁰ 83.29 and 83.3 of the Canadian *Criminal Code*

If that is accepted, then the question arises whether longer periods of preventative detention, such as 28 days under the UK legislation and 14 days under the Australian States' legislation are necessary or desirable.

The problem with these longer periods of preventative detention without charge is that they are significantly punitive. Courts in the three countries which are reviewed in this paper would generally be very slow to sentence an offender (particularly a first offender) to 28 or 14 days imprisonment where any other sentencing option was available. So the detention of a person for 28 or 14 days must be considered as significant punishment and therefore must be justified as actually necessary.

Practical considerations of the operation of the preventative detention laws

It is important to note that the police in the jurisdictions being discussed in this paper already have extensive powers to charge a person for a criminal offence (even one of a relatively minor nature) and hold them in custody to be brought before a Magistrate if there is an unacceptable risk that the person would not attend court on the charge, would commit a further offence or would be a danger to themselves or others. A police officer and a court before which this person is brought are not required to release a person who has been charged with an offence, and emergency circumstances occurring at the time would be a relevant consideration.

The specific Queensland legislation can be used as an illustration of the powers of police and courts to remand persons charged with any offence in custody. The *Bail Act 1980* (Queensland) section 16(1) & (1A) states:

(1) Notwithstanding this Act, a court or police officer authorised by this Act to grant bail shall refuse to grant bail to a defendant if the court or police officer is satisfied--

(a) that there is an unacceptable risk that the defendant if released on bail--

(i) would fail to appear and surrender into custody;

(ii) would while released on bail—

(A) Commit an offence; or

(B) endanger the safety or welfare of a person who is claimed to be a victim of the

offence with which the defendant is charged or anyone else's safety or welfare; or

(C) interfere with witnesses or otherwise obstruct the course of justice whether for the defendant or anyone else; or

(b) that the defendant should remain in custody for the defendant's own protection.

(1A) Where it has not been practicable to obtain sufficient information for the

purpose of making a decision in connection with any matter specified in subsection

(1) due to lack of time since the institution of proceedings against a defendant the

court before which the defendant appears or is brought shall remand the defendant in custody with a view to having further information obtained for that purpose.

Therefore this power of preventative detention of persons is relevant only for persons the police do not consider they have evidence sufficient to charge with any criminal offence.

This then brings the other practical effect this preventative detention legislation to light. It is obviously desirable that terrorists be caught before committing any act of terrorism and that they be punished for their conspiracy or attempt to commit an act of terrorism. The acts of terrorism that these provisions are meant to guard against are going to be committed by allegedly well organized international organisations such as Al-Qa'ida. The "vanishing" of one of their number for 14 or 28 days is likely only to serve to notify them that that particular operative is now compromised and that they will have to modify their plans.

The desirable outcome is that sufficient resources are put into the investigation and monitoring of terrorist suspects so that there is evidence to charge these people with attempting or conspiring to commit offences rather than simply taking them off the streets for 14 or 28 days. This is of course assuming that the information that the police are relying upon is correct (given that is not seen as sufficient to charge the person with a single simple offence). If it is not, then an innocent person is punished with a period of imprisonment.

It is important to stress that even if the police are monitoring the right person, the power to lock them up for 14 or 28 days may not in fact achieve a desirable outcome at all. The person who was locked up has now been placed on notice and the organisation to which he or she belongs must be assumed to be aware of their operative's detention. Any further investigation would have been severely compromised.

Conclusion

It does not seem therefore that anything other than a 24-48 hour detention period linked to a hearing for a control or recognizance order could ever be justified on a pragmatic basis, let alone from a civil liberties perspective. In this context, it is significant that Canada considered that its police powers and the common law were sufficient to cover the threat level prevailing in 2007 and did not renew its extended anti-terrorist provisions in the Canadian Criminal Code.

In conclusion, it is recognised that the threat of international terrorism may require a formalization of the common law defence of necessity which would allow emergency action to prevent a terrorist crime. However, it is submitted that legislation similar to the now repealed Canadian Crime Code provisions is the most suitable model for such legislation, if it is considered necessary in the situation prevailing in any given country.