

Responses to the Threat of Terrorism by Special Enactments and Through the Criminal Law

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The subject of this Plenary provides an opportunity to examine issues of which there is now some practical experience in Australia. The Society has reviewed the subject previously and I understand that some of the Issues which I will discuss have been touched upon in a different way on those occasions, however, I propose to take a slightly different approach to the subject.

I propose to examine the Responses from Australia's perspective, which is not dissimilar to the responses from other jurisdictions represented in this room. The subject for my purposes has three sections. (1)The special enactments which introduced new offences to meet the threat of terrorism and why those new offences were necessary. (2)The procedural response through the criminal law. (3) The community tensions which what I will call peripheral enactments have caused and whether those tensions in any real way impact on the effectiveness of the responses covered in (1) and (2).

Australia, in compliance with its international obligations under the Convention for the Suppression of Terrorist Bombings (NY 15th December 1997), enacted provisions which created two offences, the focus of which was the delivering, placing, discharging or detonating explosive or other lethal devices in a public place, government facility, public transport system or infrastructure facility. Prior to that legislation had been passed to criminalise aircraft hijackings. Some have argued that our existing laws are sufficient to meet the threat which terrorism has posed for 21st century democracy. Clearly the responses of a decade ago and earlier were not sufficient the meet the variety of ways in which we now know terrorists are prepared to act.

The events of September 11 2001 provided world focus for a response which sought to not only outlaw certain violent conduct or potentially violent conduct, which had a 'terrorist' motivation, but also to restrict or limit access to funding or sources of funding and equip our intelligence agencies and other investigative agencies to meet the threat of terrorist conduct.

Australia joined in that response and the first major piece of legislation which created new offences was the Security Legislation Amendment (Terrorism) Act 2002. Australia's federal system provides for a division of responsibilities for criminal justice systems, and the federal government had previously committed to enacting the Model Criminal Code, about which you have already heard something at this Conference. Within the framework

of the Australian Criminal Code the legislation, on July 5th 2002 created new offences of committing a terrorist act (defined), training or possessing things in preparation to commit a terrorist act, being a member of or supporting a terrorist organisation, (provision was made for the listing of terrorist organisations) and financing offences. I will return to these offences shortly

To ensure that the Australian Parliament's legislative powers were complete and would not suffer from a lack of Constitutional authority the Premiers of the Australian States, at a Leaders' Summit in Canberra in April 2002, referred the balance of State legislative powers to the Commonwealth Parliament thereby enabling the Commonwealth to pass the intended legislation. The intention of the States and the Federal Government was plain. The broad range of conduct proscribed by this legislation was, with few modifications, the subject of legislation passed in many other jurisdictions at this time, but within Australia there was a clear bipartisan intent to achieve breadth and integrity in Australia's legislative response, but, where possible, consistency with other jurisdictions.

The gross suicidal conduct of September 11 and the catastrophic consequence of such conduct not only shocked the world, but it also presented legislators with a dilemma. The deterrent consequence of a successful prosecution for a criminal offence was not likely to have an effect upon persons contemplating suicidal acts of terrorism and therefore an earlier intervention point was needed. 'Mere acts of preparation' had, until that time, not constituted an actual offence, and were only relied upon in an evidentiary chain. Concern was expressed that criminalising acts of mere preparation was going too far. I do not agree. I consider that the step was, for very good public safety reasons, necessary.

So, for the first time in Australia we had within the Australian Criminal Code an offence of doing an act in preparation for or planning of a terrorist act. England did not legislate to cover acts of preparation until 2006.

Terrorist act is defined in Division 100 of the Code to mean an action or threat of action made with the intention of advancing a political, religious or ideological cause with the intention of coercing or intimidating Government or the public, and intention which may in certain circumstances be difficult to prove.

"...action..." is necessarily broad. It is one that:

Causes serious physical harm or death to a person,

Causes serious damage to property

Endangers the life of another

Creates serious risk to the health or safety of the public

Or seriously interferes with electronic systems.

The offence provisions concerning terrorist acts are contained in Division 101 of the Code, which makes it an offence to

- engage in a terrorist act
- provide or receive training connected with terrorist acts,
- possess a thing connected with the preparation for or assistance in a terrorist act
- collect or make documents likely to facilitate terrorist acts
- do an act in preparation for or planning of a terrorist act.

The imperative for prevention and early intervention rather than detection after the completed act is reflected in these offences and reinforced in the later provisions in the Code, which focus on terrorist organisations and financing, control orders and preventive detention orders.

The challenge to settled concepts of prosecutable criminal conduct which these new provisions pose is not one which should be taken lightly, because not only is there now the real prospect of prosecutions for acts of preparation which do not approach the threshold for an Attempt, but also the likelihood of prosecutions for the offence of conspiring to do an act in preparation for a terrorist act, an agreement to do an act of preparation . However, I am satisfied that these steps were necessary, just as were others, which I will come to. The reassurance in Australia is that prosecutions of this new range of offences will be subject to the scrutiny of the Courts. Australia has not chosen a path towards special Tribunals nor has the UK. I will refer to what has happened in the England towards the end of my presentation as one of the speakers we approached to present on behalf of the UK, Miss Sue Hemming of the Crown Prosecution Service, has made available some speaking notes, which I will refer to if time permits.

I have spoken briefly about the specific terrorism offences, but in the same raft of legislation the Australian Parliament enacted Division 102 of the Criminal Code which covers terrorist organisations.

A terrorist organisation is one which is engaged in the planning or fostering the doing of a terrorist act, or, an organisation specified by regulation. Amongst those organisations which have been prescribed are Al Qa'ida, Jamaah Islamiyah, and Hamas.

The “organisation offences can involve directing activities of a terrorist organisation, being a member of a terrorist organisation, recruiting for a terrorist organisation , training or receiving training in a terrorist organisation, getting funds to or from a terrorist organisation, associating with a terrorist organisation, not dissimilar to the old offence of consorting. But the pattern is the same, trying to meet the threat before it escalates. The proof that an organisation which is not specified as a terrorist organisation is in fact a terrorist organisation may be difficult, but this is not an area of the law for the faint hearted. The process of specifying a terrorist organisation requires the Minister to be satisfied and has a review process, permitting a delisting application.

The penalties for these offences are significant, a person who is convicted of being a member of a terrorist organisation is liable to a maximum sentence of 10 years (whereas

intentionally recruiting for a terrorist organisation the maximum is 25 years but where the fault element is recklessness the maximum sentence is 15 years. The intention is clearly to target the recruiter, the person seeking to influence or induce others to join.

The third branch of offences is aimed at thwarting financial assistance of or support for terrorist acts. Under division 103 an offence is created of providing or collecting funds that will be used to facilitate or engage in a terrorist act. The offence only requires proof that the person was reckless as to whether the funds were to be used to facilitate or engage in a terrorist act (maximum penalty life imprisonment .

You can see therefore that the preventive process underlying this raft of legislation, which has been the subject of much discussion, but in my view the difficulty lies not with the penalties or the conduct which it aims to prevent but the early phase at which the law is intersecting this conduct. The process of successfully intersecting conduct covered by this legislation involves the challenging task of obtaining proof of the offending and the process of gathering that proof in an admissible form, because that also brings a new focus to the courtroom.

The nature of the conduct and the stage at which it is pursued challenges the process of evidence gathering. These matters are often the subject of investigations which are multi disciplinary and covert, they involve not only the use of listening devices and telephone intercepts, but they also involve reliance upon intelligence gathered or held by agencies which, until recent times, had little interface with the criminal justice system and particularly court process. Such an agency may rely upon its own resources and personnel, but it may also depend upon intelligence from another country to establish grounds for suspicion. The use of secure or sensitive sources for backgrounding investigations and support for an investigation through sources which are accustomed to gathering evidence for use in courts creates a sensitivity which has encouraged some jurisdictions to establish special tribunals to avoid the risk of exposing secure or sensitive intelligence information and the work of some intelligence agencies to the scrutiny of pre trial disclosure and a full public hearing.

In Australia an espionage prosecution, *Lappas* (2003) 152 ACTR 7 brought many of these issues to the fore at a time when it was quite apparent that the issues could arise in terrorism offence prosecutions. The main problem which Lappas identified was the difficulty in proving, in a Court of law a prosecution where proof of the case and the entitlement of the defence to full prosecution disclosure and production of documents which were classified could not be achieved in an open court. The Judge having upheld a claim of public interest immunity by the prosecution in relation to a document classified Top Secret, then determined that the accused would not receive a fair trial without disclosure of the document.

The rules of procedure in the ACT and other Australian jurisdictions did not permit the introduction in to evidence, in a protected way, documents which were, of their nature, so sensitive, that they could not be tendered in the normal way.

It is interesting actually to see that the issue of protected witnesses or undercover operatives or informers who do not want their identity disclosed has recently been the subject of a ruling in England. I am sure all those interested in Terrorism prosecutions will watch the outcome with interest.

The National Security Information (Criminal and Civil Proceedings) Act 2004 (“NSI ACT”) commenced on January 11th 2005. (It was subsequently amended to extend its operation to civil proceedings).

The first point of interest with the NSI Act is that it does not apply to proceedings until the Commonwealth DPP triggers its operation to particular proceedings, by giving notice in the appropriate form. Once triggered, if either the prosecutor or defence counsel do not notify the Attorney General if they know or believe that they or one of the witnesses they intend to call will disclose information which “relates to national security” or “may affect national security “, they can be prosecuted and imprisoned (2 years)

The NSI Act does not overcome the Lappas difficulty, but it attempts to firstly put the Government on notice, and then there may be an acceptance that the document can be disclosed or the evidence given. If however the Attorney General issues a witness exclusion certificate or a non disclosure certificate, that is conclusive evidence that there is prejudice to national security if the document or evidence is disclosed. Until a Court orders otherwise the certificates lead to a closed court pre trial hearing where the Attorney General has a right to intervene, and unless the defence counsel is security cleared then the court may exclude defence counsel from parts of the hearing where the document or evidence is being heard or examined. The outcome of the closed court process is either to allow the hearing of the evidence, in other words, overturning the effect of the certificate or allowing the evidence, if a document, to be given in redacted form. If the relevant agency then declines to produce the document the trial relevant to that portion of the evidence is (Lappas) at risk.

But the preliminary aspect of the notification process is an attempt to have both the defence and prosecution resolve the evidentiary difficulty either cooperatively or ultimately with the assistance of the Court. Needless to say, if the document or evidence has a top secret classification and defence counsel is not cleared to that level, then the debate in the closed Court hearing is somewhat restricted. The Act is not perfect, but it is an attempt and it demonstrates the difficulty in maintaining judicial oversight of Terrorism trials.

My view is that every endeavour should be made to keep these matters in the public domain, there is a deep public and professional suspicion of special tribunals for a limited or sensitive list of matters. They elevate their significance and distort the debate. I would prefer to see them kept in the criminal justice system.

Terrorism has no boundaries. For the very reason that no loophole should exist, Australia has adopted extended jurisdiction provisions for the key terrorism offences (*supra*) namely extended geographical jurisdiction D (Section 15.4) The extent of this jurisdiction is that any of the offences I have referred to can be prosecuted in Australia no matter

where committed and there is no requirement of an Australian element or connection, clearly a recognition of the country's international obligations.

The fact of such extensive jurisdiction is however not without its difficulties. Countries many miles apart may have an interest in the same matter, one country not being affected by the attempted or successful terrorist act other than by the fact that a person suspected of involvement is within that country's borders. Who prosecutes first, death penalty issues in one jurisdiction and not the other may affect decisions concerning extradition proceedings. Pre trial publicity alone is an issue. But, some jurisdictions do not have the same investigative processes. For example England has a restriction on the evidentiary use of the product of telephone intercepts. A matter investigated in Australia would contain, as part of the brief, all this material, it would not be admissible in the UK. Where are these matters to be prosecuted and who determines this, there is no uniform protocol that I am aware of for the resolution of these issues.

There are further difficulties with intelligence information from one country which may not seem so sensitive in the hands of the prosecuting jurisdiction. I can recall issues of witness availability where we unsuccessfully attempted to recover a witness to Australia, but an earlier "protocol" difficulty meant that we were not successful in securing the return of that witness, an intelligence agency was, for want of a better word, offended. The evidence sought was not sensitive, the witness was just not made available. There is a difficulty with the interface between the desire of traditional investigators and the commitment to protecting sensitive material in the hands of intelligence agencies. One has a deep understanding of the evidentiary process and the requirements for pre trial disclosure where the other is only now becoming aware of these issues and has not been in the same milieu.

Without doubt the area which has given rise to significant public disquiet at the legislative response to terrorism has been the enactments in peripheral areas. Detention, control orders, security clearances for counsel and extension of the period for questioning persons suspected of terrorist offences have all been areas of contention. This is a pity. People who contemplate committing terrorist acts, or encourage others to do so, are criminals. They should be investigated and prosecuted as people who have committed crimes. The process which provides a basis for complaining about unequal treatment does not help reasoned debate. Certainly we are dealing with a difficult and very different problem and some measures are needed. But, with few exceptions, the charging and trial processes for these matters is largely the same as for other matters.

One area of contention in the lead up to a prosecution is the extension of the time for questioning and the concept of 'dead time'.

Part 1C of the Crimes Act (Commonwealth) provides for the detention and questioning of suspects before they are brought to Court. There are specified safeguards (recording, access etc.) and time limits for questioning. Those time limits were extended in 2004 for the specific purpose of allowing more time to investigate the more complex issues arising in terrorism investigations. I don't think Australia is on it's own here, but this is one area of contention. The maximum period available for questioning, 24 hours, is not, in itself

long, but time is not counted for a number of things, forensic procedures, medical treatment and obtaining access to legal advice. However with terrorism offences an amendment to Part 1 C permits what is called dead time applications where an application is made to a Magistrate for time to make overseas enquiries (for example) when, if successful the Magistrate will suspend the 24 hour clock for a specified period, and that suspension may be extended. These are not ex parte applications and the suspect may make representations through his or her solicitor. But the process can lead to contention and this is unfortunate.

Finally, I want to briefly consider the process of preventive detention and control orders. These are not part of the trial or prosecution process and in Australia the DPP is not involved in making application for these orders. Control Orders are provided for in the Criminal Code, Division 104. The control order if made imposes restrictions on a person for the purpose of giving protection to the public from a terrorist act. The application is made with the consent of the Attorney General and the onus is civil, balance of probabilities. If the Court is satisfied that an order would substantially assist in preventing a terrorist act (for example) the court may impose restrictions or controls on that person which are reasonably necessary to protect the public from a terrorist act.

Preventive detention orders (Division 105) provide for the detention of someone for a defined period of time to prevent an imminent terrorist act occurring or to preserve evidence of a recent terrorist act.

Control orders and Detention orders are made on application to a Federal Court Judge or magistrate, the AAT or the Supreme Court of a State or Territory.

These matters are, with the exception of security clearances, peripheral to the trial and the attempt to successfully prosecute, they have inflamed public debate and distorted the views of many as to what is really being done legislatively and through the court process.

They have not, in practise interfered with the trial of any suspect, but the debate on what is necessary and what more is needed is one which should be had in a clear and objective manner. It does not assist a proper understanding of these issues when matters which are not part of the trial process, nor for that matter the investigative process, become mixed with them.

There may be other ways of dealing with that particular problem, I have no simple answer, or solution, but I can say that the new offences and the continuing attempt to prosecute them in Courts of law in Australia is something which I support and would wish to see continue.

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(The author was, until October 2007, the Commonwealth DPP in Australia. The views expressed in this paper are entirely those of the author and should not be taken as expressing a view of the Office of the Commonwealth DPP).